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ERRATA

At page 40, in third headnote, "session" should read cession.

At page 284, "43 Stat. 255", should read 34 Stat. 255.

At page 325, "47 Stat. 128", should read 48 Stat. 128.

At page 353, in last paragraph of headnote, "Title 413", should read Title 43.

At page 384, line 23, citation should read 44 Stat. 239.

At page 546, "43 Stat. 961", should read 43 Stat. 981.

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PREFACE

In 1883 the Department of the Interior began publication of the more important decisions of the Land Department with the view to preserving in authentic manner and in permanent form convenient for reference a line of consistent precedents in departmental rulings illustrating the land laws of the United States. Prior to that time the only published decisions of the Department were those by private reporters, the more familiarly known being Brainard, Copp, and Lester. As originally conceived, the publication entitled "Decisions of the Department of the Interior relating to the Public Lands", and thereafter referred to as the "Land Decisions", pertained almost exclusively to matters coming under the jurisdiction of the General Land Office and a few matters from the Indian Office. Gradually the jurisdiction of the Department has been enlarged by the creation of new bureaus, among them being the Bureau of Reclamation, the Geological Survey, and the National Park Service. Many new laws have been enacted and policies established relating to the Indians and Indian affairs. New and important problems in other bureaus and services are constantly arising and call for solution. This has been notably the case as to activities connected with or growing out of the National Industrial Recovery Act. Consequently, there has been an increasingly growing demand for the publication of decisions by the Secretary and his Assistant Secretaries, and opinions by the Solicitor, relating to matters other than those pertaining to the public lands. On July 7, 1930, the Secretary issued an order amending the title so as to read "Decisions of the Department of the Interior", and directing that thereafter leading decisions and important opinions relating to all activities of the Department be published in future volumes. Including this volume, 54 volumes have been published, covering the period from July 1881 to September 30, 1934. Volumes 1 to 52 are referred to as the "Land Decisions." (L. D.). The abbreviation "I. D." when used in cited decisions of the Department and in the opinions of the Solicitor has reference to volume 53 and later volumes of this work.

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- 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.
- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
- 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.
- Krighbaum, James T. (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L. (52 L. D. 282, 295); vacated, 53 I. D. 42, 45. (See 280 U. S. 306.)
- 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.
- 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. 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.
- McPeck v. Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- 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. 437); 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.
- *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.
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- 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.
- New Mexico, State of (49 L. D. 314); overruled, 54 I. D. 159.
- 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; 23 L. D. 204; 25 L. D. 501); overruled, 53 I. D. 242. (See 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.
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- 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.
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- 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.
- Phibus, 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.
- Pierce, Lewis W. (18 L. D. 328); vacated, 53 I. D. 447.
- Pietkiewicz *et al.* *v.* Richmond (29 L. D. 195); overruled, 37 L. D. 145.
- Pike's Peak Lode (10 L. D. 200); overruled so far as analogous, 20 L. D. 204.
- Pike's 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.
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- 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.* Rossler (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, Fred B. (47 L. D. 325); vacated, 53 I. D. 649.
- 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.
- St. Clair, Frank (52 L. D. 597); modified, 53 I. D. 194.
- *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.
- 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 Fe 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 Lodge (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.
- Sprull, Lelia May (50 L. D. 549); overruled, 52 L. D. 339.
- Standard Shales Products Co. (52 L. D. 522); overruled so far as in conflict, 53 L. D. 42.
- 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 New Mexico (49 L. D. 314); overruled, 54 L. D. 159.
- 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.)
- 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.
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- 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.
- Wabe, 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, Ernst (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.
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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume, edition of 1882, 2 volumes, edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "I. D." to Decisions of the Department of the Interior, beginning with vol. 53; "L. and R." to records of the former division of Lands and Railroads; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52.—Editor.

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DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR

RICHARD M. LYMAN, JR.

Decided July 7, 1932

SOLDIERS' ADDITIONAL HOMESTEAD RIGHT—ASSIGNMENT—WIDOW; MINOR CHILDREN.

No right of additional entry under sections 2306 and 2307 of the Revised Statutes inures to the minor children of a soldier who never made a homestead entry and whose widow had remarried prior to and was the wife of another at the date of adoption of the Revised Statutes, notwithstanding the fact that such widow, during her widowhood and prior to the adoption of the Revised Statutes, may have made a homestead entry for less than 160 acres of land.

DIXON, First Assistant Secretary:

This is an appeal by Richard M. Lyman, Jr., from decision of the Commissioner of the General Land Office dated May 6, 1932, rejecting his application, as assignee of Julia E. Carney, daughter, and one of the two surviving heirs of Eliza Bump, widow of Hiram Bump, to enter, under sections 2306 and 2307 of the Revised Statutes, the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 14, T. 21 N., R. 4 E., M.D.M., California.

The application is based upon the military service of Hiram Bump, and the homestead entry No. 4415 of his said widow, made August 12, 1869, for the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 30, T. 6 N., R. 15 W., Ionia land district, Michigan. Said application was filed February 12, 1932, and was rejected primarily because the tract applied for had previously been withdrawn under the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). The decision under review also held, on authority of the case of *Henry Fred Dangberg* (43 L.D. 544), that the additional right in question never existed, and on the record presented this is the sole question for determination, the appellant conceding that the land was not subject to location.

The record shows that Hiram Bump rendered the requisite military service and died on or about January 12, 1866, without having made a homestead entry. He left a widow, the said Eliza Bump, and three minor children, two of whom survive. As above stated, the said widow, on August 12, 1869, which was prior to the adoption of the Revised Statutes, made homestead entry No. 4415 for 40 acres

of land in her own right as the head of a family. She remarried in November, 1869, and so far as the record shows she remained the wife of her second husband until her death in 1897.

The assignment from Julia E. Carney assumes that her mother, the said Eliza Bump, became entitled to an additional homestead right of 120 acres, and that the said Julia, as one of the surviving heirs, succeeded to a moiety (60 acres) of the right.

In the *Dangberg case*, cited by the Commissioner, the Department held (syllabus)—

No right of additional entry under sections 2306 and 2307 of the Revised Statutes inures to the minor children of a soldier who never made a homestead entry and whose widow had remarried prior to and was the wife of another at the date of the adoption of the Revised Statutes, notwithstanding the fact that such widow, during her widowhood and prior to the adoption of the Revised Statutes, may have made a homestead entry for less than 160 acres of land.

It is contended in the appeal that the ruling thus enunciated is wrong; that inasmuch as an entry was made by the soldier's widow for less than 160 acres of land a right of additional entry accrued, and upon the death or remarriage of the widow without having exercised the right, the full benefit thereof inured to the soldier's minor children.

After careful consideration the Department sees no sufficient reason for changing its ruling on this question. The soldier, who died without having exercised a right of homestead, never had an additional right, the additional right conferred upon the soldier by section 2306 being dependent upon the fact that he had previously entered a quantity of land less than 160 acres under the homestead law. If the soldier had not made a homestead entry for less than 160 acres, the right to make an additional entry never existed in him or in his estate. (*William Deary*, 31 L.D. 19; *Homer E. Brayton*, 31 L.D. 443; *Inkerman Helmer*, 34 L.D. 341.) The widow of the soldier could, upon the basis of an original entry made by herself prior to the adoption of the Revised Statutes, so long as she remained unmarried, assert an independent, additional right, but the statute confers the right upon the widow upon the express condition that *she be unmarried*. (*John S. Maginnis*, 32 L.D. 14; *Henry S. Kline*, 36 L.D. 311.)

In the case last cited the Department reviewed numerous adjudged cases bearing upon the question involved, and said—

The cases cited and all other cases touching the existence of such additional right in favor of a widow of a soldier hold in effect that it is only in case such widow was unmarried at date of the legislation conferring the right, that she was vested therewith. No case is found which expressly or impliedly recognizes such right as existing or arising in favor of a soldier's widow who was not unmarried at date of the act which bestowed it. The reason is that it was a compensatory gift to her as the relict and representative of the

soldier, and in recognition of his military service. If she were remarried that sole reason for bestowing the right upon her no longer existed.

In the present case the widow remarried prior to the passage of the act and was married at its date and until her death. Hence said widow never became entitled to an additional homestead right under sections 2306 and 2307 of the Revised Statutes.

The decision of the Commissioner is accordingly

Affirmed.

RICHARD M. LYMAN, JR. (ON REHEARING)

Decided February 17, 1933

SOLDIERS' ADDITIONAL HOMESTEAD RIGHT—ASSIGNMENT—REMARRIAGE OF WIDOW—STATUS OF MINOR CHILDREN OF SOLDIER.

Under the provisions of Section 2307 of the Revised Statutes, the minor children of the soldier are disqualified to make a soldiers' additional entry if the soldier's widow remarried prior to **June 22, 1874**, the date of the adoption of the Revised Statutes, even though prior thereto and after the death of the soldier she had made an original homestead entry of less than 160 acres.

PRIOR DECISION REAFFIRMED.

Departmental decision in case of *Henry Fred Dangberg* (43 L.D. 544) adhered to.

DIXON, First Assistant Secretary:

Motion for rehearing has been filed on behalf of **Richard M. Lyman, Jr.**, in the matter of the Department's decision dated **July 7, 1932**, affirming the action of the Commissioner of the General Land Office of **May 6, 1932**, in rejecting **Lyman's** application, as assignee of **Julia E. Carney**, daughter and one of the two surviving heirs of **Eliza Bump**, widow of **Hiram Bump**, to enter under sections 2306 and 2307 of the Revised Statutes certain land in the Sacramento, California, land district.

As stated in the motion for rehearing the question presented is as follows:

The only point involved in this case is whether the minor children of a soldier of the civil war whose widow made a homestead entry of less than 160 acres prior to **June 22, 1874**, and who remarried prior to the enactment of the soldier additional laws are entitled to a soldier additional right under the provisions of secs. 2304, 2306, and 2307, R.S.

It is conceded in the motion that the widow had no right because of her remarriage, but it is urged that the children were entitled as donees of the right under section 2307.

In the case of *Henry Fred Dangberg* (43 L.D. 544) cited by the Department in the decision complained of, the identical question was considered. In that case the Department said:

This case has been fully argued before the Department, orally and in briefs. After mature consideration, the Department is convinced that no right of

additional entry inured to Mrs. Tuttle under the facts of this case (see case of Ernest B. Gates, 41 L.D., 383), and that it would be an unwarranted perversion of the letter and spirit of the statute to hold that a right of additional entry inured to the minor heirs of a soldier who never made a homestead entry and whose widow had remarried prior to, and was the wife of another, at the date of the adoption of the Revised Statutes, notwithstanding the fact that such widow, during her widowhood and prior to the adoption of the Revised Statutes, may have made a homestead entry for less than 160 acres of land.

In the brief in support of the motion counsel submits that the holding in the Dangberg case is wrong and should be overruled, and the arguments presented in support of this view have been carefully considered. Counsel maintains that the widow's entry was a proper basis for an additional entry exactly the same as if the entry were made by the soldier; that section 2307, R.S., gave to these orphan children by reason of the mother's remarriage the right to make the additional entry she would have had if she had not remarried; and that they were donees of the right as minor children on June 22, 1874.

The reasons for the decision in the Dangberg case are clearly stated therein. The Department there held that no right of additional entry inured to the widow and that it would be an unwarranted perversion of the letter and spirit of the statute to hold that a right of additional entry inured to the minor heirs of the soldier under the facts of the case. The same reasoning appears to be applicable to the case under consideration and the arguments presented afford no sufficient grounds for a different conclusion.

Upon further consideration the Department, therefore, finds no reason for disturbing its former decision in this case and the motion for rehearing is accordingly

Denied.

**UNITED VERDE COPPER COMPANY, HENRY J. ALLEN, ASSIGNEE
(ON PETITION)**

Decided July 13, 1932

WYANDOTTE SCRIP—LEGAL REPRESENTATIVES—PATENT.

Under the stipulation in the supplemental agreement contained in article 9 of the treaty of January 31, 1855, the rights of the parties named in the original agreement contained in the Wyandotte treaty of March 17, 1842, inure to and may be exercised by their heirs or legal representatives without restriction, and such heirs or legal representatives may exercise those rights by the making of scrip locations and receiving patents therefor in their own names.

PRIOR DEPARTMENTAL DECISION MODIFIED.

Decision in case of *Henry J. Allen* (37 L.D. 596), modified.

DIXON, *First Assistant Secretary*:

The United Verde Copper Company has filed petition for exercise of supervisory authority in the matter of the ruling of the Commissioner of the General Land Office in his letter of October 22, 1925, to the register of the Phoenix, Arizona, land office (Phoenix 04802), with respect to Wyandotte certificate No. 9, Indian B-250, which was returned to the local office for delivery to the claimant company, the application to locate filed by Henry J. Allen, assignee, having been rejected.

The Commissioner instructed the register as follows:

You will advise the said company that in a decision dated April 26, 1909 (see 37 L.D. 596), the Secretary held that patent, if issued, would be in the name of the reservee (Henry Jaques) and that Henry J. Allen was only recognized in this case as attorney in fact for the heirs and legal representatives of Henry Jaques.

The claimant company states that it purchased the certificate for a valuable consideration and now invokes the supervisory power of the Secretary to the end that authority be given said company to make a new location upon which patent may issue in the name of the company. The right asserted is based upon certain agreements between the United States and the Wyandotte Nation, entered into March 17, 1842 (11 Stat. 581), and January 31, 1855 (10 Stat. 1159), respectively.

Under Article 14 of the original treaty, the United States agreed "to grant by patent in fee simple to each of the following-named persons, and their heirs, all of whom are Wyandottes by blood or adoption, one section of land of six hundred and forty acres each, out of any lands west of the Missouri River set apart for Indian use, not already claimed or occupied by any person or tribe." The beneficiaries are named in the article. The following restriction against alienation was imposed: "The lands hereby granted to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be conveyed by them or their heirs without the permission of the President of the United States."

The agreement was supplemented by Article 9 of the treaty of January 31, 1855, as follows:

It is stipulated and agreed, that each of the individuals, to whom reservations were granted by the fourteenth article of the treaty of March seventeenth, one thousand eight hundred and forty-two, or their heirs or legal representatives, shall be permitted to select and locate said reservations, on any government lands west of the States of Missouri and Iowa, subject to preemption and settlement, said reservations to be patented by the United States, in the names of the reservees, as soon as practicable after the selections are made; and the reservees, their heirs or proper representatives, shall have the unrestricted right to sell and convey the same, whenever they may

think proper; but, in cases where any of said reservees may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandotte council, or where any of them have died, leaving minor heirs, the said council shall appoint proper and discreet persons to act for such incompetent persons, and minor heirs, in the sale of the reservations, and the custody and management of the proceeds thereof, the persons so appointed, to have full authority to sell and dispose of the reservations in such cases, and to make and execute a good and valid title thereto.

It will be noted that in accordance with the supplemental agreement, the class of beneficiaries was enlarged and restrictions against alienation were removed, the parties entitled being each of the individuals to whom reservations were granted by the 14th article of the original treaty, or their heirs or legal representatives. Any of these were to be permitted to select and locate said reservations. The reservations were to be patented in the names of the reservees as soon as practicable. The reservees, their heirs or proper representatives, were accorded the unrestricted right to sell and convey the same.

It seems to have been the intention of the parties to the supplemental agreement that the rights of the parties named in the original agreement would inure to and could be exercised by their heirs or legal representatives without restriction. In other words, such heirs and legal representatives as are shown to possess the right may exercise it by the making of locations in their own name, and receiving patent therefor in their own name.

The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act, or by operation of law. *New York Mutual Life Insurance Company v. Armstrong* (117 U.S. 591, 597). In land cases the term has also been used in its broader sense to include representatives of a grantee by contract, as well as by operation of law. *Hogan v. Page* (2 Wall. 605). Numerous other cases may be cited in support of the definition of the term to warrant the conclusion that the designation is broad enough to include all persons, with respect to another's property, who stand in his place and represent his interests, whether transferred by his act, or by operation of law.

Viewed in its broader sense, it seems from the wording of the stipulation and agreement in the treaty of 1855 that it was the intention to include heirs and legal representatives as beneficiaries on equal footing with the original grantees, and in consequence that they should be recognized as beneficiaries in their own right, not only entitled to locate the land, but to receive patent therefor in their own name. The construction in the Department's decision of

April 26, 1909 (37 L.D. 596), to the contrary is modified accordingly.

The petition accordingly is granted and the petitioner will be recognized as a qualified applicant, and patent may issue in the name of said applicant, provided due compliance with the law in all respects is shown.

EXTENSION OF TIME ON OIL AND GAS PROSPECTING PERMITS UNDER ACT OF JUNE 30, 1932

REGULATIONS

[Circular No. 1277]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., July 15, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved June 30, 1932 (Public, No. 217, 72d Congress), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That any oil or gas prospecting permit issued under the Act of February 25, 1920 (41 Stat. 437), or extended under the Act of January 11, 1922 (42 Stat. 356), or as further extended under the Acts of April 5, 1926 (44 Stat. 236), March 9, 1928 (45 Stat. 252); and the Act of January 23, 1930 (46 Stat. 58), may be extended by the Secretary of the Interior for an additional period of three years in his discretion, on such conditions as he may prescribe.

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 three years from the date of the passage of this Act.

Applications for extensions of time coming within the provisions of this Act may be filed with the Register of the district land office or with the Commissioner of the General Land Office, Washington, D.C. The application should give full and definite information regarding expenditure of money for development work under the permit and for reliable geological surveys of the lands involved. The showing must be by affidavit and state in detail the amounts and dates of such expenditures, purposes for which made, and to whom the payments were made. If the permittee has secured geological surveys of the lands, copies of the reports and maps thereof should be filed. Any other facts which the permittee believes will show equities in support of his application should be included in the showing.

In any case where the permittee has filed bond to protect a surface claimant of lands included in the permit, or because the lands are in a reclamation project, consent of the surety to remain bound during

the extension period must be furnished, except where the bond by its terms covers extensions of time that may be granted. Also such bond as may be considered necessary and sufficient may be required conditioned on the abandonment, under the supervision of the supervisor of oil and gas operations, of any wells drilled on the permit lands.

C. C. MOORE,
Commissioner.

Approved:

Jos. M. DIXON,
First Assistant Secretary.

NEW MEXICO v. ALTMAN ET AL. (ON PETITION)

Decided July 18, 1932

SCHOOL LAND—MINERAL LANDS—NEW MEXICO.

Section 15 of the act of September 9, 1850, which act provided among other things for the establishment of a territorial government for New Mexico, did not contain a grant *in praesenti* of sections 16 and 36 in each township in that Territory, but merely a reservation of those sections in contemplation of a future grant by Congress.

DIXON, *First Assistant Secretary:*

On May 24, 1932, the Department affirmed a decision of the Commissioner of the General Land Office which dismissed a protest made by the State of New Mexico through its Commissioner of Public Lands against the issuance of a patent under mineral entry for any portion of lots 1, 2, 3 and 4, Sec. 36, T. 17 S., R. 13 W., N.M.P.M., New Mexico.

The record shows that said township was surveyed in 1867 and the survey approved in 1868. The surveyor returned the land as mineral in character. Fort Bayard Military Reservation, covering most of Sec. 36, was created in 1869, but its boundaries were not defined until 1908, said lots being outside of the reservation as then identified. Mineral patent was issued in 1908 for a portion of said section. Adverse proceedings against the State were brought in 1921, charging the land was mineral in character and the State filed answer, but later withdrew it, waived a hearing and conceded that the section did not pass to the State under its grant of school lands of June 21, 1898 (30 Stat. 484).

It was contended by the State in its appeal from the action denying its protest that title to all of section 36 vested in the State upon its identification by survey in 1868, by virtue of the provisions of section 15, act of September 9, 1850 (9 Stat. 452), which contained no exception of mineral lands; that the Department had no juris-

diction to inquire into the mineral character of the land, the adverse proceedings being void, and the waiver and concession of its commissioner being likewise without authority; that the patent issued to the mineral claimant was void. The Department disposed of the contention as to the asserted effect of the act of 1850, *supra*, in these words—

But the act of 1850 did not grant the sections therein specified. It merely reserved them in contemplation of a future grant, and the legal title thereto remained in the United States. *Jane Hodgert* (1 L.D. 632); *Roland Braithwaite* (14 L.D. 213). In this connection see the cases of *Barkley v. United States* (19 Pac. 36); *United States v. Bisel* (19 Pac. 251); *United States v. Elliott* (41 Pac. 720).

The attorney general of New Mexico, by letter of July 7, 1932, requests reconsideration by the Department of the ruling quoted, in which he states—

Sec. 15 of the organic act, which was an act of September 9th, 1850, reserved sections 16 and 36 for school purposes. No reservation whatever was made of minerals in the act and no such reservation was made until the act of June 21st, 1898.

It appears to us that in view of the act of 1850 the land was identified upon approval of the survey in 1868.

The Executive order for withdrawal of public lands for Fort Bayard Military Reservation was not until 1869, and it would seem that this being true and no mention having been made in the act of 1850 of any mineral reservation, that the State had a right to assume that it had title to these lots and that it in fact did have.

The letter will be considered as an informal petition for the exercise of supervisory authority by the Secretary.

Section 15 of the act of September 9, 1850, *supra*, reads as follows:

That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

The proposition that acts of Congress using this or substantially similar language are in effect a grant of land for school purposes to a State, and that the title passes to the State upon the identification of the sections by survey is not new in the Department or the courts.

Examination of the reported cases where this question was presented discloses that its interpretation of the act is in harmony with the weight of authority. In addition to the cases cited in the opinion challenged, which of themselves are sufficiently impressive to remove all doubt, attention is invited to *Union Pac. Ry. Co. v. Karges* (169 Fed. 459), which construed section 16, act of May 30, 1854 (10 Stat.

277), organizing the Territory of Nebraska, which is identical in language with the provision under consideration. The Court said:

By this section no grant of the lands was made. It simply constituted a reservation of the sections for the purpose specified. No grant of these sections was made to the territory or state until the enabling act of April 19, 1864 (chapter 59, 13 Stat. 47), section 7 of which reads as follows:

"And be it further enacted, that sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools."

This is the first enactment containing a grant of these sections, and upon acceptance by the state of the enabling act, and the state's admission into the Union, a vested right to these sections was first acquired. Nebraska was organized in February, 1867, and accepted the provisions of the enabling act. By such acceptance on the part of the state, it acquired a vested right to sections 16 and 36 in each township which had not, at the time, been in any manner disposed of by the United States. Until such vested right was acquired, Congress had full power and authority to make such disposition of these sections, or portions thereof, as it saw fit. *State of Minn. v. Batchelder*, 1 Wall. 109, 17 L. Ed. 551; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Emblen v. Lincoln Land Co.*, 184 U.S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736.

Construing this same provision relating to Nebraska, in *Union Pacific Ry. Co. v. Douglas County* (31 Fed. 540), the late Justice Brewer, then a circuit judge, held that when such lands had been reserved by Congress, Congress will not be presumed to have intended a disposal of them in any other way unless the intent is clearly expressed in the act of Congress, and he further held in that case that the grant of Congress to the Union Pacific Railway Company of a right of way by act of July 1, 1862 (12 Stat. 489), gave to the company a right of way across the school lands of the Territory of Nebraska, reserved by the provisions of the organic act of 1854, *supra*, thus clearly holding that Congress had such control over such school lands after they had been reserved for the benefit of the schools of the State of Nebraska that it could grant to the railroad company the right of way.

The Supreme Court of Oklahoma, in *Territory v. Choctaw, O. & W. Ry.* (95 Pac. 420), construed a similar reservation of Secs. 16 and 36 in the organic act of the State as not a grant, following the rule in *Barkley v. United States* (3 Wash. T. 522, 19 Pac. 36), and *United States v. Bisel* (8 Mont. 20; 19 Pac. 251), cited by the Department in its decision of May 24, 1932, *supra*, and *Union Pacific Ry Co. v. Douglas County*, *supra*.

It is also noticed that in *United States v. Elliott* (41 Pac. 720), the Supreme Court of Utah, construing section 16 of the organic act of Utah (9 Stat. 453, 457), the same in language as section 15 of the

organic act for New Mexico, the court reversed its previous position in 7 Utah, 389, saying (page 721), "And, considered independently of the authorities cited, the statute reserving the lands can not by any possibility, be tortured into a grant of the lands to the territory when the survey is made."

On July 22, 1854, an act was passed by Congress to establish the office of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes (10 Stat. 308). Section 5 of said act, which applied to New Mexico, is the same in language as section 15 of the act of 1850, *supra*.

In *Dugan v. Montoya* (173 Pac. 118), the Supreme Court of New Mexico held that said act was not a grant of sections 16 and 36 to the Territory of New Mexico, "but simply provides that when such townships, embracing such sections, should be surveyed, that the sections named were reserved, for the purpose of being applied to schools in said territory." The court upheld a grant of a right of way for station grounds on a part of a section 16 in that State to the Atlantic and Pacific Railroad Company by the act of Congress of July 27, 1866 (14 Stat. 292), which provided for a right of way over *public lands* including station grounds, etc.

In deference to the wishes of the Attorney General, the Department has further considered the question, but sees no reason to depart from its previous conclusions. The petition is accordingly
Denied.

EXTENSIONS OF TIME FOR PAYMENTS ON HOMESTEAD ENTRIES ON SOUTH HALF OF FORMER COLVILLE INDIAN RESERVATION, WASHINGTON

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., July 22, 1932.

REGISTER, SPOKANE, WASHINGTON:

Your attention is directed to the act of Congress approved June 27, 1932, Public, No. 196, which reads as follows:

That the Secretary of the Interior is hereby authorized, in his discretion, to extend for a period of not to exceed two years the time for the payment of any installment or installments due, or hereafter to become due, of the purchase price for lands sold under the Act of Congress approved March 22, 1906 (34 Stat. 80): *Provided*, That the payments extended under the provisions of Public Resolution Numbered 33, approved March 19, 1920 (41 Stat. 535), may be extended hereunder: *Provided further*, That any and all payments must be made when due unless the entryman applies for an extension

and pays interest for one year in advance at 5 per centum per annum upon the amount due, and patent shall be withheld until full and final payment of the purchase price is made in accordance with the provisions hereof: *Provided further*, That where payments are extended hereunder for more than one year the same rate of interest shall be paid in advance for the second year: *And provided further*, That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, shall forfeit the entry, and the same shall thereupon be canceled, and any and all payments theretofore made shall be forfeited.

The act of March 22, 1906 (34 Stat. 80), authorizing the opening of lands on the south half of the Colville Indian Reservation to entry, provides that one-fifth of the purchase price shall be paid at the date of entry and the balance in five equal annual installments.

The act of March 19, 1930 (41 Stat. 535), authorizes an extension of time for payment of any annual installment from year to year upon payment of interest in advance at the rate of 5 per cent per annum, provided that the last payment and all other payments are completed within a period not exceeding one year after the last payment becomes due by the terms of the act of March 22, 1906—that is within six years from the date of entry.

The act of June 27, 1932, *supra*, authorizes the Secretary of the Interior to grant further extensions of time for payment not to exceed two years—that is, under this act the time for payment may be extended up to eight years from the date of entry, provided such an extension is obtained each year by the payment of interest in advance at the rate of 5 per cent per annum.

You will promptly serve notice on each person whose payments are in arrears that he will be allowed 30 days from receipt of notice within which to pay the principal and interest in default or to obtain an extension of time for payment of the principal by payment of the interest on each installment from the date when it became due to the anniversary of the entry next occurring after such notice.

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

If the action herein specified is not taken within the time allowed, in each case, you will report the defaulting entries to this office for cancellation.

C. C. MOORE,
Commissioner.

Approved:

JOS. M. DIXON,
First Assistant Secretary.

RELIEF TO WATER USERS ON IRRIGATION PROJECTS—ACT OF
APRIL 1, 1932

Opinion, July 25, 1932

RECLAMATION—IRRIGATION PROJECT—RELIEF TO WATER USERS—STATUTORY CON-
STRUCTION.

The moratorium act of April 1, 1932, which afforded temporary relief to water users on irrigation projects constructed and operated under the reclamation law, being a relief act, should be liberally construed, and when so construed, sections 1 and 2 thereof, which are descriptive of the two large bodies of water users, namely, organizations and individuals, include the nonconsenters on the Garland Division of the Shoshone project, Wyoming, and on other projects.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have submitted to me for opinion the question, propounded by the Commissioner of the Bureau of Reclamation, whether the so-called nonconsenters on the Garland Division of the Shoshone project are entitled to the benefits of section 2 of the act of Congress of April 1, 1932 (47 Stat. 75).

The Shoshone Irrigation District, a State quasi-municipal corporation, was formed to include the lands formerly comprising the Garland Division of the Shoshone project, Wyoming. On November 4, 1926, the district entered into a contract with the United States to pay the construction charge of the portion of the project within the limits of the district. The land had previously been covered by water-right applications signed by individual landowners and entrymen and the district contract left such persons the option to remain under their existing contracts or to modify them to conform to the district contract with the United States, in which case the conforming landowners would be entitled to a longer period within which to pay their construction charge, but would be subject to a joint liability, i.e., to a liability which by reason of default of other landowners there might be an increase in the amount of the construction charge to be paid by the individual landowner or entryman. The nonconforming landowners were called nonconsenters because they did not consent to the district contract with the United States but elected to carry out the provisions of their water-right application contract. With the consent of the district and the United States the nonconsenters may now assent to the district contract with the United States and modify their individual contracts accordingly.

The act of Congress referred to is sometimes called the moratorium act of 1932. It attempts in sections 1 and 2 to divide all water users

into two classes, namely, those defined in section 1 which have through districts or water users' associations contracted with the United States for repayment of the construction charges, and those defined in section 2, in which there are no organizations to contract collectively but where each individual water-right applicant or entryman must accept the act.

In section 4 of the act the organizations and individuals are referred to in the same sentence in this manner: "At the expiration of the period for which deferment of charges is made under this act all districts, water users' associations or other water users' organizations and *all individuals* accepting the provisions hereof shall resume payment of charges" etc. And near the end of this same section it is stated: "In the case of any district, water users' associations, or other water users' organizations, or *individuals* under contract for payment of construction charge" etc., while in section 6 we find the same reference to organizations and individuals as follows: "The Secretary of the Interior in his discretion is further authorized to defer the payment to the United States from any water users' organization as defined in section 1 hereof and from *any individual* water-right applicant or entryman of construction charges" etc. These references to the statute clearly indicate an intention on the part of Congress to include all water users within the scope of the act and does not show a plan to exclude any individual landowner or a particular class of landowner. In defining the two large groups, namely, those who have contracted collectively and those who have contracted individually, and for the purpose of excluding individuals under Warren Act contracts, the language in the first three lines of section 2 of the act was adopted.

There is clearly no intention expressed in the history of the legislation, in the Department or other correspondence, the hearings before the Committees, or the debates in Congress, to indicate that it wanted to exclude nonconsenting application landowners from the benefits of the act. The act of April 1, 1932, is a relief act and it should be liberally construed.

It is my opinion that it is a reasonable construction of the law to say that sections 1 and 2 were descriptive of the two large bodies of water users, namely, organizations and individuals, and that nonconsenters on the Garland Division of the Shoshone project, and also nonconsenters on that and other projects, are entitled to the benefits of the moratorium act of April 1, 1932, *supra*.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

AUTHORITY OF THE SECRETARY OF THE INTERIOR TO DISPOSE OF REINDEER BELONGING TO ESTATES OF DECEASED NATIVES OF ALASKA

Opinion, July 26, 1932

ALASKAN NATIVES—REINDEER—ADMINISTRATION OF ESTATES.

There is no provision of law whereby any Federal agency has been constituted general guardian for the natives of Alaska so as to place their private property under governmental control, and consequently where the property of a native of that Territory consists of reindeer owned by him in his own right, altogether free from restriction, the Government has no authority to take part in the administration of his estate.

ALASKAN NATIVES—INDIANS—REINDEER—REINDEER SERVICE—SECRETARY OF THE INTERIOR—ADMINISTRATION OF ESTATES.

The provisions of the act of June 25, 1910, as amended, for determining Indian heirs and for the administration of the restricted property of deceased Indians, are applicable to the natives of Alaska, and where the estate of a deceased native of that Territory consists of reindeer which were restricted from sale, the Secretary of the Interior is empowered to administer the estate and he may, if he sees fit, remove the restrictions and dispose of the reindeer and pay the money over to the heirs, but an employee of the Reindeer Service has no such authority.

ALASKAN NATIVES—REINDEER—ADMINISTRATION OF ESTATES—SECRETARY OF THE INTERIOR—COURTS—JURISDICTION.

Where a native of Alaska dies leaving a mixed estate of restricted and unrestricted property, the Secretary of the Interior can deal only with the former class, while the jurisdiction over the latter class devolves upon the local court.

ALASKAN NATIVES—REINDEER—SECRETARY OF THE INTERIOR—RULES AND REGULATIONS—REMEDY FOR ENFORCEMENT.

Congress has conferred upon the Secretary of the Interior the authority to make regulations and to impose restrictions with respect to reindeer owned by the United States in the Territory of Alaska that have been or may be transferred to the natives and to act in behalf of the natives in such connection, and enforcement thereof may be had in a proper case by suit to recover the animals illegally transferred, or the value thereof.

REINDEER—REINDEER ASSOCIATION—ISSUANCE OF STOCK.

The fact that a reindeer organization in the Territory of Alaska has issued shares of stock to individuals for reindeer turned over to it by them does not deprive the Government of its control over any restricted reindeer where the transfer had not been approved by a proper administrative officer.

FINNEY, *Solicitor*:

My opinion has been requested on certain questions submitted by Governor Parks of Alaska, as stated in a communication by Messrs. Trowbridge and Gillman, field representatives, relating to the Alaska

Reindeer Service. For convenience the statement is reproduced as follows:

We have the honor to submit herewith several questions relative to disposition of reindeer estates, which have heretofore been handled by the Reindeer Service and in former years by the Bureau of Education employees. This subject has arisen on several occasions since our arrival and no doubt there will be additional cases encountered.

Some of these estates consist of reindeer only, but there have been other cases, where the reindeer are only a small part of the property of the estate. In such cases, the estates are probated in the Territorial courts, where no recognition of the reindeer has been taken, and in other cases the courts have made disposition of the reindeer property. An important case now pending is that of the Peter Williams estate at Akiak, where serious difficulty has been encountered by the Department of Justice officials in following the laws pertaining to probate matters. This case has been assigned to us to investigate by the Secretary, at request of the Bureau of Indian Affairs.

The following questions are submitted, in order that we may proceed with intelligence when contacting with these probate cases:

1. Is there any authority of law for employees of the Reindeer Service to settle estates involving property consisting of reindeer and make distribution of reindeer owned by the estate, considering the fact that all natives of Alaska are citizens under the law?

2. Does Section 23 of the Reindeer regulations authorize distribution of reindeer of estates of natives, considering that said section clearly refers to "herders", and further, that many natives own reindeer who never have been herders, have bought reindeer outright, and own reindeer, which were the result of the natural increase from those given them by the Government, or increase from those they purchased?

3. If the regulations are supported by law, as to the disposition of reindeer by the Reindeer Service or any other branch of the Interior Department, does such authority cover instances where the estates include other property and which must be probated by the courts of Alaska?

In our opinion, reindeer are not restricted property of the natives, except as relates to female stock, which he can dispose of only where there is in excess of 100 head. This is the only restriction that we are aware of and this covered by regulation, which is not supported by any Act of Congress.

In some reindeer organizations, certificates of stock are issued—one share of stock for each reindeer owned. When an estate is to be settled, the shares of stock in the company is the item to be disposed of by the duly appointed administrator, not the livestock itself. The duty of an official administrator of an estate is to divide the property according to the instructions of the court. In the majority of estates in the reindeer region, the estate consists only of reindeer and the courts have seldom taken action in such cases, except where creditors presented claims against the estate and where the ownership of reindeer was large in numbers.

Article 3 of the treaty of March 30, 1867 (15 Stat. 539), by which Alaska was ceded to the United States, provides:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights,

advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

While the treaty made a distinction between the civilized or settled tribes and the uncivilized tribes (see case of *Minook*, 2 Alaska Rep. 200), it appears that Congress in extending protection and bestowing benefits for the welfare of the natives has included all the natives in its benefactions. The question of the status of the natives of Alaska was given careful consideration in an opinion by Solicitor Edwards under date of May 18, 1923 (49 L.D. 592), wherein it was recited that for a long time after the cession of the Territory Congress took no particular notice of these natives, and made no particular provision for their support and education, and that under such conditions it was held in the earlier days that these natives did not bear the same relation to the Government, in many respects, as was borne by the American Indians, but that:

Later, however, Congress began to directly recognize these natives as being, to a very considerable extent at least, under our Government's guardianship and enacted laws which protected them in the possession of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and *their support*.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts. See *Alaska Pacific Fisheries v. United States* (248 U.S., 78); *United States v. Berrigan et al.* (2 Alaska Reports, 442); *United States v. Cadzow et al.* (5 id., 125), and the unpublished decision of the District Court of Alaska, Division No. 1, in the case of *Territory of Alaska v. Annette Islands Packing Company et al.*, rendered June 15, 1922.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians.

In another elaborate opinion by the Solicitor of this Department approved under date of February 24, 1932 (53 I.D. 593), it was stated:

X From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimo and other natives are of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30,

1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States, including the citizenship act of June 2, 1924 (43 Stat. 253).

It, therefore, appears that former uncertainty as to the legal status of the natives of Alaska has been measurably clarified through various opinions and adjudications, so that, if not Indians in fact, their relation to the Government has come to be regarded as fairly analogous to that of the Indian tribes in the several States of the Union, and that they are to be considered as included in the operation of general laws appertaining to Indians.

In this connection it is pertinent to consider the provisions of the act of June 25, 1910 (36 Stat. 855) and acts amendatory thereof. Section 1 of that act, as amended by the act of March 3, 1928 (45 Stat. 161), provides that when any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will, as further provided by law, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. Provision is also made for partition or sale of such property. Section 2 of the said act, as amended by the act of February 14, 1913 (37 Stat. 678), provides that any persons of the age of 21 years having any right, title, or interest in any allotment held under trust or restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior, but no such will shall be valid unless and until it shall have been so approved. The approval of the will does not operate to remove the restrictions on alienation, but the Secretary of the Interior may in his discretion, upon the death of the testator, remove the restrictions and dispose of the property and pay the moneys to the legatee or legatees in whole or in part from time to time as he may deem advisable, or use the proceeds for their benefit.

Section 12 of the act provides that where any such allottee, having a restricted allotment, dies without heirs, the Secretary of the Interior shall report the facts to Congress with a recommendation for the cancellation of the patent.

The act of January 24, 1923 (42 Stat. 1174, 1185) provides that upon a determination of the heirs to any trust or restricted Indian property of the value of \$250 or more, or to any allotment, or after approval by the Secretary of any will covering such trust or restricted property, there shall be paid by such heirs, or by the beneficiaries under such will, or from the estate of the decedent, or from the proceeds of sale of the allotment, or from any trust funds belonging

to the estate of the decedent, certain graduated fees, which amount shall be accounted for and paid into the Treasury of the United States.

Elaborate regulations have been promulgated for the administration of these laws in respect to Indians in the States, but so far as observed they have not been applied in respect to trust property of the natives in Alaska. No reason is seen why these laws do not have operation in respect to restricted allotments and other restricted property of natives in Alaska. However, an examination of the regulations under which these laws are administered in the States leads me to believe that they are too elaborate and involved for practical application in the sparsely settled regions and broad expanse of Alaska. Doubtless other regulations simplified to meet conditions in Alaska could be adopted for operation there with greater satisfaction.

As a broad outline of appropriate procedure, I would suggest that where an estate is being probated in a local court involving a restricted allotment or other restricted or trust property of a native of Alaska, that some properly designated employee of the Department be required to procure a copy of the records made in that connection bearing upon the points in which this Department would be interested in the determination of the heirs and the disposition of the restricted property, to be submitted to the Indian Office with appropriate recommendation, whereupon decision can be prepared for action by the Secretary. Ordinarily such a record should afford adequate basis for Departmental action. In cases where probate proceeding in a local court is not contemplated, such designated employee should be required to give suitable notice and ample opportunity for a hearing before him on a certain date, whereupon pertinent evidence should be taken, in respect to the heirs and the restricted property, and forwarded to the Indian Office with appropriate recommendation, such evidence and recommendation to be considered by the Indian Office and finally by the Secretary. Experience in the handling of the cases as they arise will indicate such additional details of administration as may be needed in practical operation.

In more specific response to the questions submitted, I am of opinion, that question 1 must be answered in the negative. If the reindeer are owned by the native in his own right, altogether free from restriction, it is not a case where the Government should take any part in the administration of the estate. But if there be such restricted property then the case should be handled in the manner above outlined or under such regulations as may be adopted. But I do not think an employee of the Reindeer Service could be authorized to settle such estates. That function is lodged in the Secretary of the Interior.

Question 2 is substantially answered in the answer to question 1. Where the deceased native owned the reindeer without restriction there is no authority for the Department to administer on them, that function being appropriate for a local court.

Question 3 seems to relate to cases where both restricted and unrestricted property is involved. In such case this Department can deal only with the restricted property, leaving the free property for disposal under local law.

Regarding the general observations by the said field representatives as to restrictions in the regulations on the sale of reindeer, reference is made to the authority for such regulations in section 39, title 48, U.S. Code, which provides:

All reindeer owned by the United States in Alaska shall as soon as practicable be turned over to missions in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. The Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry.

In an opinion by the Solicitor of this Department dated September 16, 1931, it was said:

I do not find any restrictions in the regulations on the sale of male reindeer owned by the natives except as provided under contract with each apprentice, but there has always been a restriction on the sale of female reindeer. The last regulation, by order of October 2, 1929, provides:

Female reindeer may be disposed of by a native of Alaska to any person upon the written approval in each instance of the General Supervisor of the Alaska Reindeer Service or his agent, provided each individual native owner must at all times retain at least 100 female deer for breeding purposes; reports of sales, transfers and slaughter shall be made to the General Supervisor on forms provided by him.

I think this regulation may be enforced in a proper case by bringing suit to recover the animals illegally transferred, or the value thereof. But I am of the opinion that this regulation has application only in respect to animals concerning which the Government is authorized to act in behalf of the natives who may, in such connection, be regarded as wards of the Nation. The law as embodied in section 39, title 48, U.S. Code, contemplates that when practicable the reindeer owned by the United States shall be turned over to the natives, or to the missions, to be held and used under such conditions as the Secretary of the Interior shall prescribe. In respect to any such animals so turned over to the natives, as well as the increase of such animals, it is doubtless within the province of the Secretary of the Interior to control the disposal thereof by regulations. It may be, however, that natives in some instances have acquired female reindeer by their own labor or funds which could not be traced to a Government source, but which were obtained altogether independ-

ently of the Government. In such case it does not appear that the Government would have jurisdiction to interfere with any transfer thereof by the native, as I am not aware of any provision of law whereby any Government agency has been constituted general guardian for the natives so as to place any and all of their private property under control of the Government.

Furthermore, I do not believe that the regulation as drawn would be applicable to a case where a native sells a male reindeer and with the proceeds buys a female reindeer, or where he trades a male reindeer for a female reindeer. He is permitted to dispose of male reindeer without restriction, except as may be provided by contract with apprentices, and it follows that he may do as he pleases with that which he receives in return for such transfer. I see no reason, however, why the regulation could not be amended to meet such a situation if deemed advisable from an administrative point of view.

In respect to the instances mentioned where reindeer have been turned over to reindeer organizations and certificates of stock issued thereon—one share of stock for each reindeer owned—I am unable to render any definite opinion on the statement presented as to what effect that would have as regards restricted reindeer so involved. It is conceivable, however, that the Government could claim the right to control the disposition of any such restricted reindeer if the transaction had not been approved by a proper administrative officer. Any such cases should be specially reported for appropriate consideration.

Approved:

Jos. M. Dixon,
Acting Secretary.

EXCHANGE OF LANDS IN SAN JUAN, MCKINLEY, AND VALENCIA COUNTIES, NEW MEXICO—ACT OF MARCH 3, 1921

INSTRUCTIONS

[Circular No. 1284]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., August 3, 1932.

REGISTER, SANTA FE, NEW MEXICO;
SUPERINTENDENT AT EASTERN NAVAJO AGENCY, CROWN POINT, NEW
MEXICO;
SUPERINTENDENT AT ZUNI AGENCY, BLACKROCK, NEW MEXICO:

The following regulations are issued for your guidance under the act of March 3, 1921 (41 Stat. 1225, 1239), authorizing reconveyance and relinquishments of lands, and lieu selections therefor, in San Juan, McKinley, and Valencia counties, and are to supersede the

previous regulations contained in Circulars No. 850 (49 L.D. 281), and No. 1208 (53 I.D. 54).

The act mentioned contains this provision:

The Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately-owned and State school lands, and relinquishments of valid homestead entries or other filings, including Indian allotment selections, within any township of the public domain in San Juan, McKinley, and Valencia counties, N. Mex., and to permit lieu selections by those surrendering their rights so that the holdings of any claimant within any township wherein such reconveyances or relinquishments are made may be consolidated and held in solid areas: *Provided*, That the title or claim of any person who refuses to reconvey to the Government shall not be hereby affected.

As the "exchanges" permitted under the act for the purpose of consolidations can be made only with the mutual consent of all persons interested, and be brought to the point where approvals may be had of the Secretary of the Interior, there should be full preliminary cooperation as a preventive of adverse action and as a means of aiding prompt and favorable action by the Government. It would, therefore, be appropriate that you suggest to all prospective applicants that before any applications are actually filed in the local land office, they go over the matter, as between themselves, with the view of arriving at some tentative agreement as to what lands they wish to relinquish and take in exchange.

The question of whether the land wanted by each interest is vacant public domain or railroad land, whether it is State land or Indian allotments patented or selected therefor, or whether leased, etc., should first be ascertained by such persons as nearly as may be possible; also, some understanding should be had between all the interests indicating their attitude. There are many small details connected with propositions of this character which must necessarily be worked out first by the applicants themselves, and that can be done promptly and satisfactorily by personal conferences among themselves, rather than to have applications filed indiscriminately with the expectation that the field force of this Department will attempt to reconcile all the differences that will no doubt be found to exist.

A person or corporation, or the State of New Mexico, desiring to reconvey and select lieu lands, should file in duplicate an application in the local land office at Santa Fe, definitely describing by Government surveys the lands wanted and the lands offered in exchange; and notice of such application must be given in compliance with the circular of February 21, 1908 (36 L.D. 278), with the exception, that instead of beginning publication within twenty days of filing of selection, the selector will begin such publication within thirty days from date of service of notice by the register that the application has been placed of record.

In all cases where the application involves land occupied, claimed, or owned by an Indian, the register will forward a copy of the application to the proper Indian superintendent; and in all such cases will furnish the superintendent with the serial number of the application, which serial number together with the name of the land office must be indorsed thereon as a means of identification and referred to in all correspondence concerning said application. Copies of applications covering lands occupied, claimed, or owned by Indians in San Juan and McKinley counties will be filed with the Indian superintendent at Crown Point; and copies of applications covering such lands in Valencia county will be filed with the superintendent at Blackrock. It will be the duty of these officials to examine the land proposed to be relinquished or reconveyed by all Indian applicants, and the land proposed to be acquired by Indian applicants, and to submit reports of such examinations involving lands in their respective jurisdictions to the Commissioner of Indian Affairs with appropriate recommendation as to the allowance or disallowance of the application, a copy of which report must be forwarded to the register at Santa Fe.

The register will forward to the Commissioner of the General Land Office with the monthly returns all applications filed in his office for exchanges under the said act of March 3, 1921, *supra*, after noting the same on the records in the usual manner. The application will be noted "suspended" by the register, and unless disallowed by the Secretary of the Interior, the lands applied for in exchange will not be subject to application or filing by any other applicant.

Privately-owned or State school lands held in fee, mineral or non-mineral, may be exchanged for other lands mineral or nonmineral, if they are of approximately equal value. The school section lands offered in exchange must be those granted by the act of June 21, 1898 (30 Stat. 484), or by the act of June 20, 1910 (36 Stat. 557), and not those granted by the act of January 25, 1927 (44 Stat. 1026), and a statement in accordance therewith should accompany each application by the State. Upon the filing of an application, a report will be obtained from the Geological Survey as to the approximately equal values, including coal, oil, gas or other minerals, of the surrendered and selected lands.

An affidavit showing that the land asked for in exchange is not adversely claimed should accompany each application, except that in cases where the land is covered by an allotment, homestead or desert entry, a statement may be incorporated in the affidavit to the effect that the claimant to such land has filed an application to relinquish or reconvey the land to the United States under the provisions of the act of March 3, 1921, *supra*, if such be the fact. Where applications are submitted involving the reconveyance or relinquishment of lands

selected by or patented to individual Indians, such applications may be considered jointly and not necessarily as separate applications; provided, in such cases, the lands to be acquired in exchange will consolidate the holdings of such Indians.

The lands selected must, in conjunction with other property owned by the party conveying, be in a compact body, as near as may be possible, regardless of township lines; but no application will be considered involving lieu lands in any township wherein the selector owns no land and where the approval of such application will not effect a consolidation of the holdings of the applicant in such township or townships. Surveyed, unappropriated, and unreserved land except as provided by the preceding paragraph, can be selected.

There should also accompany the application a warranty deed, duly executed according to the laws of New Mexico by the proponent, conveying to the United States the land to be given in exchange, but such deed need not be recorded. An abstract of title brought down to show good title in the proponent, free from all encumbrances, must also be filed. Such abstract of title must be authenticated by the proper State and Federal officers and show that the land is free from all judgments, claims, or liens, including taxes, or such abstract may be authenticated by an abstractor or abstract company as provided by General Land Office Circular No. 726 of October 13, 1920. If the exchange is authorized the deed will be returned for recording and the abstract to be brought down to show such recordation, whereupon patent will be issued in the regular order of business.

Where the land relinquished is covered by an unperfected *bona fide* claim for which no certificate for patent is outstanding, there must be filed with the selection a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county that no instrument purporting to convey or in any way to encumber the title to the land or any part thereof is on file or of record in his office; or if any such instrument or instruments be on file or of record therein, the certificate must show the facts. A selection in lieu of an unperfected claim not covered by patent certificate must in all respects conform to the law under which such unperfected claim is held, and will be subject to the payment of such fees and commissions as would be required under the statutes to complete the unperfected claim in lieu of which the selection is made.

If the land relinquished is covered by an unperfected claim—such as a homestead or desert entry—for which certificate for patent has not been issued and the law under which the claim was initiated requires that land taken thereunder must be in one body, the same requirement must be observed in making the lieu selection irrespective of lands otherwise owned or claimed. If the land relinquished

is covered by an Indian allotment for which a trust patent has been issued, that trust patent should accompany the application for exchange and on the reverse side of the patent should be indorsed the relinquishment of the patentee witnessed by two persons or before a notary public or other official with a seal. If the trust patent has been lost or destroyed or for any reason can not be located, the relinquishment and application for exchange may be combined, including a sworn statement as to the loss of the patent, or reason given why it can not be furnished. In cases of this character no deed will be necessary, but the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell, assign, or mortgage the land covered by the unperfected claim or relinquished allotment.

A selection of land in lieu of an unperfected entry under the settlement laws if credit for residence on the unperfected claim be desired, must in addition to other proofs be accompanied by the affidavit of the selector, corroborated by two witnesses, showing when residence was established on the unperfected claim and the duration of such residence. In such a case, unless the selector has resided upon, cultivated, and improved the relinquished unperfected claim for the full period required by law to earn a patent thereto, he must establish and maintain a residence on the land selected and cultivate and improve the same for the full period required by law to earn a patent, less the time spent upon the relinquished unperfected claim.

If the relinquished unperfected claim be not one held under the settlement laws, the affidavit as to the residence required by the preceding paragraph need not be furnished; but in either case the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell the land covered by the relinquished unperfected claim. No patent shall be issued for any lieu land selection until all parties in interest and involved in the exchange of their holdings with each other and with the Government shall have completed their selections and thereby and otherwise in accordance with applicable law and the regulations thereunder earned equitable title to the land involved therein.

The law makes no provision for reimbursing any persons for improvements on land relinquished or reconveyed. However, when any applicant receives notice that an exchange applied for has been authorized, he may, if he so desires, remove any buildings, fencing, or other movable improvements owned or erected by him on the land relinquished or conveyed; *Provided*, that such removal is accomplished within ninety days from receipt by him of said notice. Any land relinquished to the United States under these regulations,

which tracts would ordinarily become subject to entry under the public land laws, shall be withheld from all forms of disposal until further specific action is taken thereon to make the said lands subject to settlement or entry, or to any form of disposal; and until otherwise directed the local land office will not allow any entry or application for such lands.

C. C. MOORE,
Commissioner.

Approved:

JOS. M. DIXON,
First Assistant Secretary.

**FREE USE OF TIMBER ON VACANT UNRESERVED PUBLIC
LANDS IN ARIZONA, CALIFORNIA, COLORADO, IDAHO, MON-
TANA, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON,
SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING**

REGULATIONS

[Circular No. 1285]

[Superseding Circulars 222 and 223]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., August 15, 1932.

1. *Parties who may obtain timber.*—Settlers upon public lands, citizens and bona fide residents of the State, and corporations doing business in the State may obtain free use permit for timber.

2. *Lands on which timber may be cut are:*—(a) Mineral lands, unoccupied and unreserved and not subject to entry under existing laws of the United States, except for mineral entry, in the above-mentioned States except in California, Oregon, and Washington. (Act of June 3, 1878, 20 Stat. 88). Instructions of July 17, 1909 (38 L.D. 75). (b) Nonmineral, unoccupied and unreserved public lands. (Act of March 3, 1891, 26 Stat. 1093).

3. *Kind of timber which may be cut.*—The proper protection of the timber and undergrowth necessarily varies with the nature of the topography, soil, and forests. No timber not matured may be cut, and each tree taken must be utilized for some beneficial domestic purpose. Persons taking timber for specific purposes will be required to take only such matured trees as will work up to such purpose without unreasonable waste. Stumps will be cut so as to cause the least possible waste, and all trees will be utilized to as low a diameter in the tops as possible. All brush, tops, lops, and

other forest debris made in felling and removing timber under these regulations shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the Chief of Field Division, and failure on the part of the applicant, or an agent cutting for an applicant, to comply with this requirement will render him liable for all expenses incurred by the Chief of Field Division in putting this regulation into effect.

4. *Area of land to be cut over.*—The permits shall limit the area of cutting to embrace only so much land as is necessary to produce the quantity of timber applied for.

5. *Use which may be made of timber.*—Timber may be cut under approved permit when actually needed for firewood, fencing, building, or other agricultural, mining, manufacturing, and domestic purposes.

6. *Exportation of timber.*—Timber may not be exported from the State in which it is cut, except: (a) Timber from a specified area in Wyoming may be exported into Idaho. (Act of July 1, 1898, 30 Stat. 618); (b) Timber from a specified area in Montana may be exported into Wyoming. (Act of March 3, 1901, 31 Stat. 1439); (c) Under the act of March 3, 1919 (40 Stat. 1321), citizens of Malheur County, Oregon, may cut timber in Idaho and remove such timber to Malheur County, Oregon; (d) Under the act of March 3, 1919 (40 Stat. 1322), citizens of Modoc County, California, may cut timber in Nevada and remove such timber to Modoc County, California; (e) Timber from a specified area in Arizona may be exported into Utah. (Act of February 27, 1922, 42 Stat. 398.)

7. *Length of time of permit.*—All rights and privileges under a permit shall terminate at the expiration of the period of one year from the date of approval of the permit.

8. *Forms on which applications should be made:* (a) Where timber not to exceed \$50 in stumpage value, in any one continuous period of 12 months, is desired, application must be filed on form 4-029, and permission to cut the timber applied for may be granted by the Chief of Field Division; (b) If timber between a stumpage value of \$50 and \$200 is desired, in any one continuous period of 12 months, application must be made on form 4-022b. Permission may be granted by the Chief of Field Division, subject to approval, revocation or revision by the Commissioner of the General Land Office. Persons who commence cutting upon receipt of a permit from a Chief of Field Division before final approval by the Commissioner of the General Land Office will be liable to the Government for a reasonable stumpage value for timber so taken, in the event that the permit is not finally approved; (c) If timber having a stumpage value in excess of \$200 is desired application must be made on form

4-022b, but permission to cut same shall be granted only upon showing of special necessity therefor, and upon direct approval by the Secretary of the Interior.

9. *What applications should contain.*—Applications should be filed in duplicate and should set forth the names and post office addresses of the applicants, and any agent or agents who may be employed to procure the timber. Where a corporation is the applicant, the State in which it was incorporated should also be shown.

Blank forms for making application may be procured from the Chief of Field Division within whose district the lands from which the timber is to be removed are located.

Applications should show the amount of timber required by each applicant; the use to be made thereof; a description of the land from which the timber is to be cut, by subdivision, section, township and range, if surveyed, or by natural objects sufficient to identify the same if unsurveyed; and the date it is desired to begin cutting.

10. *When agents do the cutting.*—Where one or more persons desire timber, and are not in a position to procure the same for themselves, an agent or agents may be appointed for that purpose. Such agent shall not be paid more than a fair recompense for the time, labor, and money expended in procuring the timber and manufacturing the same into lumber, and no charge shall be made for the timber itself. The said compensation must be set forth in a written contract to be entered into by the parties, and a copy thereof must be filed with the application.

11. *When the agent is a sawmill operator.*—If the amount of timber applied for exceeds \$50 in stumpage value, for any continuous period of 12 months, a bond equal to three times the amount of the stumpage value of the timber applied for will be required, conditioned upon the faithful performance of the requirements contained in these regulations.

12. *Liability of applicant.*—Where permits are secured by fraud, or where timber is not taken or used in accordance with the terms of the law or these regulations, the Government may enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands. For criminal liability see section 49 of the Penal Code, approved March 4, 1909 (35 Stat. 1088, 1098).

13. *Action by the Chief of Field Division.*—(1) Where timber up to \$50 stumpage value is applied for, he will note thereon the date filed in his office. If the examination of the records of the district land office shows the lands to be vacant, unreserved public lands, and no objection appears, he will approve the application and return one copy thereof to the applicant who may commence cutting operations immediately upon receipt of such approved application. (2) Where

timber in excess of \$50 stumpage value is applied for he will, after examination of the records, proceed as follows: (a) Ascertain by field examination or otherwise if the applicants are *bona fide* residents of the State named, and need the amounts of timber set opposite their respective names, for the purposes indicated; (b) If the petitioners are not in a position to cut and remove said timber themselves and employ an agent to procure the timber for them, he will ascertain if the agent who is to procure the timber for them is in every way reliable, and if the price agreed upon between the applicants and agent represents only a fair compensation for the necessary time, labor and legitimate expense in getting out the timber and furnishing it in the form desired, and does not include any charge for the timber itself; (c) He will ascertain if the removal of the timber will interfere with, lessen or damage the water supply or injuriously affect any public interest; if said timber is for the actual use of the petitioners or desired for barter or sale; and if the timber is to be used in the State where cut, or transported to other States; (d) He will ascertain if there are private dealers who will supply timber or lumber to the petitioners, and if so, at what rate; (e) He will, upon completion of the investigation required, transmit the application and bond, if a bond be required, together with a report thereon, and a copy of the permit, if one has been granted by him, to the Commissioner of the General Land Office. The report will cover the stumpage value of the timber applied for and all pertinent facts. The agreement relative to the disposition of the tops, lops, and other débris, shall be shown in the permit, and when a bond is required said agreement shall be incorporated into the bond.

14. These regulations supersede the regulations in Circulars 222 and 223, approved March 25, 1913 (42 L.D. 22).

C. C. MOORE,
Commissioner.

Approved:

Jos. M. DIXON,
First Assistant Secretary.

APPENDIX

TIMBER ON MINERAL LANDS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building,

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

* * * * *

Approved, June 3, 1878. (20 Stat. 88.)

TIMBER ON NON-MINERAL LANDS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

"SEC. 8. * * * And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

Approved, March 3, 1891. (26 Stat. 1093.)

AMENDS ACT OF MARCH 3, 1891 (26 STAT. 1093), TO INCLUDE NEW MEXICO AND ARIZONA

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

Approved, February 13, 1893. (27 Stat. 444.)

SALE AND USE OF TIMBER IN ALASKA.

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

* * * * *

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

* * * * *

Approved May 14, 1898. (30 Stat. 414.)

PERMITS TO CUT TIMBER IN WYOMING AND REMOVE SAME TO IDAHO

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

* * * * *

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

* * * * *

Approved July 1, 1898 (30 Stat. 597-618).

AMENDS ACT OF MARCH 3, 1891 (26 STAT. 1093), TO INCLUDE CALIFORNIA, OREGON, AND WASHINGTON

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an Act approved March

third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Nevada," in said amended Act, insert the words "California, Oregon, and Washington."

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

PERMITS TO CUT TIMBER—WYOMING-MONTANA

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

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

PUNISHMENT FOR TIMBER DEPREDACTIONS ON PUBLIC LANDS

Whoever shall cut, or cause or procure to be cut, or shall wantonly destroy, or cause to be wantonly destroyed, any timber growing on the public lands of the United States; or whoever shall remove, or cause to be removed, any timber from said public lands, with intent to export or to dispose of the same; or whoever, being the owner, master, or consignee of any vessel, or the owner, director, or agent of any railroad, shall knowingly transport any timber so cut or removed from said lands, or lumber manufactured therefrom, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States. And nothing in this section shall interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

Sec. 49, Penal Code, approved March 4, 1909 (35 Stat. 1088-1098).

PERMITS TO CUT TIMBER IN IDAHO AND REMOVE SAME TO OREGON

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

* * * * *

That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Malheur County, Oregon, to cut timber in the State of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Malheur County, State of Oregon.

Approved, March 3, 1919 (40 Stat. 1321).

PERMITS TO CUT TIMBER IN NEVADA AND REMOVE SAME TO CALIFORNIA

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

* * * * *

That it shall be lawful for the Secretary of the Interior to grant permits under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Modoc County, California, to cut timber in the State of Nevada for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Modoc County, State of California.

Approved, March 3, 1919 (40 Stat. 1322).

TIMBER CUTTING PERMITTED FOR MANUFACTURING, ETC., PURPOSES BY
OUTSIDE CORPORATIONS

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

Act of January 11, 1921 (41 Stat. 1088).

PERMITS TO CUT TIMBER IN ARIZONA AND REMOVE SAME TO UTAH

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

* * * * *

That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of section 8 of the Act of March 3, 1891, to citizens of Washington County, and of Kane County, Utah, to cut timber on the public lands of the counties of Mohave and Coconino, Arizona, for agricultural, mining, and other domestic purposes, and remove the timber so cut to said Washington County and Kane County, Utah.

Approved February 27, 1922 (42 Stat. 398).

**SULPHUR PRODUCTION—ACT OF APRIL 17, 1926, AS AMENDED
BY ACT OF JULY 16, 1932**

REGULATIONS

[Circular No. 1287]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D.C., August 16, 1932.

REGISTERS,

UNITED STATES LAND OFFICES,

LAS CRUCES AND SANTA FE, NEW MEXICO:

The act of Congress, approved April 17, 1926 (44 Stat. 301), as amended by the act approved July 16, 1932 (Public, No. 291), 72d Congress, entitled: "An Act To promote the production of sulphur upon the public domain within the States of Louisiana and New Mexico," reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for sulphur in lands belonging to the United States located in the States of Louisiana and New Mexico for a period of not exceeding two years: *Provided,* That the area to be included in such a permit shall be not exceeding six hundred and forty acres of land in reasonably compact form.

Sec. 2. Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of sulphur have been discovered by the permittee within the area covered by his permit, and that the land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit, at a royalty of 5 per centum of the quantity or gross value of the output of sulphur at the point of shipment to market, such lease to be taken in compact form by legal subdivisions of the public-land surveys; or if the land be not surveyed, by survey executed at the cost of the permittee in accordance with regulations prescribed by the Secretary of the Interior: *Provided,* That where any person having been granted an oil and gas permit makes a discovery of sulphur in lands covered by said permit, he shall have the same privilege of leasing not to exceed six hundred and forty acres of said land under the same terms and conditions as are given a sulphur permittee under the provisions of this section:

Sec. 3. Lands known to contain valuable deposits of sulphur and not covered by permits or leases shall be held subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding six hundred and forty acres; all leases to be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease and the

payment in advance of a rental of 50 cents per acre per annum, the rental paid for any one year to be credited against the royalties accruing for that year.

Sec. 4. Prospecting permits or leases may be issued in the discretion of the Secretary of the Interior under the provisions of this act for deposits of sulphur in public lands also containing coal or other minerals on condition that such other deposits be reserved to the United States for disposal under applicable laws.

Sec. 5. The general provisions of section 1 and sections 26 to 38, inclusive, of the act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," are made applicable to permits and leases under this act, the first and thirty-seventh sections thereof being amended to include deposits of sulphur, and section 27 being amended so as to prohibit any person, association, or corporation from taking or holding more than three sulphur permits or leases in any one State during the life of such permits or leases.

Sec. 6. That the provisions of this act shall apply only to the States of Louisiana and New Mexico."

Said act authorizes the Secretary of the Interior to grant prospecting permits and leases for sulphur lands belonging to the United States in those States.

The similarity of this act to the general mineral leasing act of February 25, 1920 (41 Stat. 437), is such that the provisions of Circular No. 672, approved March 11, 1920, relating to oil and gas permits and leases are generally applicable, and to the extent that they are not inconsistent with the said act of April 17, 1926, as amended, they will govern the procedure in applications for permits and leases under the latter act.

A sulphur permit may, however, be allowed for a maximum of 640 acres only.

The royalty in sulphur leases granted consequent upon a permit shall be 5 per cent of the quantity or gross value of the output of sulphur at the point of shipment to market.

An oil permittee who shall make a discovery of sulphur in lands covered by his permit shall have the same privilege of obtaining a sulphur lease as is given to a sulphur permittee.

All sulphur leases for lands known to contain valuable deposits of sulphur and not covered by permits or leases shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease and upon the payment in advance of a rental of 50 cents per acre per annum, the rental paid for any one year to be credited against the royalties accruing for that year.

No person, association, or corporation shall take or hold more than three sulphur permits or leases in any one State during the life of such permits or leases.

Applications for permits should be filed in the proper district land office for lands in the State of New Mexico, and in the General Land Office at Washington, D. C., for lands in the State of Louisiana.

This circular supersedes Circular No. 1104, issued December 22, 1926, addressed to the Register at Baton Rouge, Louisiana.

C. C. MOORE,
Commissioner.

Approved:

JOS. M. DIXON,
Acting Secretary.

HIRAM M. HAMILTON

Decided August 31, 1932

NATIONAL FOREST LANDS—EXCHANGE OF LANDS—TITLE.

In an exchange of lands in national forests under the terms of the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), a relinquishment to the United States under the provisions of the act of June 4, 1897 (30 Stat. 36), with no application for other lands in lieu thereof, leaves the transaction incomplete and does not pass clear and complete title to the base lands to the United States, equitable rights therein remaining in the profferer.

NATIONAL FOREST LANDS—EXCHANGE—TITLE—EXTENSION OF ABSTRACT OF TITLE.

Before the United States will consummate an exchange of lands in national forests, it must be fully satisfied as to the title to the land relinquished, and accordingly will require that the abstract of title submitted be extended, where necessary, to show good title at date of acceptance.

DEPARTMENT'S INSTRUCTIONS OVERRULED IN PART.

The Department's instructions of February 13, 1925 (51 L.D. 51), insofar as in conflict with this decision, are overruled.

EDWARDS, *Assistant Secretary:*

This is an appeal by Hiram M. Hamilton from the decision of the Commissioner of the General Land Office dated May 3, 1932, in the matter of his application, under the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), to exchange the SE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 27, T. 2 N., R. 2 W., S.B.M., within the San Bernardino National Forest, for the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 28, T. 7 S., R. 22 E., M.D.M., within the Sierra National Forest, California.

The record shows that by two separate deeds, executed January 2, 1902, Hamilton and wife relinquished to the United States the said SE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 27, T. 2 N., R. 2 W., S.B.M., within the San Bernardino National Forest, with a view to the selection of lieu lands under the provisions of the act of June 4, 1897 (30 Stat. 36). Said deeds were duly recorded January 4 and 6, 1902,

respectively, but so far as the records of the Land Department show Hamilton did not apply for other lands in lieu of those relinquished. It appears, however, that in connection with the anticipated exchange under the act of June 4, 1897, *supra*, Hamilton procured and retained possession of a duly authenticated abstract of his title to the said relinquished lands. This abstract, which is part of the record now before the Department, shows that said lands were patented to the Southern Pacific Railroad Company October 7, 1891, and that said company, by deed dated December 27, 1901, conveyed them to Hamilton. The abstract, extended and certified to November 30, 1906, shows that the land was at the time free from all other claim of title, tax liens, or other incumbrances.

In 1931 Hamilton started negotiations with the regional forester to exchange the lands in question for other lands, under the provisions of the act of March 20, 1922, *supra*, presenting an affidavit stating that he was the lawful owner of said lands. The proposed exchange was found to be in the public interest, and the Secretary of Agriculture recommended, under date of November 30, 1931, that it be consummated. Hamilton filed formal application for such exchange February 12, 1932, accompanied by the abstract of title previously mentioned.

In his letter of November 30, 1931, recommending the approval of the exchange, the Secretary of Agriculture stated that the land offered by Hamilton was subject to the following reservations in favor of the Southern Pacific Railroad Company:

"A strip of land 200 feet wide lying equally on each side of each main track, side track spur, switch and branch line of said railroad or of any railroad corporation, grantee of said railroad, as the same are now constructed or located upon, across or adjacent to any of the offered lands and all parts and parcels of said lands which are now used for the operation and maintenance of the railroad of the Southern Pacific Railroad Company, or of any railroad corporation, the grantee of the Southern Pacific Railroad Company, or for the track, yards, depot grounds, buildings, or other structures thereof.

The right to use any water rising upon any of said lands which has heretofore been appropriated by, and is now being used for the operation of the railroad of the Southern Pacific Railroad Company, and the right (to the extent the same may heretofore have been exercised by said vendor) to conduct the same as well as water rising upon other lands, across any of the land offered in pipes or aqueducts, for the purpose aforesaid, together with all necessary rights-of-way therefor.

The fact that the offered land is subject to the above described reservations has been taken into consideration in estimating the value of the land in question."

With respect to the reservation above referred to it may be stated that the accompanying abstract fails to show that Hamilton's grantor retained any right or interest in the property in question, and it is

apparent that the Secretary of Agriculture's information in the matter was obtained from some other source.

When the application for exchange was reached for examination the General Land Office held, in substance, that the deeds placed of record by Hamilton in 1902 were without effect and passed no title to the United States. Hamilton was called upon to execute and have recorded a new deed conveying to the United States the said SE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 27, T. 2 N., R. 2 W., S.B.M., with an excepting clause sufficient to protect the rights of the railroad company under the reservation previously mentioned; also to have his abstract of title brought down to a date overlapping the recordation of such new deed, and recertified to show the relinquished lands free from tax liens, pending suits, judgment liens, or other incumbrance.

Appellant contends that the Commissioner improperly imposed such requirements upon him. He says that when he purchased the lands in question from the Southern Pacific Railroad Company he obtained an absolute title without reservations, and that he is not justified in making and should not be called upon to make a new deed containing reservations for the benefit of his grantor, who is without interest in the property. He asserts that the United States has good title to the lands by virtue of his previously recorded deeds, and that the accompanying abstract of title is complete without further extension under departmental ruling of February 13, 1925 (51 L.D. 51).

In the view of the Department the execution and recordation of a new deed by Hamilton may be dispensed with. It is immaterial whether the land in question is affected by reservations for the benefit of the Southern Pacific Railroad Company. The land to which Hamilton got title, all of which he purported to convey to the United States, was and is, if the abstract is accurate, free of any easement or servitude. If the railroad company's conveyance to Hamilton contained a reservation, such reservation is sufficient to protect its rights, and it is not important whether the reservation is mentioned or continued in Hamilton's conveyance to the United States. Moreover, the Department of Agriculture appears to be fully advised respecting the status of the lands and the extent to which they are affected by the reservation aforesaid, and offers no objection to the exchange on that ground. In the circumstances, the sufficiency of Hamilton's recorded relinquishment will not be questioned.

In the opinion of the Department, however, the Commissioner's objection to the abstract presented was well taken. Manifestly, in its present form, such abstract is not sufficient to assure a clear title in the United States. Experience has shown that many of the

tracts formerly conveyed to the Government but not accepted have been transferred, taxed, encumbered, or affected by adverse possession, and in view thereof the Department is unwilling, in the instant case, to apply the rule stated in the decision of February 13, 1925, *supra*, with respect to the extension of abstracts.

It cannot be held that equitable title and right to the lands relinquished by Hamilton in 1902 passed to the United States by the spreading of his deeds upon the record. On the contrary, it is clear that all equitable estate and right of property remained in the title proponent, and his abstract must be brought down to date so that the Land Department may be fully advised as to the true condition of the title. Until the abstract is so extended no officer authorized to act in behalf of the United States can determine whether such proffered exchange can be approved or not.

As thus modified, the decision of the Commissioner is

Affirmed.

HIRAM M. HAMILTON

Motion for rehearing of the Department's decision of August 31, 1932 (54 I.D. 36), denied by Assistant Secretary Edwards, February 28, 1933.

VALIDITY OF MARRIAGE BY CUSTOM AMONG THE NATIVES OR INDIANS OF ALASKA

Opinion, September 3, 1932

ALASKAN NATIVES—INDIANS—STATUS—MARRIAGE BY CUSTOM—VALIDITY.

While in earlier times the view prevailed that the natives of Alaska did not bear the same general relation to the Government as that borne by the American Indians, such view is no longer entertained, the contrary view receiving support from acts of Congress and the decisions of courts of the United States, which hold, generally, that the laws of the United States with respect to Indians within the territorial limits of the United States are applicable generally to the natives of Alaska.

ABORIGINES—INDIANS—MARRIAGE BY CUSTOM—VALIDITY—STATE AND FEDERAL COURTS.

In line with the national policy of permitting the aborigines to be controlled in their internal and social affairs by their own laws and customs, the courts, both State and Federal, when called upon to consider the validity of marriage and divorce by so-called Indian custom, have almost uniformly upheld them on the theory that the National Government has recognized the autonomy of the Indians in such matters and thus removed them from the realm of State law in this respect.

ALASKAN NATIVES—INDIANS—TERRITORIAL LAWS GOVERNING MARRIAGE—SCOPE.

Although the Territorial legislature of Alaska has passed laws regulating marriage among the inhabitants of the Territory, such laws are similar in character to those of American commonwealths, which, nevertheless, have recognized the validity of marriages among the Indians by tribal custom.

ALASKAN NATIVES—INDIANS—PREREQUISITES OF A MARRIAGE BY CUSTOM.

By the weight of legal authority, wardship alone is not sufficient to render valid a marriage or divorce by Indian custom, but at the time of such marriage or divorce it must appear that the parties thereto have retained their tribal relations, and that no Federal statute intervened. Such marriage or divorce is not in fact a common law marriage, but possessed of the legal force of a ceremonial marriage between whites.

ALASKAN NATIVES—"UNCIVILIZED TRIBES," AS USED IN TREATY OF CESSION, INTERPRETED.

As to what tribes of Alaskan natives were included within the term, "uncivilized tribes," as employed in Article III of the treaty under which Alaska was ceded to the United States (15 Stat. 593); it was held, in *In re Minook* (2 Alaska Reports, 200, 221), that they "were those independent pagan tribes who acknowledged no allegiance to Russia, and lived the wild life of their savage ancestors;" and this includes those natives who, to-day, live under primitive conditions in regions remote and difficult of access, influenced by superstition, and following the crude customs inherited from their ancestors. By the terms of the treaty of session, these tribes were to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

ALASKAN NATIVES—MARRIAGE BY CUSTOM—AUTHORITY OF CONGRESS—ANALOGY TO INDIANS.

There is no provision of law forbidding marriages between Alaskan natives according to native custom, and in the absence of a definite expression upon the subject by Congress, in whom the paramount authority over these people rests, marriages among them should be accorded the same legal recognition and sanctity which the courts of this country have uniformly extended to similar relations among the American Indians.

ALASKAN NATIVES—MARRIAGE BY CUSTOM—NO UNIVERSAL RULE.

The validity of a particular marriage, in any given case, must be determined by the facts and conditions appearing, and no specific rule governing all cases can be laid down.

FINNEY, Solicitor:

You [Secretary of the Interior] have requested my opinion as to the validity of marriage by custom among the natives or Indians of Alaska.

The subject is a sensitive one, touching closely, as it does, the instincts and customs of a primitive people, and, so far as I have been able to find, has neither been the subject of judicial investigation nor dealt with expressly by legislation, either Federal or Territorial. The Territorial Legislature has, to be sure, enacted laws regulating the subject of marriage among its inhabitants; (See sections 435 and 437, Compiled Laws of Alaska, 1913; Chapter 56, Session Laws of Alaska, 1917, p. 117; Chapter 58, Session Laws of

Alaska, 1932, p. 84; Chapter 77, Session Laws of Alaska, 1929, p. 164). Bearing in mind, however, that these are not laws of the United States, but Territorial laws of a general nature making no specific mention of the natives or Indians, it may prove helpful in determining the applicability of such laws to the natives or Indians to first discuss the status of these people and the relation which they bear to the Federal Government,—matters which have been the subject of several opinions by the Solicitor for this Department.

Solicitor Edwards, in an opinion dated May 18, 1923 (49 L.D. 592), after pointing out that in earlier times the view prevailed that the natives of Alaska did not bear the same relation to the Government in many respects as was borne by the American Indians, said:

Later, however, Congress began to directly recognize these natives as being, to a very considerable extent at least, under our Government's guardianship and enacted laws which protected them in the possession of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and *their support*.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts. See *Alaska Pacific Fisheries v. United States* (248 U.S., 78); *United States v. Berrigan et al.* (2 Alaska Reports, 442); *United States v. Cadzow et al.* (5 id., 125), and the unpublished decision of the District Court of Alaska, Division No. 1, in the case of *Territory of Alaska v. Annette Islands Packing Company et al.*, rendered June 15, 1922.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians.

The subject was more exhaustively treated in my recent opinion of February 24, 1932 (M. 26915), wherein it was stated after an extended review of the applicable statutes and court decisions:

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States, including the citizenship act of June 2, 1924 (43 Stat. 253).

The foregoing opinions were referred to, followed and applied in my opinion of July 26, 1932 (M. 27127), in which it was held that the general laws enacted by Congress conferring jurisdiction upon

the Secretary of the Interior in the matter of probating the estates of deceased American Indians, might be applied with respect to the restricted allotments and other restricted property of deceased Alaskan natives. In that opinion it was said, among other things:

It, therefore, appears that former uncertainty as to the legal status of the natives of Alaska has been measurably clarified through various opinions and adjudications, so that, if not Indians in fact, their relation to the Government has come to be regarded as fairly analogous to that of the Indian tribes in the several States of the Union, and that they are to be considered as included in the operation of general laws appertaining to Indians.

In view of the foregoing opinions, which appear to be fully supported by the authorities therein cited, it must now be regarded as established that the native tribes of Alaska occupy substantially the same relation to the Federal Government as their American neighbors; that they are a dependent people under the protective care of the United States; that they and their affairs are subject to such legislation as Congress may see fit to enact for their benefit and protection, and that the laws of the United States with respect to the American Indians are applicable generally to the natives of Alaska.

Regarding the American Indians, it may be said that at the time of the formation of the Federal Government several of the Indian tribes found here were powerful and warlike, and it was found expedient to treat them as possessing some of the attributes of sovereignty and to deal with them as nations by entering into treaties with them. Later, treaties with such Indian tribes were superseded by Federal legislation, by which the remnants of the tribes were subject to general government and located on reservations. Broadly speaking, the policy of the Federal Government in this legislation was to guarantee to the Indian tribes control over their internal and social affairs. *United States v. Kagama* (118 U.S. 375); *United States v. Quiver* (241 U.S. 602); *United States v. Hamilton* (233 Fed. 685). In the case of *United States v. Kagama*, the court said:

With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

And in *United States v. Quiver, supra*, it was held that:

The policy reflected by the legislation of Congress and its administration for many years is that the relations of the Indians among themselves are to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise.

In line with this national policy of permitting the aborigines to be controlled in their internal and social affairs by their own laws and customs, the courts, both State and Federal, when called upon to consider the validity of marriage and divorce by so-called Indian custom, have almost uniformly upheld them on the theory that the National Government has recognized the autonomy of the Indians in such matters and thus removed them from the realm of State law in this respect. The authorities bearing upon this subject will be found collected in my opinion of April 12, 1930 (53 I.D. 78), dealing generally with the subject of Indian custom marriage and divorce. No useful purpose will be served by specific reference here to all of these authorities, but it may be pointed out that wardship alone is not sufficient, the courts in practically every instance in which a marriage or divorce contrary to the laws of the land is upheld, making the same dependent upon the fact that at the time of such marriage or divorce the parties retained their tribal relations (see in this connection *In re Wo-gin-up's estate*, 192 Pac. 267); that there was no Federal statute rendering the tribal customs invalid (*Buck v. Branson*, 127 Pac. 436); and that such marriages, though possessing some elements in common with common law marriage among the whites, is not in fact a common law marriage, but a marriage as legal as one by ceremony among the whites; (*Buck v. Branson*, *supra*).

Turning again to the natives of Alaska: The third Article of the treaty of March 30, 1867 (15 Stat. 539), by which Russia ceded Alaska to the United States, provided for the protection of the citizenship of the inhabitants of the ceded territory, as follows:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

As pointed out in *United States v. Berrigan* (2 Alaska Reports 442), the above stipulation divided the inhabitants into three general classes: (1) Those Russian subjects who preferred to reserve their natural allegiance were to do so and were permitted to return to Russia within three years; (2) Those Russian subjects who preferred to remain in the ceded territory, and were guaranteed that they should be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and "shall be maintained and protected in the free enjoyment of their liberty, property and religion"; and (3) the uncivilized tribes in the terri-

tory, who were promised that they should "be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." The effect of the treaty upon this latter class, i. e., the uncivilized tribes, was considered in the case of *In re Minook* (2 Alaska Reports, 200, 221). Judge Wickersham, speaking for the court, said:

The meaning of this sentence in a treaty between Russia and the United States is clear; it was intended to and does extend all general laws and regulations which the United States may from time to time adopt in regard to the Indian tribes of the United States to and over the Indian tribes of Alaska. Upon its ratification and its further approval by Congress, this treaty and this clause became the supreme law of the land. It gave the Indian tribes of Alaska the same status before the law as those of the United States, and, unless a different intention appears upon the face of the law, extends all acts of Congress, applicable and of a general nature, relating to the Indians of the United States, to Alaska.

As to what tribes were included in the term "uncivilized tribes", the court ruled that they "were those independent pagan tribes who acknowledged no allegiance to Russia, and lived the wild life of their savage ancestors."

In *United States v. Berrigan, supra*, it was held that the Athapascan stock, including the native bands of the Tanana, belonged to the uncivilized tribes mentioned, saying:

The pleadings and evidence in this case show that the natives for whom the government appears belong to that stock so widely scattered throughout the Yukon and its tributary valleys, and which the science of ethnology classes as belonging to the Athapascan stock. Nor is this stock confined even to the wide ranges of the Yukon; they inhabit the whole interior of Alaska, a region almost as large as the United States east of the Mississippi river, and also nearly the whole of British North America; they crossed the mountain ranges at the head of the Yukon, and inhabited the upper Columbia Lakes. Bands of these hardy rovers were found in Washington, Oregon, and northern California; they passed from the Columbia river basin, probably by the way of the Great Salt Lake country, into New Mexico and Arizona, and thence into Mexico. The Umpquas in Oregon, and the Navajos and dread Apaches of the Mexican border, belong to this widely distributed family, and speak the common stock language spoken by their northern brothers along the Tanana and Yukon. Throughout their wide southern migration they have everywhere preserved and are characterized by a wild and roving disposition, and of all the native tribes of North America they more nearly than any other are fitly described as "uncivilized native tribes." *Roche v. Washington*, 19 Ind. 53, 56, 81 Am. Dec. 376. The Tinneh tribes of Alaska were uncivilized native tribes at the date of the treaty with Russia, and the evidence in this case shows that the band for which this suit is brought still occupies that plane of culture.

In addition to the Athapascan stock occupying the interior of Alaska, the native population of the Territory may be classified as the Eskimos, the Aleuts, and the Thlinkets. In southeastern Alaska also are found the Haidas and Tsimpsean Indians. The latter came to Alaska a half century ago with Father Duncan, an English mis-

sionary, and founded Metlakatla on Annette Island near Ketchikan. This island was subsequently made an Indian reservation, the only one in Alaska, and more than 500 natives live there today. With them, however, we are not particularly concerned as they are perhaps the farthest advanced of any of the native tribes and no longer follow the native custom of marriage and divorce. The Eskimos, found along the shores of the Arctic Ocean and on the islands of Bering Sea and the Aleutian chain, numbering nearly 20,000, constitute the bulk of the native population. Of these natives, those, who like their Athapascan neighbors of the interior, still live under the primitive conditions in regions remote and difficult of access, influenced by superstition and following the crude customs inherited from their ancestors, should undoubtedly be classed as among the "uncivilized tribes" referred to in the Treaty of 1867.

As to the marriage customs prevailing among these primitive people, considerable information has been furnished by the librarian and curator of the Territorial Library and Museum, consisting of excerpts and quotations from various writers who have investigated the subject, notably Father Ivan Veniaminov, who, in 1840, became the first Greek Bishop of Alaska, and is regarded as one of the most careful and authentic recorders of the customs of the Alaskan natives. I also have before me a memorandum prepared by Mr. Charles W. Hawkesworth, Acting Chief of the Alaskan Division, Juneau, Alaska, dated July 27, 1932, discussing the customs of these natives past and present. Therefrom it is disclosed that the marriage customs of these people, though varying somewhat in minor details among the different tribes, do not differ materially from the customs of the American Indians; that these customs have long been established and are in vogue today among the uncivilized tribes, save where, under the guiding hands of the missionaries, the natives have been converted to the Christian faith and their marriages legalized in accordance with the Territorial laws. Having already determined that these people occupy the same general relation to the Federal Government as the American Indians and are to be judged by the same general laws and rules, it follows in the absence of some provision to the contrary, that the marriages among them by native custom should be accorded the same legal recognition and sanctity which the courts of this country have uniformly extended to similar relations among the American Indians. True the Alaskan natives, with the sole exception of the Metlakatlas, do not reside upon reservations, but in this respect they are no different from the American tribes in earlier times. Congress has declared that they shall not be disturbed in the possession of lands in their use and occupancy and claimed by them (Sec. 8, act of May 17, 1884, 23 Stat. 26); and whether further protection shall be extended to them by the setting

aside of specific reservations for their use is a matter of policy as yet undetermined. Nor is the fact that no treaties have been made with them by the Federal Government of any significance. As was said in *Nagle v. United States* (191 Fed. 141):

It should be borne in mind, however, that it has long since been declared to be the policy of Congress not to treat further with the Indians as tribes. Act of March 3, 1871, 16 Stat. 544, 566. Ever since the passage of that act, Congress has governed the Indians by law; and not by treaty, and the policy affords cogent reason why general laws should apply to individual Indians in Alaska as well as elsewhere.

The organic act of August 24, 1912 (37 Stat. 512), with limitations not here material, established and vested in the legislature of the Territory of Alaska legislative authority, pursuant to which the laws hereinbefore referred to, regulating marriage among the inhabitants of the Territory, were enacted. Similar laws, however, were in force in the American commonwealths, notwithstanding which, as we have seen, the courts, both State and Federal, have recognized the validity of marriages among the Indians by tribal custom. There would seem to be no good reason why, in the absence of any Federal law upon the subject, an exception should be made in the case of the Alaska natives by holding them to a stricter rule than that which prevails as to the American Indians. The organic act contains no provision invalidating the native customs, nor is such a provision found in any other Federal legislation of which I am aware. In the absence of a definite expression upon the subject by Congress, in whom the paramount authority over these people undoubtedly rests, the correct rule to apply, in my opinion, is that laid by the Supreme Court of the United States in *United States v. Quiver*, *supra*, holding that the relations of the Indians among themselves in matters of this kind are to be controlled by the customs of the tribe, save where Congress expressly or clearly directs otherwise.

In general, therefore, it is my opinion that marriage among those natives constituting the uncivilized tribes, if entered into in accordance with their long-established customs, should be recognized as valid until Congress directs otherwise, irrespective of the Territorial laws, which, I hold, for reasons stated above, do not apply to such cases. In reaching this conclusion, no attempt is made, of course, to lay down specific rules governing all cases, as the validity of a marriage in any given case must, in the nature of things, be determined according to the facts and circumstances peculiar to that case.

Approved:

Jos. M. DIXON,

First Assistant Secretary

ROOS v. ALTMAN ET AL. (ON PETITION)

Decided September 14, 1932

STOCK-RAISING HOMESTEAD—DESIGNATION—AFFIDAVITS—MINERAL LANDS.

The essential prerequisites to the allowance of a stock-raising homestead entry are that the tracts applied for be unappropriated, unreserved public land, designated as stock-raising land, and supported by an affidavit to the effect that no part of the land is claimed, occupied, or being worked under the mining laws.

RECORDS—PUBLIC LAND—MINING CLAIM.

The fact that the records of the Land Department show that a tract of public land is free from claim of any kind is not conclusive that the land has not been validly appropriated under the mining laws.

MINING CLAIM—SEGREGATION—POSSESSION.

A valid mining location, so long as it is maintained in accordance with the mining law, segregates the land therein from the public domain and confers an exclusive possessory right upon the locator.

STOCK-RAISING HOMESTEAD—APPLICATION—OCCUPANCY.

It is incumbent upon an applicant who seeks to enter or select land under the nonmineral public land laws to furnish evidence of its condition as to prior occupation and appropriation.

STOCK-RAISING HOMESTEAD—APPLICATION—PATENT—MINING CLAIM—MISREPRESENTATION—TRUSTEES.

Applications and proofs of a homestead entryman are *ex parte*, not adversary, and if he misrepresents the facts which it is his duty to disclose and obtains a patent based thereon, when there was a preexisting valid mining location on the ground, he may be declared a trustee for the benefit of the locator at the suit of the latter.

STOCK-RAISING HOMESTEAD—NONOCCUPANCY AFFIDAVIT—MINING CLAIM—EVIDENCE—BURDEN OF PROOF.

When a homestead entry is allowed upon the faith of an affidavit by the homesteader that the land is not occupied or appropriated under the mining laws, the burden of proof will be upon one claiming adversely under an alleged mining location to show that the entry was not rightfully allowed.

STOCK-RAISING HOMESTEAD—RECORDS—ERROR.

Allowance of an entry under the stock-raising homestead act of lands designated under that act and free from record appropriation and contest, after compliance with the law and regulations, is not erroneous because of the existence of matters which would have rendered it invalid, but which did not appear.

STOCK-RAISING HOMESTEAD—MINING CLAIM—EVIDENCE.

A requested exclusion of a mining claim from a stock-raising homestead entry is an admission by the entryman of its present existence, but not necessarily of its validity.

STOCK-RAISING HOMESTEAD—APPLICATION—MINING CLAIM—SEGREGATION SURVEY—EVIDENCE.

An application for a homestead entry which excludes an alleged mining claim from a legal subdivision and requests a segregation survey without disclosing a basis for the segregation is merely an application for indefinite

fractions of the subdivision, incapable of definition in areal extent and location, and is not subject to allowance.

STOCK-RAISING HOMESTEAD—APPLICATION—MINING CLAIM—SEGREGATION SURVEY—FINAL CERTIFICATE—PATENT.

The allowance of an application for a stock-raising homestead entry, in which the applicant requests the exclusion of an unsegregated mining claim, upon condition that patent would not issue until a segregation survey should be made and final certificate conformed thereto, is without authority of law and has no legal effect.

STOCK-RAISING HOMESTEAD—CONTEST—MINING CLAIM—MINERAL SURVEY—EVIDENCE.

If a mineral claimant brings a contest against a regularly allowed homestead entry and uses an official mineral survey of his claim as evidence of the existence of conflict, the survey is not conclusive as to the location of his claim and the entryman has the right to impeach it in the Land Department, if not made in accordance with the law and regulations or if it is fraudulent or erroneous.

STOCK-RAISING HOMESTEAD—CONTEST—MINERAL ENTRY.

The allowance of a mineral entry for land embraced within a stock-raising homestead entry, though the latter may be voidable, is contrary to well settled rules, and it is unnecessary to disregard them in order that the mineral claimant may bring a contest to an issue against the stock-raising entry.

STOCK-RAISING HOMESTEAD—CONTEST—ANSWER—DISCLAIMER—MINING CLAIM—EVIDENCE—BURDEN OF PROOF.

Where the homestead entryman, in his answer to a contest, disclaims any interest in the ground within certain mining claims in so far as they overlap his entry, and asks for the exclusion of the same from his entry to the extent of conflict, but questions the extent of conflict alleged, the mineral contestant is relieved of the burden of proving the validity of his claim, leaving only the question of the extent of conflict to be litigated.

STOCK-RAISING HOMESTEAD—MINING CLAIM—MINERAL SURVEY—PLAT—EVIDENCE.

Where the plat and field notes of a mineral survey, of which the Land Department takes official notice, *prima facie* establishes a conflict between a mining claim and a homestead entry, such evidence will be regarded as conclusive unless successfully impeached.

EDWARDS, Assistant Secretary:

C. R. Altman and Bayard Sullivan, who were allowed to make mineral entries Las Cruces 043463 and 043464, have filed written request that the order and notice of hearing directed by Departmental decision of July 28, 1932, involving the question of priority of right between the claimants of the Minnie and Key lode claims embraced in 043463, and stock-raising homestead entries 035041, 036247 and 041372, made by Alford Roos, be recalled and vacated.

The reason assigned for the request is that Roos in his answer and other responses to contest 5308 of said mineral claimants against his entries above mentioned, disclaimed any right or interest in the ground covered by the Minnie and Key locations and called attention

to his applications 036247 and 041372, wherein he petitioned for the exclusion of those locations, among others, from his entry by segregation survey. Roos has filed a petition resisting the request on the ground that if granted it would in effect award to the mineral claimants a portion of the subdivisions embraced in his entries, upon which he had established settlement and made improvements.

The mineral applicants include a request for the dismissal of the protest of Roos against the Nickel and Nannie V. lode claims, involved in 043464, on the ground that there is concededly no conflict between those claims and the Roos entries. The requests will be considered as a petition for the exercise of supervisory authority by the Secretary.

In considering this motion the Department is confronted on the threshold with an anomalous situation arising from procedure taken with respect to these contending claims, in which mineral entry and nonmineral entry, antagonistic as to the exclusive right to the possession of the surface, have been allowed for the same areas of land, in contravention of a fundamental rule of the Department that two entries for the same tract must not exist at the same time. *Whitney v. Maxwell* (2 L.D. 98); *Henry Cluff* (3 L.D. 216); *McAvinney v. McNamara* (3 L.D. 552); *Legan v. Thomas* (4 L.D. 441); *Russell v. Gerold* (10 L.D. 18); *Melvin P. Yates* (11 L.D. 556); *Swims v. Ward* (13 L.D. 686); *Elda Mining and Milling Co.* (29 L.D. 279).

The question therefore to be determined is, whether from errors apparent of record one or the other opposing entry should be forthwith canceled for invalidity, or whether a hearing should be had to determine by extrinsic evidence whether the mineral or nonmineral entryman has the better right to the land common to both entries.

In arriving at such determination, only facts material to the inquiry and official action that created the situation will be stated. September 4, 1926, Roos made entry 032819 for certain tracts in T. 17 S., R. 12 W., N.M.P.M. September 6, 1927, he made application for additional entry 035041, which after designation was allowed May 18, 1928, and included, among other tracts, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31 of the same township. January 12, 1928, he filed 036247 for certain other tracts in the same township including lot 9 of Sec. 31. The application specifically requested segregation survey and exclusion of certain mining claims, among them "unpatented Little Goat, Ruth, Key as shown by courses and bearings on plat transmitted with this application and attached hereto." The plat referred to depicted areas in Lot 9 as covered by the Key, Little Goat and other claims. In response to a requirement of the register on February 16, 1928, he filed a duly corroborated affidavit wherein he declares as to SE $\frac{1}{4}$ NE $\frac{1}{4}$ and lot 9, Sec. 31 and as to certain other tracts

applied for, "that no part of said lands is claimed, occupied or being worked under the mining laws." March 9, 1929, the Commissioner held the request for survey premature and directed that the entryman be notified, "that when he is prepared to submit final proof, if he will notify this office, the matter will again be given consideration," stating as reasons for this action that—

Inasmuch as this land is in a mineralized district, with numerous mining claims, patented and unpatented, and inasmuch as final proof has not been submitted by the homestead entryman, a new plat of these sections would at the present time be premature. It also appears that there are nearby one or more other pending nonmineral applications, and it may be found desirable to prepare a new plat covering all pending entries, and possibly including sections 29, 30, etc., in their entirety.

March 23, 1929, Roos, urging allowance of that entry, stated:

* * * there is now but one part of a claim to have segregated out of my homestead application, that is the part of the Little Goat unpatented mining claim shown on the before mentioned plat I filed with application 036247, as that part is used for residence purposes by one Ambros Vigil and I do not want to hold that. * * * I do not see any reason for withholding allowance of 036247 because of delaying segregation survey, which can come at any time as the Commissioner says; * * *

June 15, 1929, the Commissioner returned entry 036247 for allowance, stating it would be subject to all conflicting mining claims, reiterating that a segregation survey and plat would be premature. Entry was allowed July 22, 1929. October 10, 1929, the Commissioner advised the entryman as follows:

The fact that a segregation plat must eventually be prepared in order to actually delineate the resulting lotting after elimination of areas covered by your entries in conflict with mineral claims, will not delay you in submitting final proof, and will not delay action thereon or issuance of final certificate. However, patent will not issue until after segregation plat has been prepared and the entry and final certificate conformed thereto of which you will be given ample notice by the register. An entry upon which acceptable proof has been offered is considered a perfected entry.

January 29, 1930, Roos filed application 041372, which included lot 10, of said Sec. 31, but, "Excluding from lot 10, T. 17 S., R. 12 W., M., Surveys 1258, Lucky Bill 1022, Rio Grande, No. 2, 1028, Phoenix and unpatented Minnie, Clyde, Altman, Claimant, and segregation survey requested."

No affidavit as required by Circular No. 738 was filed. To the contrary, Roos had averred in the affidavit of February 16, 1928, above mentioned, that lot 10 with certain other subdivisions "* * * are not subject to homestead entry by myself for the following reasons: That said lots are entirely or almost entirely covered with valid, subsisting, existing claims, to wit, * * * Lot 10 by the American, L. C. Jones, claimant."

After the curing of certain defects of no bearing here, on June 20, 1930, the application was returned to the local office for suspension pending designation of a subdivision other than lot 10.

October 2, 1930, Altman and Sullivan, the present petitioners, filed contest 5308, alleging that the Minnie and Key lodes were in conflict with entries 035041, 036247 and 041372 in so far as they embraced SE $\frac{1}{4}$ NE $\frac{1}{4}$, lots 9 and 10, Sec. 31, and that the claims were prior, valid and subsisting mining claims. They also protested against the final proof made by Roos on October 4, 1930. Notice of contest was issued and on October 25, 1930, Roos filed answer in which he denied that any part of the Minnie and Key lodes was within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31; that the Minnie had been abandoned, and a new claim located over the same ground on March 19, 1927; that both claims were not valid because of lack of discovery. He further alleged:

This entryman denies the allegations that the ground covered by said Key and Minnie are covered in part by the said homestead entries of contestee, for the reason that in his application for homestead entry, he specifically asked for a segregation survey to exclude certain mining claims; that he specifically excluded the said Minnie claim which lies wholly within lot 10, aforesaid, as filed on by his serial No. 041372, as is of record in the Land Office; that entryman specifically excluded the ground covered by the said Key claim as is shown in yellow on the blue print plat attached to this answer and made a part thereof, and which is an identical copy of the one filed with the entryman's application to homestead serial No. 035041 and made a part of said application and now a part of the records of the Land Office, and the same shows that all the land south and southeast of the Little Goat lode claim was excluded from his entry with segregation survey requested.

Roos requested a dismissal of the contest. An accompanying paper styled a demurrer repeated the same allegation in substance.

Based upon above-quoted portions of the answer, November 3, 1930, the contestants filed what they styled a "motion for allowance of contest," contending that the answer was a disclaimer of interest in the claims and that they joined with contestee in an application for a segregation survey. They alleged that at their instance an official mineral survey of the claims had been ordered and their intention was to apply for patent thereto, and prayed that the homestead entries be canceled to the extent of the Key and Minnie lodes. Meanwhile entry 041372 had been allowed by the register on October 30, 1930.

Passing on the pleadings in the contest proceedings, by letter of November 15, 1930, the Commissioner stated, "the most satisfactory method of establishing whether there is in fact a conflict and whether the claims are valid mining claims is by means of an official survey and by patent proceedings upon the two claims." The register was instructed to take no further action in contest 5308 and told that:

"The contestants will be expected to proceed promptly with their survey, application for patent and patent proceedings," and "If reasonable diligence is not shown, the contestee may bring the matter to the attention of this office;" that the question of conflict between the mining claim and entry 035041 as to SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31, would be established by the official survey of the former, and whether or not the mineral claims were valid and should be segregated could not be determined until final proof on the mining claims had been submitted.

On the same date, November 15, 1930, the Commissioner advised the register that the patented claims must be segregated prior to the patenting of the homestead entry, but before any unpatented claims can be segregated, their segregability must be established, and that he had no such information as to the Little Goat, Ruth or Key claims; that nothing would be done until an expected report was received from the field service. He stated that if Vigil, the claimant of the Little Goat claim, desired to safeguard the surface area he should contest the homestead entry; that segregation survey of an unpatented mining claim was not warranted on request of either homestead or mineral claimant; that as "the burden of proof was primarily upon the person asserting a mining claim, and if when the homestead entry is ready for consideration for patent, no claim has been properly asserted, the homestead entry may be patented without reference to the mining claim." On the same date, a mineral protest by S. M. Lutz against application (then an entry) 041372 was denied as not in proper form to constitute an application to contest. It was stated that if the owner of an unpatented mining claim "*wishes to retain ownership of the surface area*, it is incumbent upon him to assert and establish before this office by due procedure the priority and validity of the mining claim." Treating 041372 on the assumption that it continued to be merely an application, the Commissioner said that if Lutz applied for patent to his claim it would be given precedence over the Roos application.

March 31, 1931, pursuant to the Commissioner's previous instructions, Altman and Sullivan filed application 043463 for patent to the Minnie and Key lodes. The official plat of survey thereof (M.S. 2020) shows portions of the Key claim and an adjoining claim, Little Goat, within lot 9, and that the Minnie lode is partly within lot 10 and slightly overlaps SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31. Final certificate and entry were allowed June 19, 1931. June 22, 1931, Roos petitioned the Department to institute contest against both applications, 043463 and 043464, alleging, as to each claim involved, lack of discovery of mineral and insufficient patent expenditure, and in the event his petition was denied to allow him opportunity to enter private contest against the Minnie and Key lodes. October 25,

1931, the Commissioner instituted proceedings, Contest No. 5553, against all of the stock-raising entries of Roos, charging noncompliance with the residence and improvement requirements, and also, that his entries conflicted with prior existent valid mining claims, among those enumerated being the Minnie, Key and Little Goat.

November 10, 1931, the Commissioner dismissed Roos's protest as to the charge of lack of discovery on the Minnie and Key claims on the ground that that issue would be decided in the Government proceeding, refused to institute adverse proceedings requested by Roos and held his protest defective in form, but permitted him to file a properly corroborated duplicate challenging the sufficiency of the development work on the Minnie and Key lodes. Roos appealed. He also filed, December 18, 1931, another protest containing the same charges and the same pleas in substance as in his original, and asking for certain confidential and other information, personal inspection of the claims by the register, and another field examination. February 4, 1932, the Department affirmed certain Commissioner's decisions denying, substantially the special requests of Roos and approving the action on his protest and directed prosecution of the Government proceeding. March 17, 1932, the Department modified this decision to the extent of directing another field examination and report. Upon consideration of this report, the Department, in the decision of June 28, 1932, held that the evidence would not establish the charges relating to failure of compliance with the homestead requirements, took notice that the examiners had listed the Key and Minnie among the prior valid claims, of the pendency of the respective protests of Roos and Sullivan and Altman, and dismissed the Government's proceeding, and directed that the question of priority and validity of the mining claims be litigated at a hearing on the private protests, the burden of proof being placed on the mineral claimants.

The essential prerequisites to the allowance of a stock-raising entry are that the tracts applied for be unappropriated, unreserved public land and that they be designated as stock-raising lands (section 1, act of December 29, 1919, 39 Stat. 862), and that the entryman file an affidavit in accordance with Instructions of May 7, 1921, Circular No. 738, which in support of an additional application should contain the allegation, "that no part of said land is claimed, occupied, or being worked under the mining laws." The fact that the records of the Land Department show that the land is free from claim of any kind is not conclusive that the land has not been validly appropriated under the mining laws. *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (112 Fed. 4, 16; affirmed 190 U.S. 301). It is well understood that no notation of mining claims is necessary or is made on the records of the Land Department, but a valid location,

so long as it is kept up in accordance with the mining law, segregates the land therein from the public domain and confers an exclusive possessory right upon the locator. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* (171 U.S. 650, 655); *Clipper Min. Co. v. Eli Min. Co.* (194 U.S. 220).

In the event that an applicant under other laws seeks to enter or select the land, it is manifestly necessary that the evidence of its condition as to prior occupation and appropriation should be furnished by him. *Kern Oil Co. et al. v. Clarke* (30 L.D. 550, 566).

The applications and proofs of the homestead entryman are, however, *ex parte*, not adversary. *Washington Securities Co. v. United States* (234 U.S. 76, 79). If he misrepresents the facts which it is his duty to disclose, and obtains a patent based thereon, it may be set aside in equity at the suit of the United States; *Colorado Coal & Iron Co. v. United States* (123 U.S. 307), and, if there was a pre-existing valid mining location on the ground patented to the homestead settler, the patentee may doubtless be declared a trustee of the mining ground for the benefit of the owner thereof at the suit of the latter. Costigan on Mining Law, 87. In such a case the courts of Arizona, *Kansas City M. & M. Co. v. Clay* (3 Ariz. 326, 29 Pac. 9), *Old Dominion Copper M. Co. v. Haverly* (11 Ariz. 241, 90 Pac. 333), and the courts of California, *Van Ness v. Rooney* (160 Cal. 131, 116 Pac. 392), *Brown v. Luddy et al.* (9 Pac. (2d) 327), have gone so far as to hold that the owner of the mining claim can collaterally attack the homestead patent and have it set aside for lack of jurisdiction of the Land Department to issue it.

An affidavit in conformity with Circular No. 738, *prima facie* establishes that the land applied for is not occupied or appropriated under the mining laws, and if the entry is *regularly* allowed, the burden will be upon the mineral claimant to show the contrary, and this showing is not deemed to be made unless the mineral claimant established a prior existing location perfected by discovery, or a mining location in the actual possession of the claimant, who is diligently engaged in the search for mineral at the date of the inception of the stock-raising entry. *Ainsworth Copper Co. v. Bex* (53 I.D. 382); *United States v. Hurliman* (51 L.D. 258).

If the applicant shows compliance with the applicable law and regulations; allowance of the entry is not erroneous because of the existence of matters which would have rendered it invalid, but which did not appear. *James R. Crawford et al.* (53 I.D. 435), decided August 6, 1931, and cases there cited.

Tested by these rules, the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31, being free from record appropriation and contest, designated as stock-raising land, and a sufficient affidavit under Circular No. 738 having been filed, its allowance was regular and the entry was *prima facie* valid.

A more complicated situation is presented as to lots 9 and 10. The requested exclusion of certain mining claims was an admission by Roos of their present existence, but not necessarily their validity. Section 37(c) of the mining regulations forbids the allowance of an agricultural claim for any portion of any lot, or legal subdivision of 40 acres, where there is no approved survey of the mining claims intruding therein, and even where there is such an approved survey, it requires evidence of the mineral character of the claims whose segregation is sought as a basis for their segregation and the allotting of the residual area. It directs that in the absence of such a showing the "*original lot or legal subdivision*," shall be subject to agricultural appropriation only.

As the applications of Roos for lots 9 and 10 disclosed no basis for segregation, they were mere applications for indefinite fractions of a subdivision, incapable under existing conditions of definition in areal extent and location, and while they existed in that form were not the subject of allowance. The action of the Commissioner in returning the applications for allowance as to the whole lot in each instance, including land that Roos did not ask for, and disclaimed intention to hold, and to which the Commissioner attempted to attach some understanding or condition that patent would not issue until a segregation plat was prepared and final certificate conformed thereto, has no warrant in law and was entirely without legal effect.

On allowance, the entries carried no such condition, but the same rights as any other entry under the stock-raising law, and were subject only to the *contingency* to which all such entries are exposed, that someone would appear and show a better right before patent issued, as by the filing of a contest by the owner of a prior valid mining claim. It will be noticed from the foregoing quotations from his later letters to mineral protestants that the Commissioner fully recognized that such was the effect of the entry.

Furthermore, allowance of application 041372 as to lot 10 was erroneous for the additional reasons that a contest was pending against it, and not only had no affidavit under Circular No. 738 been filed, but Roos had alleged the existence of valid mining locations thereon. As to application 036247 for lot 9, Roos's allegations were equivocal and inconsistent, and clarification should have been required, especially as the Commissioner was aware that the land applied for was in a mineral district where there were numerous existing mining claims.

It was also clearly error not to permit the mineral claimants to proceed with their contest on the ground that it would be necessary for them to apply with diligence for patent and make final proof

thereon before the claims they asserted could be segregated, and also allowing the mineral applicants to make mineral entry in disregard of the previous homestead entries of Roos for the same land, and in further holding that the question of conflict between the entry of SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31 and the Minnie claim would be established by the official survey thereof.

The questions as to the locus of the mining claims, the extent of their conflict with the homestead entry as well as their validity, should be determined from the evidence in the contest proceedings when those questions are put in issue. The evidence should there be adduced by the mining claimant as to where his location lies. (See *Southern Pacific Railroad Company*, 50 L.D. 577). Manifestly, the best evidence he could produce of this character would be a duly approved official mineral survey of his claim. That survey, however, is an *ex parte* proceeding; "it prejudices the rights of no one, and settles or decides nothing as regards title to the claim. * * * Such survey is not conclusive evidence, and may be objected to by an adverse claimant, and overthrown by competent testimony." *Orient, Occident, and Other Mines* (7 C.L.O. 82).

Clearly then, if a mineral claimant brings a contest against a regularly allowed entry and uses an official mineral survey of his claim as evidence of existence of conflict, the homestead entryman has the right to impeach it in the Department, if not made in accordance with law and regulations or if it is fraudulent or erroneous. It is, of course, not necessary that the mineral claimant apply for and perfect an application for patent to his claim in order to obtain and use a mineral survey thereof as evidence. Such survey, by law, is made a prerequisite to an application for patent, not the patent application a prerequisite to a survey, and instances are many where surveys have not been followed up with an application for patent. It is familiar learning that the owner of a valid mining claim need not ever apply for patent.

The possessory right and title to a mining claim, which the courts hold is a vested estate, would be held by a very insecure tenure if every person who attempted to appropriate the ground therein under nonmineral public land law could obtain patent upon *ex parte* proceedings and over the protest of the owners of the claim, who would not be heard because they would not apply for patent.

The rule is well settled that the local officers can neither allow an entry, receive an application, nor do any other act affecting the disposition of land after an entry of it has been allowed and while a contest for it is pending and undecided. *Holt v. Murphy* (207 U.S. 407); *James v. Germania Iron Co.* (107 Fed. 597; app. dismissed, 195 U.S. 638); *Grove v. Crooks* (7 L.D. 140); *McCormack v.*

Night Hawk and Nightingale Gold Mining Co. (29 L.D. 373). This rule has been specifically applied to the allowance of a mineral entry on lands embraced within an existing homestead entry. *Elda Mining and Milling Co.* (29 L.D. 279); *Walter G. Bryant* (53 L.D. 379). Although the entry is voidable it segregates the land so long as it remains of record. *Leary v. Manuel* (12 L.D. 345); *Faulkner v. Miller* (16 L.D. 130); *Stewart v. Peterson* (28 L.D. 515). It was not necessary in order to bring the controversy between the opposing claimants in this case to an issue to disregard these fundamental rules.

While the contestants had filed a sufficient contest, upon which they should have been allowed to proceed, the contestee, Roos, in his answer thereto disclaimed any interest in the ground within the Minnie and Key lodes in so far as they overlapped his application and entry, and pointed to the fact that he asked for the exclusion of the same therefrom, denying only that the Minnie claim invaded the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31. The emphatic and definite disclaimer of interest by Roos in the area in conflict warranted cancellation of his entries to the extent of the same, and relieved the contestants in that proceeding of the burden of establishing the validity of their claims, leaving only the question of fact whether there was a conflict with the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31, to be litigated.

The effect of the disclaimer is not affected by the fact that Roos in the same answer challenged the validity of the claims. Allegations to that effect by him became those of a protestant without interest in the controversy. As contestee asserting a private right in the lands within the Minnie and Key lodes, he stated himself out of court.

However, as has been mentioned, Roos has a protest pending in the capacity of friend of the Government, from which the charges as to validity of the mining claims was eliminated for the reason they would be determined in the Government proceeding then pending. As that proceeding was dismissed without hearing, the charges will be reinstated in full, with the burden on the protestant to establish the same. The plat and field notes of mineral survey No. 2020, of which the Department takes official notice, *prima facie* establish the conflict of the Minnie claim with entry 035041 as to the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31, and if not successfully impeached will be regarded as conclusive.

In the meantime, entries 035041, 036247 and 041372 of Roos and entry 043463 of Altman and Sullivan will be suspended to await the determination of the fundamental question, whether the Minnie and Key lodes were claimed, occupied or being worked at the time Roos filed his applications affecting the same.

As to mineral entry 043464, the so-called protest of Roos against it is found to be no more than a petition that the Government institute proceedings against it. In view of the favorable report of the field service thereon, and that no cancellation of any entry of Roos is involved by permitting the entry to stand, the petition is denied.

The decision of June 28, 1932, is modified to the extent herein indicated, and the motion to dismiss the pending proceedings is
Denied.

LEASE OF PUBLIC LANDS TO THE CITY OF ANCHORAGE, ALASKA, FOR AIRPORT PURPOSES

Opinion, September 19, 1932

AIRPORTS—RAILROAD LANDS—TOWN SITES—WITHDRAWAL—ALASKA.

Neither the provision in the Alaska Railroad Act of March 12, 1914, authorizing the withdrawal of lands along the line of the road for town site purposes nor the Executive order under which the withdrawal for the Anchorage town site was made contained any specific reference to airports or aviation fields, and where lands withdrawn pursuant to the Executive order were patented to the city of Anchorage for airport purposes such conveyance was based upon the implied authority derived from the term "for other public purposes" contained in the order of withdrawal.

AIRPORTS—LEASE.

With respect to any express or implied authority to grant rights in or to dispose of public lands for airport purposes under general provisions of the public land laws, it is plain that it was superseded by the act of May 24, 1928, under which rights for airports thereafter sought were to be acquired.

AIRPORTS—LEASE—PATENT—LAND DEPARTMENT—JURISDICTION.

The act of May 24, 1928, authorizes the leasing only of public lands for airport purposes, and the Land Department is without authority to cancel a lease issued thereunder and to issue a patent in lieu of the lease.

FINNEY, *Solicitor*:

Pursuant to the reference of the Assistant Secretary of September 6, 1932, I have considered the question submitted in the letter of the Acting Commissioner of the General Land Office, dated September 2, 1932, regarding the authority of this Department to revoke the lease of certain lands granted to the city of Anchorage, Alaska, for use as a public airport and grant absolute title to the premises involved.

The facts and questions are stated in the Acting Commissioner's letter as follows:

The city of Anchorage, in correspondence herewith addressed to the Assistant Secretary of the Interior, requests that it be given absolute title to Tract 32, 140.24 acres, in the Fourth Addition to Anchorage. Said tract was leased to

the city on June 4, 1932, for 20 years, for use as a public airport, under the act of May 24, 1928 (45 Stat. 728).

The question is presented in connection with the request, whether the act cited now prescribes an exclusive method under which the city may acquire said tract for airport purposes.

I have had an informal conference with Secretary Edwards relative to this matter, and it is requested that you furnish a formal opinion as to whether, under existing law, it would be proper for this Department to cancel the said lease, to restore the land, which has been eliminated from the town site, to its former status as a part thereof, and to patent the tract to the city as a public reserve for airport purposes under authority of the act of Congress approved March 12, 1914 (38 Stat. 305), and Executive order issued thereunder dated June 10, 1921 (Circulars and Regulations of the General Land Office, January, 1930, page 271).

As a precedent for its request, and in support of its contention that absolute title may be given, the city has cited Patent No. 873,718 dated July 27, 1922, under which certain lands were granted to the city "for fire protection and park purposes and to furnish a suitable field for aeroplanes." A copy of said patent is attached to the record in Anchorage 07634.

Prior to the enactment of the act of May 24, 1928 (45 Stat. 728), there was no general law governing the use of public lands as aviation fields. The policy of Congress with respect to such use was, however, theretofore indicated in the act of April 12, 1926 (44 Stat. 241), authorizing the use of certain public lands by the city of Tucson, Arizona, for a municipal aviation field, and the act of February 27, 1928 (45 Stat. 149), authorizing similar use of other public lands by Yuma County, Arizona, with the provision that operators of Government-owned aircraft shall have unrestricted use of the land for military or other purposes.

The act of May 24, 1928, *supra*, clearly was intended as a general law respecting the granting of rights in public lands for airport purposes. It dealt specifically with that subject and evidently was designed to be complete in itself. It provides as follows:

That the Secretary of the Interior is authorized, in his discretion and under such regulations as he may prescribe, to lease for use as a public airport any contiguous public lands, unreserved and unappropriated, not to exceed six hundred and forty acres in area, subject to valid rights in such lands under the public land laws. (U.S.C., 3d supp., title 49, sec. 211.)

Sec. 2. Any lease under this Act shall be for a period not to exceed twenty years, subject to renewal for like periods upon agreement of the Secretary of the Interior and the lessee. Any such lease shall be subject to the following conditions:

(a) That an annual rental of such sum as the Secretary of the Interior may fix for the use of the lands, shall be paid to the United States.

(b) That the lessee shall maintain the lands in such condition, and provide for the furnishing of such facilities, service, fuel, and other supplies, as are necessary to make the lands available for public use as an airport of a rating which may be prescribed by the Secretary of Commerce.

(c) That the lessee shall make reasonable regulations to govern the use of the airport, but such regulations shall take effect only upon approval by the Secretary of Commerce.

(d) That all departments and agencies of the United States operating aircraft (1) shall have free and unrestricted use of the airport, and (2) with the approval of the Secretary of the Interior, shall have the right to erect and install therein 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.

(e) That whenever the President may deem it necessary for military purposes, the Secretary of War may assume full control of the airport. (U.S.C., 3d supp., title 49, sec. 212.)

Sec. 3. With the consent of the lessee, the Secretary of the Interior is authorized to cancel any lease of public lands for use as public aviation fields or airports, made under law in force upon the date of the approval of this Act, and to lease such lands to the lessee upon the conditions prescribed by this Act. (U.S.C., 3d supp., title 49, sec. 213.)

The terms and conditions governing the granting of leases are plainly stated and require no construction. Clearly it was the intention of Congress that rights in public lands for such purposes should thereafter be granted subject to the conditions prescribed therein.

It appears to be the view of the city authorities that the action requested may be taken under the authority of the act of March 12, 1914 (38 Stat. 305). This act authorized the President to locate, construct and operate railroads in the Territory of Alaska and "to withdraw, locate, and dispose of under such rules and regulations as he may prescribe, such area or areas of the public domain along the line or lines of such proposed railroad or railroads for town-site purposes as he may from time to time designate."

Executive order of August 9, 1921, issued under authority of said act, provided that the Alaska Engineering Commission file with the Secretary of the Interior its recommendations for the reservation of such areas as in its opinion may be needed for town-site purposes and that the Secretary, when the public interests require, shall cause a survey of the area into urban and suburban blocks and lots of suitable size and "into reservations for parks, schools and other public purposes and for Government use."

Attention is called in the Commissioner's letter to the fact that certain lots and parcels of land were patented to the city of Anchorage on July 27, 1922, for public park, cemetery, hospital, schoolhouse, and sanitary purposes, and certain blocks of the South Addition and of the Third Addition "for fire protection and park purposes and to furnish a suitable field for aeroplanes." It appears that the lands so patented were found to be inadequate for the purposes of a present-day airport, and the city thereupon requested that certain other unsold tracts in the town site be transferred to the city

for use as a public, territorial, and municipal aviation field and airport for the use of Federal, territorial, municipal and privately-owned aeroplanes and aircraft. The matter was considered by the Commissioner and the Department and upon the advice then given the city filed application for lease. Appropriate supplemental survey was then made and a lease was granted on June 4, 1932.

The act of March 12, 1914, authorized the withdrawal and disposition of public lands for town-site purposes. No mention, however, was made therein or in the Executive order under which the withdrawal for the Anchorage town site was made, of airports or aviation fields. Certain purposes were specified in the order (parks and schools) and there was added thereto "for other public purposes." The order was revoked as to the lands involved herein by Executive order of February 25, 1932, prior to issuance of the lease to the municipality.

While the patent to the city heretofore issued, containing certain lands intended for use as an aviation field with other purposes, was issued as within the purview of said act and the Executive order, the later enactment of specific legislation relating to public lands to be used for airport purposes clearly was intended to govern the disposition of lands for such purposes thereafter made, and the issuance of a patent for other lands at this time under the act of March 12, 1914, where no right had accrued thereunder prior to the enactment of specific legislation providing for the leasing of lands for public aviation fields subject to certain specific terms and conditions, would be unauthorized.

The act of March 12, 1914, can not be regarded as a special act, providing for the disposition to towns along the line of the Alaskan Railroad of tracts of public lands for airport purposes, as it contained no special provisions relating to the subject matter. The rule of statutory construction stated in *Rodgers v. United States* (185 U.S. 83, 87), and numerous other decisions of the Supreme Court, to the effect that a later statute, general in its terms and not expressly repealing a prior special statute relating to the same subject matter, will ordinarily not affect the special provisions of such earlier statute, is not applicable to the question herein presented. With respect to any express or implied authority to grant rights in or dispose of public lands for airport purposes under general provisions of the public land laws, it is plain that the same was superseded by the comprehensive provisions of the act of May 24, 1928, under which rights thereafter sought were to be acquired. *Utah Power & Light Co. v. United States* (243 U.S. 389).

After careful consideration of the questions presented in the Commissioner's letter, I am of the opinion that the Department is without

authority to grant the request of the city to cancel the lease in question and issue patent to it in fee for the premises, in view of the express provisions of the act of May 24, 1928, *supra*, under which the lease was granted.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CHARLES F. GUERIN

Decided September 20, 1932.

MINING CLAIM—CO-OWNERS—RELOCATION—IMPROVEMENTS—PATENT.

A co-owner who relocated a mining claim, whether with the acquiescence of the other co-owners or not, does so in derogation and not in affirmation of his own previous estate in the prior location, and will not be permitted to include in his estimate of the value of the improvements required as a condition precedent to patent any of the labor done or improvements made by the original location.

MINING CLAIM—CO-OWNERS—RELOCATION—FORFEITURE—EQUITIES—PRACTICE.

While a relocation of a mining claim made for the purpose of closing out co-owners is questionable, the safer procedure being by forfeiture under the mining statute, yet it is valid at law, subject, however, to the equities of the cotenants.

MINING CLAIM—CO-OWNERS—RELOCATION—FIDUCIARIES—ABANDONMENT—LACHES—ADVERSE POSSESSION.

The fiduciary relationship between cotenants of a mining claim is not terminated by the relocation of the claim by one co-owner unless there has been an abandonment or, by reason of laches, the relocation has become immune from attack by the adverse possession law of the State in which the claim is situated.

EDWARDS, *Assistant Secretary*:

The Commissioner of the General Land Office has transmitted, as an informal appeal, a letter from Charles F. Guerin, written in response to a decision of the Commissioner of July 9, 1932, requiring him to show cause why his mineral entry, Great Falls 075322, should not be canceled for failure to show, as required by section 2325, Revised Statutes, "that \$500 worth of labor has been expended on improvements made upon the claim by himself or grantors."

Briefly, the pertinent facts are that Guerin, owner of a half interest in the Lewis and Clark lode, located in 1901, on refusal of co-owners to do any further annual labor, caused one John Rathbone to relocate the claim as the Guerin lode on August 1, 1926, and convey it to him September 8, 1926. The mineral surveyor certified the improvements as of the value of \$520. July 29, 1929, the

Forest Service challenged the value of the improvements by protest, on the ground that the value of the improvements made since the location of the Guerin claim was only \$251, but expressed a willingness to withdraw its protest, if the claimant would make up the deficiency in further improvement to its satisfaction. Later the district forester suggested, in effect, that if Guerin desired to have accredited the improvements made on the prior location, that he follow the precedent in *C. A. Sheldon et al.* (43 L.D. 152), and show privity of title between original and present claimants of the ground. Guerin acted upon this suggestion and filed a supplemental abstract of title to the Lewis and Clark lode, which shows, however, that he acquired only title to a half interest. Not showing full ownership to that location and the outstanding co-owners not being parties to the application, he could not obtain patent to the Lewis and Clark claim, even if no other legal obstacle exists. *Repeater et al. Lodes* (35 L.D. 54); *Badger G. M. & M. Co. v. Stockton G. & C. M. Co.* (139 Fed. 838, 841).

Upon application for patent, the relocater will not be permitted to include in his estimate of the value of the improvements required by law to be made as a condition precedent to patent any of the labor done or improvements made by the original locator. *Russell v. Wilson Creek Cons. M. Co.* (30 L.D. 322); *Yankee Lode* (30 L.D. 289); *Lindley on Mines*, sec. 409.

From the applicant's own avowals as to the purpose of the relocation it must be deemed as being one in opposition to the interests of his co-owners, whether with their acquiescence or not. Being a relocation, as the Commissioner states, it was in derogation and not in affirmance of his own previous estate in the prior location. *Wilbur v. Krushnic* (280 U.S. 306, 318). The relocation then not being made in furtherance of the prior location, no privity exists between the claimants of the former and the latter. *Burke v. Southern Pacific R.R. Co.* (234 U.S. 669, 693). The Commissioner was therefore clearly right in refusing to include the labor and improvements made for the Lewis and Clark as improvements or labor applicable to the Guerin location. Guerin, however, states, in substance, in his appeal, that since the appraisal of value of the improvements by the Forest Service, the deficiency alleged by it has been more than made up by further improvement at his expense. If this be so, it is suggested that under the rule to show cause, he should present satisfactory evidence to that effect, by describing in detail the additional work alleged to have been performed, giving value as to each item thereof, its dimensions, value, and exact position within the location, in order that the examiners for the Forest Service may readily identify and examine the alleged additional work. If applicant does this, and serves a true copy of such showing on the district forester, the De-

partment will await information from the Forest Service, whether or not it desires to withdraw its protest. To enable the applicant to obtain and file this data, the 60 days allowed by the Commissioner to show cause will be deemed to run from the date of the receipt by the applicant of a copy of this decision. If the applicant fails to comply with this requirement, his entry will be canceled and case closed without further notice.

As to the Commissioner's final suggestion that Guerin may commence new patent proceedings for the Lewis and Clark claim, on showing full title therein in himself or by joining the record co-owners thereof in his application, or by showing forfeiture of their interests in the manner prescribed by sec. 2324, Revised Statutes, this seems to imply that the Guerin claim is *prima facie* invalid and the patent application may not be perfected or begun anew for that claim. While relocations to cut out co-owners are questionable, the only safe plan is to get rid of the delinquent co-owner by forfeiture under the statute. Consult Lindley on Mines, secs. 405 and 406; Costigan on Mining Law, pp. 327-333. Yet a number of cases have held they are nevertheless good at law, but are subject to the equities of the co-tenants. *Swainders v. Mackey* (6 Pac. 361); *Doherty v. Morris* (16 Pac. 911); *Strang v. Ryan* (46 Cal. 33); *Guerin v. American Smelting & Refining Company* (236 Pac. 684, 686). Such a relocation does not terminate the fiduciary relationship between the co-tenants, and those left out of the relocation may enforce a trust against the relocating co-tenant. See U.S.C.A., title 30, sec. 28, note 437 and cases cited. But where other co-tenants abandon their interest, there is no fiduciary relationship, and the remaining locator may freely relocate. *Roberts v. Date* (123 Fed. 238). And even where the relocation by a co-owner is wrongful, it may become immune from attack by adverse possession for the period prescribed by the law of the State in which the land is situated or laches on the part of co-owners to assert their rights. *Thompson v. Ferry* (Ariz.) (56 Pac. 741); *Jones Min. Co. v. Cardiff & Mill. Co.* (Utah) (191 Pac. 426); *Teeter v. Brown* (Wash.) (228 Pac. 291).

The meager facts disclosed in this case do not warrant the conclusion that a fiduciary relationship exists between Guerin and those who held interest with him in the prior location or that he does not now have full beneficial ownership in the relocation. If in fact a trust relationship exists and it is not asserted by way of protest in this case, the Department is under no obligation to deny the applicant a patent where he shows full legal title to the claim, in order to protect possible parties in interest who after six years, assertion of adverse title show no attempts to protect their own rights.

As modified the Commissioner's decision is

Affirmed.

TAXABILITY OF ALLOTTED LANDS OF COEUR D'ALENE INDIANS

Opinion, August 18, 1932

INDIAN LANDS—VESTED INDIAN PROPERTY RIGHTS—LIMITED POWER OF CONGRESS.

The Government may, in its dealings with the Indians, create property rights which, once vested, even it can not alter. Whether the transaction takes the form of a treaty or a statute is immaterial. The important considerations are that there should be the essentials of a binding agreement between the Government and the Indian and the resulting vesting of a property right in the Indian.

INDIAN LANDS—ALLOTMENTS IN SEVERALTY—TAXATION—IMMUNITY OF ALLOTMENT OF A TRUST PATENT INDIAN.

Immunity from taxation by a State or a political division thereof is one of the vested rights ordinarily incident to land in an Indian trust patent status. *United States v. Rickert* (188 U.S. 432).

INDIAN LANDS—ALLOTMENTS IN SEVERALTY ON COEUR D'ALENE RESERVATION, IDAHO—POWER OF CONGRESS—REMOVAL OF RESTRICTIONS ON ALIENATION—IMMUNITY FROM TAXATION.

There can be no serious question of the authority of Congress to remove restrictions upon the alienation of allotted Indian lands with or without the Indians' consent, but this must be distinguished from depriving Indian allottees of the immunity from taxation conferred upon them by their trust patents. The Coeur d'Alene Indians were guaranteed nontaxable land for 25 years succeeding issuance of trust patent, and this was a property right which, once vested, could be divested only by due process of law. (Citing *United States v. Benewah County*, 290 Fed. 628.)

INDIAN LANDS—ALLOTMENTS IN SEVERALTY ON COEUR D'ALENE RESERVATION, IDAHO—POWER OF CONGRESS—REMOVAL OF RESTRICTIONS ON ALIENATION—IMMUNITY FROM TAXATION.

Where lands were ceded by the Coeur d'Alene Indians to the United States in accordance with an agreement, ratified by Congress, that a portion thereof "should be held forever as Indian land and as homes for the Coeur d'Alene Indians," and allotments in severalty of portions thereof were made to Indians under the general allotment act of February 8, 1887, and trust patents issued, said land is impressed with a trust status from the date of the original trust patent, with all the rights incident thereto, including immunity from taxation by the State or its political subdivisions.

INDIAN LANDS—ALLOTMENTS IN SEVERALTY, COEUR D'ALENE RESERVATION—ACTS OF FEBRUARY 26, 1927, AND FEBRUARY 21, 1931.

By the passage of the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205), there appears a clear intent upon the part of Congress to restore Indian trust allotment lands upon which fee simple patents had issued to the same status "as though fee patents had never been issued."

INDIAN LANDS—COEUR D'ALENE RESERVATION—ALLOTMENTS IN SEVERALTY UNDER TRUST PATENTS—ACT OF CONGRESS NOT CONTROLLING.

In a trust patent issued to a Coeur d'Alene Indian December 16, 1909, for allotted lands within the Coeur d'Alene reservation, it was declared, in conformity with the governing statute, that the United States would hold

the legal title in trust for 25 years, after which, unless the period were extended by the President, the fee would be conveyed discharged of the trust and free of all charges and incumbrances. *Held*, that a fee simple patent, issued to the heirs of said Indian, although in furtherance of an act of Congress, did not render the lands covered by said patent subject to taxation by the State of Idaho or a political subdivision thereof.

FINNEY, Solicitor:

You have requested my opinion as to the legality of certain taxes levied and assessed by Benewah County, State of Idaho, against certain lands allotted to Eugenia Weywick, a Coeur d'Alene Indian.

The circumstances under which this question is presented are substantially as follows:

A tract of country in Idaho was set apart as a reservation for the Coeur d'Alene Indians by Executive orders of June 14, 1867, and November 8, 1873. These Indians were formerly possessed of a large and valuable tract of land lying within Washington, Idaho and Montana, which they ceded to the United States in accordance with an agreement ratified by the act of March 3, 1891 (26 Stat. 989, 1027), except that portion of land within the boundaries of what is now known as the Coeur d'Alene Reservation. In consideration of the agreement and cession it was agreed that the Coeur d'Alene Reservation "should be held forever as Indian land and as homes for the Coeur d'Alene Indians." Allotments in severalty were authorized to be made on this diminished reservation by the act of June 21, 1906 (34 Stat. 325, 335, 336), patents therefor to be issued under the provisions of the general allotment act of February 8, 1887 (24 Stat. 388). Upon completion of the allotments the residue or surplus lands were, by the act of 1906, authorized to be opened to settlement and entry at not less than the appraised value, the net proceeds to be deposited in the Treasury to the credit of the Coeur d'Alene and Confederated tribes of Indians.

Under the provisions of the foregoing allotment acts, Eugenia Weywick was allotted 163.38 acres of lands described as lots 5 and 6, $E\frac{1}{2}SE\frac{1}{4}NE\frac{1}{4}$, $E\frac{1}{2}W\frac{1}{2}SE\frac{1}{4}NE\frac{1}{4}$, $E\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$, $E\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$, and $E\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$ Sec. 3, T. 44 N., R. 45 W. Trust patent for the land so allotted issued on December 16, 1909. This trust patent declared, in conformity with the statute, that the United States would hold the legal title in trust for a period of 25 years, at the end of which period, unless extended by the President, the fee would be conveyed discharged of the trust and free of all charges and incumbrances.

March 26, 1917, the Secretary of the Interior, upon his own initiative and without any application from the allottee, issued to her a fee simple patent under authority of the following provision in the act of May 8, 1906 (34 Stat. 182):

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.

The allottee died March 23, 1919, without having accepted the fee patent, leaving surviving as her apparent heirs, her husband, Philip Weywick, or Wildshoe, and three children, and shortly thereafter Mr. Weywick accepted the fee patent and signed a receipt therefor. In July, 1926, Mr. Weywick, as administrator of the deceased allottee's estate, executed a deed, under order of the probate court in and for Benewah County, conveying to the McGoldrick Lumber Company a strip of land 80 feet wide across part of the allotment for a consideration of \$100. According to a statement presented with the record, the allotment has been assessed for taxes since 1920 and it appears that a part of the land was sold for delinquent taxes and conveyed to Benewah County by deed executed March 14, 1930, by Ira G. Murphy, county treasurer and ex-officio tax collector for that county. Delinquent taxes and penalties to and including the year 1930, amount to nearly \$3,000.

April 12, 1932, the First Assistant Secretary of the Interior, acting under authority of the act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205), canceled the fee patent except as to the land conveyed to the McGoldrick Lumber Company. The Commissioner of Indian Affairs states that the county authorities have refused to remove the land from the tax rolls or to cancel all assessments made for the years prior to the conveyance to the McGoldrick Lumber Company. He further states:

The question raised is whether, in view of the cancellation of the patent and restoration of the land to a trust status, we should not also request cancellation of the taxes assessed for 1927 and the following years. Or should such taxes be paid by the Indians in interest?

The act of February 26, 1927, *supra*, authorized the cancellation of fee simple patents issued upon Indian trust allotments without the consent or an application therefor by the allottee except where the patentee had mortgaged or sold any part of the land described in the patent. The amendatory act of 1931 broadened this authority so as to empower the Secretary to cancel patents as to unsold and unincumbered lands where part of the lands may have been sold or mortgages given and subsequently satisfied. That act reads:

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such

patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the Act of February 8, 1887 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this Act shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired.

If there be any virtue in the English language, there can be little or no doubt as to the intent of Congress with respect to the taxable status of these lands during the period the fee patent was outstanding and subsequent to its cancellation. After cancellation of the fee patent, a new trust patent was to issue, such patent "to be effective from the date of the original trust patent" and the lands declared to have the same status "as though fee patents had never been issued." Under these plain provisions, the land can not be regarded as having other than a trust status from the date of the original trust patent, with all the rights incident thereto, one of which is immunity from taxation by the State or its political subdivisions.

There are other and stronger reasons, however, why such lands during the period the fee patent was outstanding were not subject to the taxing power of the State.

In *United States v. Rickert* (188 U.S. 432), it was established that lands of this character are not subject to State or local taxes during the period of trust provided by the allotment laws. And the exemption from taxation so attached has been uniformly recognized as a vested property right of which the Indian can not be deprived, even by Congress, without his consent. *Morrow v. United States* (243 Fed. 854); *United States v. Benewah County* (290 Fed. 628); *Choate v. Trapp* (224 U.S. 665); *English v. Richardson* (224 U.S. 680); *Carpenter v. Shaw* (280 U.S. 363).

The *Morrow* case involved the taxation of lands allotted to mixed-blood Chippewa Indians of the White Earth Reservation in Minnesota. Trust patents similar to the one here involved had been issued for the allotted lands. By the act of June 21, 1906 (34 Stat. 353), Congress removed the restrictions as to sale, incumbrance, and taxation, of allotments held by these adult mixed-blood Indians, with the declaration that the trust patent executed therefor should pass the

title in fee simple to the lands covered thereby. Provision was also made in the act that such mixed bloods should be entitled to a patent in fee for their allotments upon application therefor. Holding that the lands were not taxable during the 25-year trust period notwithstanding that enactment, the court said:

The Government may, in its dealings with the Indians, create property rights which, once vested, even it can not alter * * *. Whether the transaction takes the form of a treaty or a statute is immaterial. The important considerations are that there should be the essentials of a binding agreement between the Government and the Indian and the resultant vesting of a property right in the Indian.

The court further said that where the Indians consented to relinquish their lands and accept allotments on their reservations under the act of January 14, 1889 (25 Stat. 642), there was a valid contract between the Government and the Indians and that an Indian receiving a trust patent thereunder had vested rights "which could not be altered against his will and hence when he was claiming no rights under the act of 1906, but was insisting upon holding the land under the trust patent, his land could not be taxed by the State." The court reached this conclusion notwithstanding the specific provision in the act of 1906 removing restrictions as to both alienation and taxation and a declaration that the trust patents should pass the title in fee simple.

The above decision was referred to and relied upon by the Solicitor for this Department in an opinion dated December 14, 1920 (M. 1190), dealing with the taxation of lands on the reservation involved in the present inquiry, which lands had been allotted and patented in fee to certain Coeur d'Alene allottees under conditions identical with those here involved, the Solicitor holding that the lands were not taxable. The views of the Solicitor as to the nontaxability of the lands were subsequently sustained by the Circuit Court of Appeals in *United States v. Benewah County, supra*. In that case the patents in fee, issued in 1916, were held for delivery until January 6, 1921, when they were revoked and canceled by the Secretary of the Interior. Holding illegal the tax assessments during the period the fee patents were outstanding, the court said:

There can be no serious question of the authority of Congress to remove restrictions upon the alienation of the lands of allottees with or without the latter's consent. *Williams v. Johnson*, 239 U.S. 414, 36 Sup. Ct. 150, 60 L.Ed. 358. But to remove restriction upon alienation is a different thing from depriving Indian allottees of the immunity from taxation conferred upon them by their trust patents. The Indians were guaranteed nontaxable land for the period of 25 years after the issuance of the trust patents. In *Choate v. Trapp* the court gave consideration to the fact that the Indians were offered the allotments on the conditions proposed, and that by accepting the terms and relinquishing their claims they furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred. One of those rights

was exemption from taxation. The court held that the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant.

So in the present case the right of the Indians to have their allotments held in trust by the United States free from taxation by local authorities for a period of 25 years was a valuable right. Once vested as it was, it could only be divested by due process of law.

Notwithstanding the declaration in the act of May 8, 1906, *supra*, under which the fee patent to Eugenia Weywick issued, that the land should thereupon become taxable, the above cases very clearly establish the nontaxable status of the land after the issuance of the fee patent neither applied for by the allottee nor issued with her consent. It is true that in neither of the cases cited was there any acceptance of the patent or a conveyance of any part of the land subsequent to its issuance. But the acceptance of the patent by Mr. Weywick, the surviving husband, and the subsequent conveyance, by him as administrator, of part of the land, even if that conveyance was made upon the petition or with the consent of all the heirs, can not be regarded, in my opinion, as a waiver of the exemption from taxation, which continued unimpaired for the 25-year period expiring in 1934.

While there is some conflict of opinion as to whether title passes by a patent issued under the circumstances of this case (compare *United States v. Benewah County*, *supra*, with *United States v. Caster et al.*, 271 Fed. 615, and *United States ex rel. Prettybull v. Lane*, 47 App. D.C. 134), it is immaterial in the view I take whether title passed or not. If not, the land of course never became taxable. If so, the acceptance by the allottee or her heirs of the patent and a subsequent conveyance of part of the land should be regarded at the most, not as impairing the exemption from taxation, but merely as an acceptance of patent in fee and exercise of the privilege of freely alienating the land, which privilege is in no way inconsistent with the continued exemption from taxation of the remaining land. As said by the Supreme Court of the United States in *Choate v. Trapp*, *supra*:

The right to remove the restriction (against alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. (Part in parentheses added.)

The foregoing principle was stated and applied by the Solicitor for this Department in an opinion dated December 24, 1924 (50 L.D. 691) in discussing a similar situation. The Solicitor said:

For a considerable period the view prevailed rather generally that inalienability and nontaxability as applied to allotted Indian lands were coexistent

factors, or, in other words, that as soon as restrictions are removed the lands then become subject to taxation. Evidently Congress entertained a like view for in several measures pertaining to such matter that body attempted, as it did in the act of May 8, 1906, *supra*, to couple taxability with a removal of the restrictions against alienation. See act of June 21, 1906 (34 Stat., 325, 353), relating to allottees on the White Earth Reservation, Minnesota, and the act of May 27, 1908 (35 Stat., 312), relating to the Five Civilized Tribes in Oklahoma. In 1912, however, the Supreme Court of the United States, after pointing out that alienability and taxability are separate and distinct subjects, laid down the rule, substantially, that while Congress could remove the restrictions against alienation whenever it saw fit so to do, yet where an Indian has once obtained a vested right of exemption from taxation for a definite period it is thereafter beyond the power of Congress, by statute, to deprive the Indian of that right without his consent. See *Choate v. Trapp* (224 U.S., 665, 673). To the same effect is the decision by the Eighth Circuit in *Morrow v. United States* (243 Fed., 854), involving allottees of the White Earth Reservation, Minnesota. See also 49 L.D., 348, 352, wherein it was pointed out that a removal of restrictions, within itself, does not deprive the Indian of any property right but simply enlarges his privilege of dealing with the lands allotted to him which he could thereafter retain, incumber, or dispose of, as he might see fit. Enlargement of personal privileges are matters of which one can hardly be heard to complain, but when we attempt to couple this with an invasion of a vested property right we confront a different situation. If it is beyond the power of Congress to invade a property right resting in the Indian, surely it is likewise beyond the power of an administrative officer, by the issuance of a patent in fee prior to the expiration of the trust period, without the consent of the Indian, to deprive him of a right which has once vested. In other words, his lands can not thus be made subject to taxation without his consent. See *Benewah County, Idaho v. United States* (290 Fed., 628).

Agreeing fully with the foregoing view, I am of the opinion, both upon principle and authority, that the lands under consideration were not and are not now taxable by the State of Idaho or any of its political subdivisions during any part of the period in controversy.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

DISPOSITION OF PROCEEDS OF SALE OF TIMBER ON GEORGETOWN (SHOALWATER) INDIAN RESERVATION, WASHINGTON

Opinion, September 23, 1932

INDIAN LANDS—GEORGETOWN OR SHOALWATER BAND OF INDIANS—RIGHT TO ALLOTMENTS ON QUINALET RESERVATION, WASHINGTON.

The Indians of the Georgetown (or Shoalwater) Band, being members of one of the "tribes of fish-eating Indians on the Pacific Coast", are, under the terms of the act of March 4, 1911 (36 Stat. 1345), entitled to allotments on the Quinalelt Indian Reservation.

INDIAN LANDS—ALLOTMENT RIGHT—ONE EXERCISE ONLY PERMITTED.

Where Indians, entitled to allotments on one reservation, elect to take them on another, under authority of law, such taking exhausts the right, under the well-settled rule that no Indian is entitled to dual privileges or double benefits either as a member of two tribes or otherwise. *Mandler v. United States* (52 Fed. (2d.) 713).

INDIAN LANDS—GEORGETOWN OR SHOALWATER RESERVATION, WASHINGTON—STATUS OF INDIAN CHILDREN AS TO ALLOTMENTS.

In the matter of allotments of land, Indian children take the status of their parents, and, like them, are entitled to allotments and should be allotted. *Halbert v. United States* (283 U.S. 753).

INDIAN LANDS—OCCUPIED LOTS IN VILLAGES AND TOWNS—SEC. 10, ACT OF JUNE 25, 1910.

Section 10 of the act of June 25, 1910 (36 Stat. 855), authorizing the Secretary of the Interior, under certain conditions, to issue patents to individual Indians for village lots occupied by them, contemplates lots occupied at the time in existing villages, and not lots in villages in prospect.

INDIAN LANDS—ABANDONMENT BY INDIANS—TITLE IN THE UNITED STATES—DISPOSITION OF PROCEEDS OF SALE OF TIMBER.

Where an Indian Reservation is virtually abandoned as such by the Indians in favor of another reservation, by satisfying the allotment right thereon and living elsewhere, the land so abandoned becomes, in effect, the land of the United States, and it and the timber thereon become subject to disposition by the United States, and money derived from the sale of such timber should be covered into the Treasury of the United States, not as Indian money, but miscellaneous receipts.

FINNEY, Solicitor:

You have requested my opinion as to the disposition to be made of moneys derived from the sale of timber on the Georgetown or Shoalwater reservation in Washington, aggregating \$15,150, now carried on Special Deposit in the accounts of the Superintendent in charge of the reservation.

The Shoalwater or Georgetown Reservation in Washington consists of 334.75 acres of land set apart for "Indian purposes" by Executive order of September 22, 1866. The Indians for whose benefit the reservation was created embraced at that time some 30 or 40 families who made their living by fishing, and the purpose in creating the reservation was to enable them to establish their homes there free from interference from the Whites. Certificates assigning parcels or lots to individual Indians appear to have been issued by Indian Agent Oliver Wood in 1881, which certificates or assignments were subsequently approved by the Indian Office with the understanding that the reservation lands belonged to the tribe in common and that no title passed to the persons named in the certificates. In 1910 Special Allotting Agent Finch B. Archer recommended that the reservation be restored to the public domain, with the exception of a small tract used for cemetery purposes, saying:

I visited the reservation on September 23 and found four Indian families members of the Georgetown band, residing thereon. Beside their houses, there are several other buildings on the reservation, in a habitable condition, and unoccupied at the time of my visit, but which, I am informed, are occupied by other Georgetown Indians, during the Fall and Winter months.

The Georgetown Indians number about 150 persons. The actual residence of most of these is at Bay Center, across Willapa Bay, Washington, and nine miles south of the Georgetown reservation. These Indians live among the white people of the village; the children of both races attend the same school. Most of the Indians have purchased lots in the Bay Center cemetery, where they bury their dead. These Indians earn a good livelihood by salmon fishing and oyster culture. Nearly all speak English, pay taxes, and have for years exercised the right of suffrage. *They have all, and at their own request, been given allotments of lands on the Quinaielt reservation.*

The above statement—regarding allotments—is also true of all those Indians, and of their living heirs, who may have had any legal interest in the tentative assignments of lands on the Georgetown reservation, as made to them in 1881 by Indian Agent Oliver Wood. This being the case, they are not entitled to additional allotments elsewhere.

By letter dated October 10, 1910, the Indian Office declined to follow the recommendation of the Allotting Agent that the reservation be restored to the public domain, saying:

As this reservation is so small in area and the benefit given to prospective homesteaders by restoring it to the public domain so slight, it would appear advisable to allow it to continue as it now stands. This is especially true, as your report indicates that some of the Indians living on the reserve lands have houses there and even though these Indians have been allotted on the Quinaielt reservation, their interests in and right to their homes on the Georgetown or Shoalwater Bay reserve should be protected. This can best be done by allowing the reservation to continue until some other arrangement is made for the disposal of the lands therein or at least the protection of the homes of the Indians located thereon.

Matters rested thus until 1920, when the Commissioner of the General Land Office, by letter dated March 1 of that year, pointed out that the reservation had not in recent years and probably never had been occupied by the Indians, and suggested that steps be taken looking to the opening of the reservation to entry. The matter was investigated and the superintendent in charge of the reservation, by letter dated April 23, 1920, advised the Commissioner of Indian Affairs that several Indian families, *all of whom had been allotted on the Quinaielt reservation*, were and had been residing on the Georgetown or Shoalwater reservation for a number of years. Because of the presence of these Indian families, the Indian Office again declined to vacate the reservation.

In August, 1926, the superintendent advised the Commissioner of Indian Affairs that there were three families living upon the reservation, all of the members of which had received allotments on the Quinaielt reservation, with the exception of four children, to whom

he recommended that the reservation lands be allotted. Three of the children were the issue of a union between Mrs. Fannie Charley McCrory, an Indian woman residing on the Georgetown reservation but allotted at Quinaielt, and a white man, and for that reason these children were regarded by the superintendent as not entitled to allotments at Quinaielt. The matter was accordingly presented to President Coolidge, and on April 6, 1927, he granted permission to allot the lands to the four children mentioned and to any other Indians entitled to allotments on the reservation in accordance with the General Allotment act of February 8, 1887 (24 Stat. 388), reserving, however, a suitable area for cemetery purposes to be used by the Indians in common. No allotments under this Executive authority have yet been made, and presumably will not be made in view of further developments set forth in the superintendent's letter of January 5, 1932, as follows:

The Shoalwater Bay reservation is a comparatively small one, consisting of 334.75 acres, and if actual allotments comparable in size to allotments on most reservations were made it would not provide allotments for but a few of the Indians. However, numbers of Indians have resided on this reservation for a long time; these Indians now reside there and expect to make their permanent homes there. Many of them are already allotted on the Quinaielt reservation and would not be entitled to an allotment on the Shoalwater reservation.

These Indians make their living through fishing and crabbing in that immediate vicinity and it is highly advisable that they continue to reside in that locality. There has, for some time, been much bickering among these Indians as to building sites for home purposes on this reservation. Part of the reservation consists of a flat area, lying just above tide water, which would make an ideal location for building homes; and it is believed highly desirable that at least a portion of the Shoalwater reservation be set aside as a village, and building lots (not allotments) be assigned to such persons as are entitled thereto and desire to make their homes there.

A number of fairly substantial homes have already been built in this particular locality; these persons desire to further improve their places and in order that this desire may be encouraged and made possible it is believed desirable that the village be set aside, surveyed, and lots definitely assigned to these persons. Eight Indian families now reside in this immediate locality. A number of these persons have funds at this office and I would like to see these Indians construct good, substantial homes before their money is exhausted and accordingly urge that this office be authorized to set aside and make a survey of a village site on this reservation, to be used for home purposes.

The recommendation of the superintendent that a village site be established for the Indians now residing upon the reservation and that building lots be assigned to them has not yet been acted upon. Whatever may be the ultimate decision upon that question, however, it is plain from the facts at hand that there are now no Indians who can be recognized as lawfully entitled to the moneys heretofore derived from sales of timber on these lands. The Indians for whom the reservation was originally set aside virtually abandoned the res-

ervation and all of them appear to have elected to take allotments on the Quinaielt reservation.

Regarding their right to allotment on the Quinaielt reservation, it may be said that that reservation was enlarged by Executive order of November 4, 1873, issued pursuant to the provisions of the Treaty of July 1, 1855, and January 25, 1856 (12 Stat. 971), with the Quinaielt and Quileute Indians. This Executive order set aside a large tract of land for the use of the Quinaielt, Quileute, Hoh, Quit, "and other tribes of fish-eating Indians on the Pacific Coast," and by the act of March 4, 1911 (36 Stat. 1345), the Secretary of the Interior was authorized and directed to make allotments on that reservation to the members of the "Hoh, Quileute, Ozette, or other Tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute Tribes in the Treaty of July 1, 1855, and January 25, 1856, and who may elect to take allotments on the Quinaielt reservation rather than on the reservations set aside for these Tribes." Regarding these other reservations, the Supreme Court, in *Halbert v. United States* (283 U.S. 753), said:

The reference to "other reservations" may be sufficiently explained by stating that some small reservations (Executive Orders Relating to Indian Reservations, 1912, pp. 172-175, 195, 200, 205, 206—Shoalwater) had been set aside theretofore for particular villages of the Hoh, Quileute, Ozette, Quit, Chehalis and other fish-eating tribes, but that these reservations were in no instance large enough to provide allotments to more than a small fraction of the Indians thereon.

The court further said:

When the bill which became the Act of March 4, 1911, was introduced in Congress it contained a direction that allotments be made to "all members of the Hoh, Quileute and Ozette tribes of Indians in Washington who may elect" etc., and said nothing about other tribes; but in the course of its passage this provision was amended so as to read: "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty (before named) and who may elect," etc. This shows that Congress intended to include tribes not included in the original provision; and it shows further that they were to be tribes having, like the Hoh and Ozette tribes, some affiliation with the Quinaielt and Quileute "in the treaty." Probably "in" was used in the sense of "under" or "through." Strictly speaking there was no affiliation in the treaty. But the treaty did contain a provision under which affiliation might be brought about. It authorized the President to consolidate the Quinaielt and Quileute tribes with other friendly tribes. Under this provision he made the order establishing the enlarged reservation for the use, not only of the Quinaielt and Quileute tribes, but also of the Hoh, Quit and other coastal tribes of fish-eating Indians "in that locality," evidently meaning in that section of the Territory of Washington.

That was a step towards consolidation. Other steps followed, one being that in 1905 the Indian Bureau began making allotments to members of all these tribes. This work was carried on under the treaty, the executive order and

the general allotment law, and it had progressed prior to the act of 1911 to the point where over 750 allotments had been completed, more than half of which were to members of the various fish-eating tribes in that section other than the Quinaielt and Quillehute. It therefore was altogether appropriate at that time to speak of these other tribes as affiliated with the Quinaielt and Quillehute under the treaty.

The court accordingly held that the Chehalis, Chinook and Cowlitz tribes were among those whose members are entitled to take allotments within the Quinaielt reservation. The court in its discussion having specifically mentioned the Shoalwater reservation as one of those reservations the Indians of which might elect to take allotments at Quinaielt under the act of 1911, it follows that those Indians also must be regarded as affiliated with the Quinaielt and Quileute under the treaty of 1855 and 1856 and therefore entitled to allotments at Quinaielt.

As stated above, the Georgetown or Shoalwater Indians in fact elected to and did take allotments at Quinaielt and, in the absence of some provision to the contrary, their action in so doing obviously precludes them from receiving or claiming any benefits on the Georgetown or Shoalwater reservation under the well-settled rule that no Indian is entitled to dual privileges or double benefits either as a member of two different tribes or otherwise. (See *Mandler v. United States*, 52 Fed. 2d, 713; *Josephine Valley et al.*, 19 L.D. 329; *Hagstrom v. Martell*, 39 L.D. 508; *Niels Esperson*, 21 L.D. 271.) This rule applies with equal force to those individual Indians now residing there who have also been allotted at Quinaielt. The unallotted children born to them there take the status of their parents and like the parents are entitled to allotments and should be allotted at Quinaielt, personal residence on that reservation not being essential to the rights of these Indians to allotments at that place (*Halbert v. United States*, *supra*). This includes the children of Mrs. Fannie Charley McCrory, who, though born of a union between Mrs. McCrory and a white man, nevertheless take the status of the mother and not that of the father for the reason that it appears from the superintendent's letter of January 16, 1928, that the mother retained her tribal status and that she and the children are now and have continuously resided on the Georgetown or Shoalwater reservation. The rule applicable to them, as stated in the Halbert case, is that "if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother."

The Executive order of April 6, 1927, authorizing the allotment of the lands on the Georgetown or Shoalwater reservation, which, as we have seen, was obtained primarily for the benefit of the

McCrory children, thus appears to have been obtained under a misconception of the rights of these children to allotments at Quinaiaelt. This suggests the advisability of administrative action, looking to cancellation of the Executive order, particularly in view of the plans now proposed by the superintendent to set aside at least part of the reservation as a village site for the Indians now residing there. Regarding this latter proposal, section 10 of the act of June 25, 1910 (36 Stat. 855), authorizes the Secretary of the Interior, whenever in his opinion it shall be conducive to the best welfare and interest of Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lots described therein to persons other than members of the tribe, etc. This provision, however, obviously has in mind the protection of the rights of occupants of lots in then existing and established villages, and appears to confer no authority for the establishment of new villages on the reservation lands and the patenting of lots to Indians who may settle there. Legislative authority to do this at Georgetown or Shoalwater thus appears to be necessary, particularly as the Indians now residing or desiring to settle there, who have been allotted elsewhere, can not be regarded as entitled to benefits at Georgetown or Shoalwater under the rule hereinbefore referred to.

The moneys now on hand accrued under a contract approved by the Department March 13, 1925, providing for the sale to B. F. and E. J. Armstrong of the timber on certain lands within the Georgetown or Shoalwater reservation for \$15,150. After paying \$6,498.44 of the purchase price, the purchasers became insolvent and the contract was canceled by the Department January 5, 1928. On the same date, a new timber sale contract was approved in favor of the surety on the canceled contract in consideration of the payment of \$8,651.56, the balance due from the Armstrongs under the original contract.

Section 7 of the act of June 25, 1910 (36 Stat. 855-857) authorizes the sale of timber on unallotted Indian reservation lands and provides that the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as the Secretary of the Interior may direct. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), however, prohibits the expenditure of Indian tribal funds without specific appropriation by Congress, with certain stated exceptions. Section 1 of the act of March 3, 1883 (22 Stat. 590), as amended by the acts of May 17, 1926 (44 Stat. 560) and June 13, 1930 (46 Stat. 584), requires that tribal funds arising from Indian

reservations be deposited in the Treasury of the United States and that on and after July 1, 1930, such funds be carried on the books of the Treasury Department in separate accounts for the respective tribes. Ordinarily, the moneys here involved which accrued from the sale of timber on unallotted Indian reservation lands would be disposed of as provided in the foregoing acts. As above shown, however, the Georgetown or Shoalwater reservation was virtually abandoned by the Indians for whom it was originally created and there are now no Indians, tribal or individual, shown to have any lawful right or claim to these moneys. Under such circumstances, and as the fee title to the reservation lands rests in the United States, the moneys in question should, in my opinion, be covered into the Treasury of the United States as miscellaneous receipts. (See secs. 3617 and 3618, Revised Statutes).

Approved:

JOS. M. DIXON,

First Assistant Secretary.

OKONITE COMPANY (ON REHEARING)

Decided October 6, 1932

COMPUTATION OF DAMAGES—DELIVERY OF GOODS—FORFEITURE—SUNDAYS AND HOLIDAYS—RECLAMATION PROJECT.

In the computation of damages as a penalty or forfeiture for breach of contract in the delivery of goods where a day, a week, or a month, or any other definite period is the agreed standard of measurement, every intervening Sunday must be included and counted, unless specifically excepted, but when the last day for performance falls on Sunday or a holiday and performance is on the next succeeding secular day, said Sunday or holiday is to be excluded.

DIXON, *First Assistant Secretary:*

September 9, 1932, the Department made a finding of fact on appeal from the decision of the contracting officer pursuant to the contract, dated May 19, 1932 (Symbol No. I2r-3189), Kennewick Division, Yakima Project, Washington. September 17, 1932, the Okonite Company made objection to the finding of fact and stated:

To go further into the matter, if you are entitled to one day's liquidated damages, on the shipment from Passaic, why are we not entitled to six day's liquidated damages from you for pre-shipment from Wilkes-Barre?

As we see it, however, you are not entitled to the liquidated damages for one day. As you state, the bid does not cover specific computation of days; you state "it is the general rule that Sundays and holidays must be counted"; we state that it is the general rule in making shipping promises to count actual working days. If we promise to ship a bill of material in twenty days, we cannot be held responsible if the customer places his order so it reaches us on,

say, Saturday, thereby including three Sundays in a computation of calendar days, but we are responsible to the extent of twenty working days, and stand by our promises.

We, therefore, take exception to your findings and again request that this voluminous and burdensome, as well as annoying matter, be closed immediately by sending us remittance for \$60.00.

This statement will be considered in the nature of an application for rehearing in which the only matter involved is the determination of the method of computing time of delay for which liquidated damages should be collected.

It is a general, although perhaps not universal rule, that in the absence of statutory expression of a contrary intent, intervening Sundays—that is, Sundays which fall on neither the first nor last days—are to be included in computing a period of time. *Brown v. City of Chicago* (7 N.E. 108); *Gordon v. People* (154 Ill. 664; 39 N.E. 560). Chapter 74, section 10, of the Illinois Laws, 1929, provides that:

In all computations of time, and of interest and discounts, a month shall be considered to mean a calendar month, and a year shall consist of twelve calendar months; * * * parts of a month upon the ratio which such number of days shall bear to 30.

In the computation of damages for breach of contract where a day, a week, or a month, or any other definite period is the agreed standard of measurement, every intervening Sunday must be included and counted (*Pressed Steel Car Company v. Eastern R. Company*, 121 Fed. 609), and such is also the rule applied in ascertaining the amount of a penalty or forfeiture. *Pilot Commissioners v. Erie R. Company* (5 Rob. N. Y. 366).

In the case of the *Pressed Steel Car Company v. Eastern R. Company*, *supra*, the court says:

The stipulation for liquidated damages is not, as counsel for the car company argue, an agreement to pay \$5 for the use of each car each day during the delay, and hence void as to Sundays, because there could be no lawful use, and therefore no legal loss of use, upon those days. On the other hand, it is a contract whereby the parties establish and agree to apply a specified standard to the measurement of damages that are uncertain and incapable of accurate determination. They agree that these unliquidated damages for the delay of the delivery of each car shall be measured by multiplying \$5 by the number of days the delivery is delayed beyond the time specified. The agreed standard is \$5 for every day's delay of each car. The contract would not have been essentially different if it had fixed the standard at \$35 for each week's delay, or at 20 cents for each hour's delay, in the delivery of each car. It would be as reasonable to exclude one-seventh of the week, or the hours of Sunday, in a measurement by such standards, as it would be to exclude Sunday where the standard of measurement is 24 hours or a day. In the computation of rents, interest, damages, or any other amounts in which the day, the week, the month, or any other fixed period of time, is the agreed

standard of measurement, every intervening Sunday, as well as every secular day, must be included and counted in the reckoning. The contract of these parties was that the car company would pay to the railway company "five dollars per day" for every car delayed, and this was an agreement that the amount of damages for each car's delay should be the product of \$5 by the number of days, including both Sundays and secular days, that the delivery of the car was delayed beyond the time when it was due by the terms of the agreement.

This statement of the court is lucid and applies forcefully to the computation of time relative to delay in delivery by the Okonite Company.

The question of the computation of time for liquidated damages accruing under contracts with the United States was under consideration by the Comptroller General in the case found in 9 Comptroller General, 336. It is stated in the finding that:

The general rule to the effect that in computing the time mentioned in a contract for the doing of an act, intervening Sundays, unless specifically excepted, are to be counted, except that when the last day for performance falls on Sunday or a holiday and performance is on the next succeeding secular day said Sunday or holiday is not to be taken into consideration, appears to be supported by the weight of authority. See *Armstrong v. McGough*, 29 A.L.R. 236, and annotations thereto; footnotes to *Conway v. Smith Mercantile Company*, 49 L.R.A. 205, and cases therein cited; *Street v. United States*, 133 U.S. 299; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. Rep. 609.

In view of this exposition of the law, the application of the Okonite Company for rehearing is

Denied.

VIVIA HEMPHILL

Decided October 6, 1932

MINING CLAIM—LIMESTONE—CALCIUM—PORTLAND CEMENT—LODE CLAIM.

A deposit of high calcium content, especially valuable for the burning of lime and the manufacture of Portland cement, that exists in lode form with well defined walls and in such quantity and situation as to render it economically practical to mine and devote to commercial uses, is subject to location as a lode or vein under the mining law.

MINING CLAIM—MINERAL LANDS—PLACER CLAIM—LODE CLAIM.

The test to be applied to determine how mineral deposits should be secured under the mining law is the form and character of the deposits, that is, if they are in veins or lodes in rock in place they must be located as lode claims, but if they are loose or scattered throughout the ground they are then subject to location only under the placer mining laws. *Webb v. American Asphaltum Company* (157 Fed. 203).

EDWARDS, *Assistant Secretary*:

Vivia Hemphill, who made mineral entry Sacramento 024529 for the Jumbo and Jumbo Extension No. 1 lodes for a deposit limestone, alleged to be in well-defined lode formation, has appealed from a

decision of the Commissioner of the General Land Office, dated October 26, 1931, which held the entry for cancellation.

The reason for the cancellation stated in the decision is that the deposit, being only ordinary limestone used for the manufacture of commercial lime, it was subject to location only as a placer deposit under the rule in *Shepherd v. Bird* (17 L.D. 82); *Henderson et al. v. Fulton* (35 L.D. 652). The proceedings under the application were also held defective in that the affidavit of posting of notice of application for the claim was not verified by claimant or her attorney in fact, as required by statute.

The defect in the affidavit of posting is not fatal in the patent proceedings (*El Paso Brick Company v. McKnight*, 233 U.S. 250), and with additional showings on appeal, the applicant has filed a sufficient affidavit of posting executed by her. The defect is therefore cured.

In the application for patent, the applicant stated that "the ground contained in each of the claims for which patent is hereby applied, is mineralized and each of the same contains rock in place bearing calcium carbonate, commonly known as limerock." Following a statement of the analysis of the rock showing "Calcium carbonate purity 95.48 percent", it is said, "That the calcium carbonate or limerock is of excellent grade for lime burning and cement manufacture, * * *"

The lode as opened and exposed follows the center line of the two claims and is approximately four hundred feet in width. The lode visibly continues northeasterly from the northeastern end line of Jumbo Extension No. 1 lode mining claim, and also from the southwest end line of the Jumbo lode mining claim and across the north of the American River in a general southwesterly direction. The lode is met on the east by a mass of serpentine rock and on the west by siliceous schist rock. It is further stated that the deposit is $1\frac{1}{4}$ miles from the Southern Pacific Railroad tracks and that the intention is to transport the deposit, because of the mountainous terrain, by aerial tramway to a millsite for treatment.

Applicant accompanies her appeal with affidavits and photographs purporting to be made by geologists and a mineral surveyor, amplifying and corroborating the foregoing statements as to the locus, form, extent and quality of the deposits located.

It is stated in these affidavits that the ledge of limestone has well-defined walls, the foot wall being serpentine and greenstone, and the hanging wall greenstone; that the contacts between the limestone and the walls on either side are plainly visible and well marked on the ground and that the lode extends above the general level of the surrounding country. Affidavits and the photographs as well show

that the ledge extends through the claims and is well exposed and visible from points on the gorge of the American River which cuts across the deposit. It is further alleged that because of the vast quantity of limestone within the claims, the high volume therein and purity content of the calcium carbonate, that applicant has agreed to sell, when patent was procured, her interest in the claims for \$125,000, of which \$25,000 has been deposited in cash. The California Lime Products Company allege that they have acquired the right, title and interest of the applicant by deed and ask that they be allowed to intervene and prove the character of the land and lode form of the deposit.

Average limestone contains 76 per cent calcium carbonate (Clarke, *Data of Geochemistry*, p. 30). The term "limestone" is used to describe a class of rocks varying in composition from pure calcium carbonate to a mixture of 54.35 per cent calcium carbonate with 45.65 per cent magnesium carbonate, when the material is called dolomite. Any gradation between these limits may be found, and all limestones contain more or less impurities. (*Mineral Resources*, U.S. Geological Survey, 1911 (2) 714.)

It appears from the showings made that the deposit is not common limestone, but is of high calcium content, especially valuable for the burning of lime and the manufacture of Portland cement; that it exists in lode form with well-defined walls and in such quality and quantity and in such a situation as to render it economically practical to mine and devote to commercial uses.

In *Oro Grande Lime and Stone Company* (unreported), decided by the Department May 9, 1927, a deposit of limestone in lode form, and substantially the same in composition, was held, after considerable discussion of pertinent cases in the courts and Department, to be subject to location as a lode or vein under the mining law. See also *Dunbar Lime Co. v. Utah-Idaho Sugar Co.* (17 Fed. 2d, 351). In *Big Pine Mining Corporation*, decided July 20, 1931 (53 I.D. 410), one of the reasons for holding void the claims containing limestone deposits in lode formation was that they were located as placers.

In the *Oro Grande Lime and Stone Company* case and in *Utah Onyx Development Company* (38 L.D. 504), the Department quoted with approval the following statement in *Webb v. American Asphaltum Mining Company* (157 Fed. 203):

The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims.

The cases cited by the Commissioner in so far as they express the view that valuable deposits of limestone, irrespective of their form or character are subject only to placer location, are not in harmony with later well-considered cases, and will not be regarded as controlling. The Commissioner's decision is therefore reversed, and patent may issue if all else be found regular.

Reversed.

RAFEL LOPEZ, LAWRENCE M. CHAMBERS, PROTESTANT

Decided October 17, 1932

WATER RIGHTS—DIVERSION—SEEPAGE—PRIOR APPROPRIATION—COLORADO.

In Colorado seepage or waste waters which return to a stream become a part of the water supply of the stream and can not be taken or diverted by a new claimant when such diversion or use would interfere with the right of use by prior appropriators downstream.

STOCK-RAISING HOMESTEAD—DESIGNATION—WATER RIGHTS—PRIOR APPROPRIATION—IRRIGATION.

Lands abutting on a stream the entire flow of which is insufficient to supply the priorities for irrigation already established and which are not therefore susceptible to irrigation may be designated under the stock-raising homestead act, if otherwise of the character contemplated by the act.

EDWARDS, Assistant Secretary:

This is an appeal by Rafel Lopez from a decision of the Commissioner of the General Land Office, dated May 6, 1932, rejecting his application to make entry under the stock-raising homestead act for E $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, and NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 15, T. 26 S., R. 52 W., 6th P.M., Colorado.

The application in question was filed March 21, 1930, accompanied by petition for the designation of the lands showing that they are crossed by a small stream, called Muddy Creek, the waters of which were said to be unavailable for the purpose of irrigating the said lands. One Lawrence M. Chambers filed a protest against the designation alleging that a portion of the land is susceptible of irrigation by pumping from Muddy Creek. The petition for designation and the protest were referred by the Commissioner of the General Land Office to the Director of the Geological Survey for consideration. Field examination was had by a representative of the Survey, and as a result of such examination the Director of the Geological Survey advised the Commissioner, under date of March 7, 1932, that the W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 15, were susceptible of irrigation by pumping from Muddy Creek, and that the flow of the creek during the irrigation season appeared adequate to provide a water supply for irrigation of the land; hence that it

was not subject to designation. The rejection of the application of Lopez was based upon the aforesaid report.

In his appeal from that action Lopez alleged that no part of the lands in question is susceptible of irrigation by pumping from Muddy Creek; that there is no regular flow of water in said creek where it passes through the lands sought to be designated except percolating or seepage waters from Muddy Creek reservoir in an amount not to exceed two cubic feet per second; that all of the waters of the stream are over-appropriated and judicially decreed to the several ditches now and heretofore irrigating lands from said waters; that the prior appropriators have used all of the flow of the stream without ever having supplied the amounts of their several appropriations or been able to secure a sufficient quantity of water from the stream to irrigate the lands which they have for many years been farming or attempting to farm by irrigation under their prior appropriations.

Said appeal was submitted to the Director of the Geological Survey, who, under date of July 9, 1932, reported in part as follows:

All the regular flow of Muddy Creek is required to satisfy old established rights at various points along the creek below the land involved in this case and any water right that may be established in this case is dependent upon an interpretation of the State laws with reference to this seepage flow. If the allegation of appellant that this flow is covered by existing water rights is correct, then the action in this case should be reversed. If the protest is sustained, it must be on the theory that the seepage flow is subject to diversion and beneficial use on the land involved in this case.

The question thus presented has been carefully considered by the Department in the light of briefs filed by the appellant and the protestant. The record shows that Muddy Creek is a tributary of Rule Creek, and that Rule Creek is a tributary of the Arkansas River, in Water District No. 67 of the State of Colorado. Several thousand acres of land are irrigated from the two tributary streams above mentioned, the waters of which have long since been over-appropriated. About two miles above the lands sought to be designated, the Muddy Creek dam and reservoir, now owned by the Bent County Irrigation District, intercepts and impounds the entire flow of Muddy Creek. Since the construction of said Muddy Creek reservoir there has been no water flowing in the creek where it intersects the land sought to be designated except seepage or waste from the Muddy Creek reservoir, not exceeding two cubic feet per second, which flow, under the law of Colorado, is subject to the rights and demands of prior appropriators downstream, below the lands involved in this case. The entire flow of the stream appears insufficient to supply the priorities for irrigation already established.

It is well settled in Colorado that seepage or waste waters which return to the stream become a part of the water supply of the stream and can not be taken or diverted by a new claimant when such diversion or use would interfere with the right of use by prior appropriators downstream. Prior appropriation and use give the first and better right. *Comstock v. Ramsay* (133 Pac. 1107; *Rio Grande Reservoir and Ditch Company v. Wagon-Wheel Gap Improvements Company* (191 Pac. 129).

In the circumstances, it is clear that the entire flow of Muddy Creek is fully covered by existing water rights; hence it must be concluded that there is no further water in said stream available for the irrigation of the lands sought to be designated. The said lands will therefore be listed for designation under the stock-raising act, and the action of the Commissioner is reversed, the protest of Chambers being dismissed.

Reversed.

BONDS IN CONNECTION WITH OIL LEASES—AMENDMENT TO REGULATIONS

[Circular No. 1290]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., October 19, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

On October 10, 1932, the Acting Secretary of the Interior amended the oil leasing regulations as to bonds as follows:

In view of the present conditions which have been brought to the attention of the Department, effective immediately and until further notice, bonds required to permittees or leasees under the oil leasing act may be furnished:

1. In the form of qualified corporate sureties.
2. Individual surety bonds.

3. United States bonds of the par value of not less than the total amount of the bond required pursuant to section 1320 of the act of February 24, 1919 (40 Stat. 1148). See Treasury Circular 154 of June 30, 1919.

Where individual surety bonds are tendered they must be executed by not less than two qualified individual sureties to cover compliance with all terms and conditions of the lease or permit or the applicable law or regulation. With the bond signed by the 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 these sureties. All bonds will be examined from time to time as to their sufficiency and additional security will be required whenever deemed necessary.

Sec. 4 (h) of Circular 672, as amended by Circular 1111 of February 21, 1927, Sec. 16 of Circular 672, and Sec. 2 (a) of oil and gas lease form approved by the Department on March 11, 1920, are modified to permit the acceptance of bonds with qualified individual sureties where same are offered in accordance with the above requirements.

All bonds furnished with individual sureties will be listed by this office for examination at the expiration of two years from date of bond, and every two years thereafter, at which time, or at any other time when found advisable, the principal of the bond will be required to furnish new affidavits of justification by the sureties, and if such sureties are not sufficient, additional security will be required.

THOS. C. HAVELL,
Acting Commissioner.

Approved:

JOHN H. EDWARDS,
Acting Secretary.

RELIEF TO WATER USERS ON IRRIGATION PROJECTS—ACT OF APRIL 1, 1932

Instructions, October 19, 1932

RECLAMATION—IRRIGATION PROJECT—RELIEF TO WATER USERS—INTEREST— CONSTRUCTION AND MAINTENANCE CHARGES—PENALTIES.

Interest accruing upon deferred charges under the moratorium act of April 1, 1932, is neither a construction charge under section 3, nor an operation and maintenance charge under section 6 of the extension act of August 13, 1914, and is not, therefore, subject to the delinquency penalty imposed by subsection H of section 4 of the act of December 5, 1924.

RECLAMATION—IRRIGATION PROJECT—RELIEF TO WATER USERS—INTEREST— PENALTIES.

Where a water user or water users' association or irrigation district that has been granted deferments under the moratorium act of April 1, 1932, defaults in the payment of the annual interest when due, simple interest may thereafter be charged upon the sums of interest due annually upon the principal debt as long as they remain unpaid.

RECLAMATION—IRRIGATION PROJECT—RELIEF TO WATER USERS—COLLECTION OF INTEREST.

The procedure for the collection of defaulted interest upon the principal debt and of simple interest which may accumulate upon the interest due from a water user, water users' association, or irrigation district, is to be governed by the terms of the contract or of the applicable Federal statute, but where neither the contract nor the statute is applicable because of the particular conditions, then the remedy is to be pursued in accordance with the law of the State in which the project is located.

ASSISTANT SECRETARY EDWARDS TO THE COMMISSIONER OF THE BUREAU OF RECLAMATION:

Receipt is acknowledged of your letter dated October 11, 1932, in which you request advice concerning certain questions that arise under the Moratorium Act of April 1, 1932 (47 Stat. 75). The questions propounded could be stated as follows:

1. If the annual interest charge due and payable December 1, 1932, is not paid when due, does this constitute a delinquency subject to a penalty of one-half of one per cent under subsection H of section 4 of the act of December 5, 1924 (43 Stat. 703)?

2. If subsection H is not applicable, is interest at five per cent to be added to the principal when not paid when due and carried at this rate until paid? In other words, will interest at five per cent be computed upon the annual interest payment after it falls due?

3. If a water user or water users' organization granted deferments under the act fails or refuses to pay the annual interest when due, what remedy is available and should be pursued upon default in the payment of interest under the Moratorium Act?

Subsection H of the act of December 5, 1924 (43 Stat. 672-703), provides:

That the penalty of one per centum per month against delinquent accounts provided in section 3 and section 6 of the act of August 13, 1914 (38 Stat. p. 686), is hereby reduced to one-half of one per centum per month as to all instalments which may hereafter become due.

The recital of this section leads to an examination of sections 3 and 6 of the act of August 13, 1914, commonly called the Extension Act. Section 3 of this act refers specifically to the penalty for nonpayment of construction charges and section 6 refers specifically to the penalty for nonpayment of operation and maintenance charges. Neither of these sections can be extended to cover any other form of indebtedness. The interest accruing upon deferred charges under the act of April 1, 1932, *supra*, is neither a construction nor an operation and maintenance charge, therefore question No. 1 must be answered in the negative.

Concerning, now, the second question, it is my conclusion that simple interest at the rate of five per cent per annum can be charged and collected as a part of the interest payment. The courts are not agreed about the right of the creditor to collect interest upon the sums of interest due annually upon the principal debt if such interest payments are not made at the annual due date. Two rules have been established by the courts as to the right to recover interest on such instalments, one, that it is recoverable, the other that it is not.

In decisions by the Supreme Courts of the following States it is held that the installments of interest falling due at stated intervals

according to the terms of a note or other contract do not bear interest after maturity:

- Colorado: Denver Brick & Mfg. Co. v. McAllister* (1882) 6 Colo. 261.
Illinois: Leonard v. Villars (1860) 23 Ill. 377.
Indiana: Niles v. Sinking Fund Comrs. (1846) 8 Blackf. 158;
Grimes v. Blake (1861) 16 Ind. 160.
Michigan: Van Husan v. Kanouse (1865) 13 Mich. 303.
Minnesota: Dyar v. Stingerland (1877) 24 Minn. 267.
Missouri: Stoner v. Evans (1866) 38 Mo. 461.
New Jersey: Force v. Elizabeth (1877) 28 N.J. Eq. 403, reversed on other grounds in (1878) 29 N.J. Eq. 587; *West End Trust Co. v. Wetherill* (1910) 77 N.J. Eq. 590, 78 Atl. 756.
New York: Townsend v. Corning (1847) 1 Barb. 627.
Washington: Cullen v. Whitham (1903) 33 Wash. 366, 74 Pac. 581.
West Virginia: Genin v. Ingersoll (1877) 11 W.Va. 549.

According to other cases, instalments of interest falling due at stated intervals, according to the terms of the note, bear interest upon failure to make payment as stipulated.

- United States: Northwestern Mut. L. Ins. Co. v. Perrill* (1879) Fed. Cas. No. 10,339 (Ohio contract).
Georgia: Tillman v. Morton (1880) 65 Ga. 386.
Iowa: Mann v. Cross (1859) 9 Iowa, 327.
Kentucky: Talliaferro v. King (1840) 9 Dana, 331, 35 Am. Dec. 140.
Louisiana: Mudd v. Stille (1833) 6 La. 17.
Maine: Farrell v. Sturtivant (1853) 37 Me. 308.
New Hampshire: Pierce v. Rowe (1818) 1 N.H. 179.
North Carolina: Bledsoe v. Nixon (1873) 69 N.C. 89, 12 Am. Rep. 642.
Ohio: Watkinson v. Root (1831) 4 Ohio, 373.
Rhode Island: Wheaton v. Pike (1868) 9 R.I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227.
South Carolina: Gibbes v. Chisholm (1819) 11 S.C.L. (2 Nott & M'C.) 38, 10 Am. Dec. 350.
Texas: Lewis v. Paschal (1872) 37 Tex. 315.
Utah: Jensen v. Lichtenstein (1915) 45 Utah, 320, 145 Pac. 1036.
Vermont: Catlin v. Lyman (1844) 16 Vt. 44.

The court in *Kennon v. Dickens*, 1 N.C. 191, 2 Am. Dec. 642, says:

That as a general rule interest upon interest is not allowable, but that when the sum is ascertained and the annual payment of it forms a part of the contract, where it is so specific that an action of debt might be sustained and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period upon the faith of the regular and punctual discharge of the interest, it ought, in justice, to be allowed.

This authority seems to closely fit the circumstances governing the interest collectible under the act of April 1, 1932.

On this same subject the court in *Mills v. Jefferson* (20 Wis. 50), says:

When a person agrees to pay interest at a specified time and fails to keep his undertaking, why should he not be compelled to pay interest on interest from the time he should have made the payment? If he undertakes to pay in a sum of money at a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld, from the time he should have made such payment. The debtor withholds from the creditor his due as much when he fails to pay interest according to his contract as when he makes default in the payment of the principal. * * * Interest payable annually or semiannually may be demanded and recovered as it becomes due, according to the authorities. A note given for it may bear interest. Why, then, should not the debtor, when he fails to pay interest according to his engagement, pay interest on the sum justly and equitably due? * * * If a debtor fails to meet his engagement, we must assume that it is not convenient for him to pay his debt, or that it will be advantageous for him to retain the money. If the rule that interest cannot legally be recovered on interest due be adopted to render the creditor vigilant, this very vigilance will frequently embarrass the debtor who needs a little indulgence. If the debtor has the means of discharging his obligation he can do so, and if he has not, or prefers to retain his money, let him be subject to the general rule, which requires the payment of interest upon a debt equitably and justly due.

You are advised that simple interest at the rate of five per cent per annum should be collected on annual interest payments after they fall due until they are finally paid by the debtor.

The third question involves the remedy for nonpayment of the interest, viz: the interest upon the principal debt and the simple interest which may accumulate upon interest. As before stated, the interest is not a construction charge nor a part of it. Neither is it a part of an operation and maintenance charge. Therefore, the remedies provided in the statute for collecting construction charges and operation and maintenance charges are not applicable to the collection of the interest charges.

If the contracts with individuals, irrigation districts, or water users' associations create liens or provide for shutting off water for nonpayment of *any charges due*, the enforcement of the interest debt can be pursued in accordance with the contract and the law applicable thereto. If the conditions permit and make applicable the authority given in the Interior Department appropriation act for the fiscal year 1928 (44 Stat. 958), and subsequent annual appropriation acts, enforcement can be attempted in the manner provided for in those acts. If neither the contracts nor this statutory provision just referred to are usable because of the particular conditions, then suit can be instituted upon the interest debt, and when judgment is entered the statutory method can be pursued for collec-

tion of the judgment against the individual, water users' association, or irrigation district, following the law of the State where the property of the debtor is located.

INDIAN-OWNED LANDS WITHIN GOVERNMENT IRRIGATION PROJECTS—ACT OF JULY 1, 1932, PROVIDING FOR DEFERRING PAYMENT OF CONSTRUCTION CHARGES, ETC.

Opinion, November 25, 1932

INDIANS—INDIAN IRRIGATION PROJECTS AND RECLAMATION ACT PROJECTS CONTRASTED—INDIAN HOMESTEADS—DISPOSITION OF FUNDS PAID AS CHARGES, ETC.

Indian irrigation projects are constructed pursuant to special acts of Congress and annual appropriations from the Treasury, and the moneys resulting from payment of construction charges, etc., are returned to the Treasury as general funds, whereas the Reclamation Act fund is in fact a revolving trust fund, money expended therefrom being returned thereto by the owners of the lands benefited, to be again expended in connection with Reclamation Act projects.

INTERPRETATION OF STATUTES—INTENT OF THE LEGISLATURE—AIDS IN INTERPRETATION.

If giving to the words of a statute their natural meaning "leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with the design and purpose, sacrificing if necessary the literal meaning in order that the purpose may not vary." *Ozawa v. United States* (260 U.S. 178, 194). See, also, *Holy Trinity Church v. United States* (143 U.S. 457).

INDIAN IRRIGATION PROJECTS—INTERPRETATION OF STATUTES—ACTS IN PARI MATERIA.

Where an act of Congress, couched in general terms, if given literal application, would do violence to an established, integrated system, the growth of many years, while a qualified application avoids this and yet meets the need apparently intended, it is to be presumed, on well established principles of statutory construction, that a restricted sense was intended.

INDIAN IRRIGATION PROJECTS—COSTS AND ASSESSMENTS—INTERPRETATION OF STATUTES.

The act of July 1, 1932 (47 Stat. 564) contained a proviso that "the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessment shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished." *Held*, that the surrounding circumstances afford clear warrant for the conclusion that Government Indian irrigation projects were meant, and not irrigation projects within the purview of the Reclamation Act.

FINNEY, *Solicitor*:

There has been submitted to me for opinion the construction that should be placed upon the act of July 1, 1932 (47 Stat. 564). The act is brief, and is quoted in full for ready reference:

AN ACT To authorize the Secretary of the Interior to adjust reimbursable debts of Indians and tribes of Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with the provisions of the Act of February 14, 1920 (41 Stat. L. 409), and uncollected are hereby canceled: *Provided further*, That a report shall be made to Congress annually, on the first Monday in December, showing adjustments so made during the preceding fiscal year: *Provided further*, That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within sixty legislative days after the filing of said report, in which case they shall become effective at the termination of the said sixty legislative days.

As an incident to the construction of the act, the question arises whether the construction charges on certain Indian lands, irrigated from the irrigation works of the Yuma Project, Arizona-California, shall be deferred. This question also involves construction charges on Indian lands on the Newlands Project, Nevada, and the Yakima Project, Washington. The part of the act which requires consideration to determine the effect is contained in the words "Government irrigation project" found in the first proviso of the act, wherein it is stated:

Provided, That the collection of all construction costs against any Indian owned lands within any *Government irrigation project* is hereby deferred, and no assessment shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished. [Emphasis added.]

It is the contention of the Bureau of Reclamation that the act does not apply to payments due the reclamation fund, but applies only to payments due to the general funds of the Treasury, that is, to money appropriated in the Indian appropriation acts for construction of irrigation works on Indian irrigation projects, while the Office of Indian Affairs contends that the act applies to all con-

struction charges on Indian land, while the land is in Indian ownership.

It is important to have a definite statement of fact before any attempt is made to construe the statute. Only the facts connected with the Yuma project will be considered, having in mind, however, that the decision will affect other projects similarly situated. The Yuma Project, Arizona-California, has been constructed and is being operated and maintained by the Bureau of Reclamation, pursuant to the act of June 17, 1902 (32 Stat. 388). In the plan of the project the Laguna dam, constructed across the Colorado River about 10 miles north of Yuma, diverts water into the main canal of the project on the west side of the river, and carries water for the irrigation of about 6,000 acres of land, formerly a part of the Yuma Indian Reservation. Most of the Yuma Indians were allotted in this area by assigning to each Indian 10 acres of irrigable land. The main canal crosses the Colorado River in a siphon at Yuma and then proceeds in a southerly course about 30 miles to the International Boundary between the United States and Mexico, making possible the delivery of water to about 50,000 acres of land along the river bottom.

With the assistance of the Indian Office, 12 Indian homesteads were located on lands south of Yuma susceptible of irrigation from the irrigation works being constructed by the Reclamation Service. Trust patents were issued to the Indian homesteaders about the year 1918. These patents contain the 25-year trust clause provided by the act of July 4, 1884 (23 Stat. 96), which extended the benefits of the homestead laws to Indians, but the patents do not contain a lien for repayment of reclamation charges pursuant to the act of August 9, 1912 (37 Stat. 265). The Department authorized the furnishing of water, temporarily, to these Indian homesteads under a form of water rental. On October 7, 1913, April 20, 1914, and March 21, 1915, the Superintendent of the Fort Yuma Indian School was authorized to sign water right applications on behalf of these Indian homesteaders, which provided for permanent water rights. Public notice was issued April 6, 1917, and the water right applications, in proper form, were executed and filed with the local project manager. These applications were in the same form as that signed by the white water users on the project.

In a letter dated March 3, 1919, from the Commissioner of Indian Affairs to the Director of the Reclamation Service, he stated:

As to payment of the construction charge against these lands it may be said that these are Yuma Indians, and, as indicated to you in office letter of July 8, 1918, we do not desire to discriminate between members of the same tribe. The Yuma Indians on the reservation in California have heretofore received ten acres of irrigable land pursuant to the Acts of April 21, 1904 (33 Stat. 224) and March 3, 1911 (36 Stat. 1063). These acts, of course, have no rela-

tion to the Yuma Indian homesteads in Arizona, but were referred to in office letter of July 8, 1918, merely for the purpose of showing that the Yuma Indians generally have been accorded ten acres of irrigable land, payment for the irrigation charges against which is to be made from the sale of surplus lands within their reservation.

The Yuma homesteads in Arizona, however, embrace forty acres each and practically the entire area of each homestead is irrigable. It is not desirable to leave small isolated tracts of irrigable land within a reclamation project uncultivated and without a water right. On the other hand I do not see my way clear to have this Office assume the burden of meeting your construction charge for the entire irrigable area of each homestead out of the appropriation available for irrigation work either for the Yuma Indians or elsewhere. This would raise the question of discrimination between members of the same tribe,—ten acres to those on the reservation in California and forty acres to those few in Arizona who took up homesteads. It was the intention, however, to apply for a water right for each homestead, having the Indian homesteader himself or his white lessee, should the land be leased, meet the reclamation charges on thirty acres out of each tract, this office, in behalf of the Indian, to meet the charge for the water furnished the remaining ten acres. This would accord these few Yuma Indians the same treatment at the hands of the Government as given other members of the same tribe who have received allotments on the reservation proper. The Office understood from the last paragraph of your letter of April 5, 1918, that the course suggested was so understood by and was satisfactory to your Bureau.

To straighten out the matter of settlement for these charges, it is suggested that your local project manager submit to your Office a statement showing the charges arising against these lands, which statement can be presented to this Office as a claim in favor of your Bureau for settlement in the usual manner, in so far as it applies to the charges accruing against ten acres of each of these homesteads. Preferably, the statement should show, in tabulated form, the name of the homestead entryman, the ten acres to be furnished with water pursuant to this arrangement, and the amount of the initial payment due thereon, which I understand is five per cent of the total construction charge. Any other data that may be deemed pertinent should be appended. In this connection it may be pointed out that Miguel Escalanti, in addition to his homestead in Arizona, also has an allotment of ten acres of irrigable land on the Yuma Reservation proper, which is already entitled to water. He should not be given, therefore, an additional ten acres in Arizona to be furnished with water either at the expense of the Government or at the expense of the Yuma Tribe. The water right for this entire forty, therefore, should be paid for either by the Indian himself or his white lessee. This leaves eleven tracts of ten acres each, the cost of water for which is to be met, for the time being, out of our appropriations. I understand that the construction charge for this unit of the Yuma project has been fixed at \$75.00 per acre. Multiplying this by ten gives \$750.00 as a total construction charge against the ten acres of each homestead. Again multiplying this by eleven, the number of Indians to be provided for, gives us a total construction charge of \$8,250.00. Five per cent of this amount is \$412.50, representing the initial payment to be paid your Service for permanent water rights for ten acres on the eleven homesteads listed. The Act of August 13, 1914 (38 Stat. 686), to which you refer, attaches a penalty of five per cent each year, after issuance of public notice, until a water right is applied for. I see no way of waiving this penalty, as it is fixed by statute and, of course, it must be added to the amount due your Service.

I assume, however, that your claim, when presented, will cover all charges then due, and it may be advisable to separate thereon the construction charge from any operation and maintenance charges that may be due, as these items may be payable from a different appropriation.

Since the date of making water right applications for the Indian homesteads, the Indian Office has secured authority to pay into the reclamation fund the construction charges as they fell due under the applications. Under the Departmental regulations, in order to secure water for the irrigable Indian homesteads, it was necessary to make the contracts represented by the water right applications. It was also necessary for the Indians, acting through the Indian agent, to make stock subscriptions to the Yuma Valley Water Users' Association, a private corporation organized and existing under the laws of the State of Arizona. Subsequent to the issuance of the public notice in 1916, the water users' association made a contract to repay to the United States all of the construction charges on the lands irrigated in Arizona, including the Indian homestead lands. The question presented by this statement of facts and the act of July 1, 1932, *supra*, is, whether the act defers the construction charges on the Indian homesteads.

In the application of the law, consideration should be given to the history of the legislation for the irrigation of lands under the reclamation act and acts amendatory thereto and the irrigation of lands on Indian reservations. Under the act of June 17, 1902, *supra*, a new policy was adopted by Congress in connection with the public lands. This act authorized the Secretary of the Interior to use the funds arising from the sale of public lands, which were to be impounded in the Treasury as the reclamation fund, for the construction of irrigation works to irrigate public lands and incidentally adjacent or interspersed private lands. In order to carry out the act, a bureau was established in the Department, and with the funds accumulated and other funds provided by acts of Congress there was constructed in the 17 Western States about 30 irrigation projects, involving an expenditure of over \$200,000,000 and nearly 2,000,000 acres of land has been placed under irrigation and cultivation. This legislation, which now comprises a volume, was enacted and built up separate and distinct from the legislation affecting Indian irrigation projects. It was a Government development, and the projects could be called Government irrigation projects. The legislation regarding the irrigation of Indian lands and interspersed lands owned by white men on Indian reservations, has taken the form, during the last 30 years, of special legislation. Each Indian irrigation project has been constructed pursuant to a special act of Congress and to appropriations made annually thereafter from the general funds of the Treasury, and when payments have been made of the

construction charge, the money has been returned to the general funds of the Treasury. It will be observed, therefore, that the reclamation fund is in reality a trust fund, and the money expended from such trust fund is returned by the owners of the lands benefited, to be again expended for additional irrigation development of the reclamation projects, thus constituting a revolving fund which should not be depleted.

The money appropriated by Congress for the construction of Indian irrigation projects is to be repaid by the owners of the lands benefited, and the principal acts of Congress authorizing such appropriations or making appropriations, have provided that the Secretary of the Interior shall fix the terms of repayment of construction charges on the Indian-owned lands. The legislation shows a tendency of Congress to be more liberal toward the Indian in his return of money to the Treasury than is accorded to the white man on the Federal reclamation projects under the control of the Bureau of Reclamation.

After considering the legislative history, making appropriations for the two distinct classes of work, it is desirable to turn our attention to the meaning of the words "Government irrigation project", as used in the act of July 1, 1932, *supra*. It is my interpretation of the words that Congress intended to say "Government Indian irrigation projects", and that the word "Government" should be construed as being limited to the Indian irrigation projects and not to the operations of the Bureau of Reclamation, under the act of June 17, 1902, *supra*. It is desirable, in attempting to interpret the words used, to study the history of interpretation and construction of statutes. Certain rules have been laid down by illustrious text-writers such as Grotius, Puffendorf, Domat, Vattel, Rutherford, Dwarris and Coke.

Grotius (Van Groot, 1583-1645), was a lawyer of international reputation, living in Holland. He wrote, among other things, certain rules of interpretation. Those that are useful in determining the meaning of the words used in the statute under consideration are as follows:

In cases that are not *odious*, words are to be understood according to the full propriety of popular use; and if in popular use there be several significations of the same word, the largest is to be taken, as the masculine may be taken for the common gender.

* * * * *

On the other hand, words shall be taken in a stricter sense than the propriety requires, if otherwise, injustice or an absurdity would follow.

* * * * *

Sometimes the meanings of words are to be restrained, and although general terms be made use of, yet they ought to be taken with some exception or limitation, either 1st, because of some original defect in the will of the speaker; or 2d, because of some accident which happens inconsistent with his design.

Puffendorf (German, 1632–1694), was a noted lawyer in Germany and was engaged by Charles Gustavus, King of Sweden, to do certain historical work in that country. Due to some political uprising, Puffendorf was thrown into prison and while there, writing on legal subjects, he deduced certain important rules for the interpretation of statutes and other writings. He was influenced in pursuing the subject by the writings of Grotius. The rules applicable to the matter under consideration are quoted as follows:

The true end and design of interpretation, is, to gather the intent from the most probable signs, which are of two sorts; words and conjectures.

As for *words*, the rule is,—unless there be reasonable objections against it, they are to be understood in their proper and most known signification; not so much according to grammar, as to the general use of them.

As for terms of art, which are above the reach of the common people, the rule is, that they be taken according to the definition of the learned in each art.

When a single *word* or *sentence* is capable of several significations; conjectures are necessary to find out the true. Both these cases rhetoricians call *ambiguous*. But logicians are more nice, who, if the variety of significations lies in a *word*, call it equivocal; if in a sentence, ambiguous.

The effects and consequence, do very often point out the genuine meaning of words. If by taking them literally, they bear none or a very absurd signification, to avoid such an inconvenience, we must a little deviate from the received sense of them.

Domat (French), in writing rules of construction, followed the civil law. The principal rules laid down by him are as follows:

Laws ought to be written to the end that the writing may fix the sense of the law, and determine the mind to conceive a just idea of that which is established by the law, and that it be not left free for every one to frame the law as he himself is pleased to understand it. We may, therefore, distinguish two ideas, which the words *law* and *rule* form in our minds. One, is the idea of what we conceive to be just; without making any reflection on the terms of the law; the other is the idea of the terms of the law; and according to this second idea, we give the name of rule or law, to the *expression of the lawgiver*.

All rules, whether natural or arbitrary, have their use; such as is assigned to every one of them by universal justice, which is the spirit of them all. Thus the application of laws is to be made, by discerning what it is that this spirit demands, which, in natural law, is *equity*; in arbitrary laws, the intention of the law giver. It is in this discerning faculty, that the science of the law does chiefly consist.

If a rule of natural justice being applied to a case that it seems to embrace, shows a result contrary to equity, we are bound to conclude that the rule has been improperly applied, and that the case should fall under some other law.

If an arbitrary, or positive rule, is applied to a case which it apparently embraces, and the result is contrary to the intent of the legislator, the rule should not be applied to the case.

If however, the severity of the law is not a necessary and indispensable part of it, but can be carried into effect by a milder interpretation and one more

conformable to equity and natural justice; then this is to be preferred to the severe and strict construction.

* * * * *

If the language of a law clearly expresses its meaning and intention, that intention must be carried out; but if the true sense of the law cannot be arrived at by the interpretation which may be made according to the rules here given, or the meaning be clear, and inconvenience appear to result, then we must have recourse to the sovereign to interpret, to declare, or to modify the law.

If the provisions of a law are clear, but its object not understood, and in its application inconveniences appear to result, we are bound to presume that the law is useful and just; and its meaning and authority are to be preferred to mere abstract reasoning. Otherwise, many useful and well contrived rules would be overturned on grounds of alleged equity, or ingenious argument.

Vattel (Swiss, 1714-1767), was a noted lawyer and author. His rules of construction of statutes are probably more often quoted by American courts and text writers than any of the other Europeans here mentioned. He laid down 45 rules for interpretation. The 1st, 10th, 12th, 15th, 19th, 23d and 34th rules are useful in determining the meaning of the words used by Congress in the act under consideration:

1. The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms; when the sense is manifest, and leads to nothing absurd; there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it.

10. Words are only designed to express the thoughts; thus, the true signification of an expression in common use, is the true idea which custom has affixed to that expression.

12. Interpretation should only tend to the discovery of the will of the contracting power. We should then attribute to each term, the sense which he who speaks had probably in his mind.

15. Every interpretation that leads to absurdity, ought to be rejected.

19. The interpretation ought to be made in such a manner, that all the parts appear consonant to each other; that what follows, with what went before; unless it manifestly appear that by the last clauses something is changed that went before.

23. To violate the *spirit* of the law, by pretending to respect the letter, is a fraud no less criminal than an open violation of it. It is not less contrary to the intention of the legislature, and only shows a more artful and more deliberate malice.

34. Though a thing appears favorable when viewed in one particular light, yet if the propriety of terms, in their full extent, lead to absurdity or injustice, their signification ought to be limited according to the rules above given.

Rutherford (1600-1661) was a Scotch minister and a writer of the law and other subjects. In his lectures or institutes he enunciated these rules:

Interpretation consists in finding out, or collecting, the intention of a speaker or of a writer either from his words, or from other conjectures or from both.

It may therefore be divided into three sorts, according to the different means that it makes use of for obtaining its end. These three sorts of interpretation are *literal*, *rational* and *mixed*.

* * * * * * *

Where words do not express the intention perfectly, but either exceed or fall short of it, so that we are to collect it from probable or rational conjectures, this is rational interpretation.

Where words, though they do express the intention when rightly understood, are in themselves of doubtful meaning, and we are forced to have recourse to like conjectures to find out in what sense they were used, this is mixed interpretation; it is partly literal and partly rational. We collect the intention from the words indeed, but not without the help of other conjectures.

Dwarris, an English author, laid down 19 rules of interpretation of statutes, from which the following is useful:

When statutes are made, there are some things which are exempted and fore-prized out of the provisions thereof, by the law of reason, though not expressly mentioned: thus, things for necessity's sake, or to prevent a failure of justice, are excepted out of statutes.

Lord Coke, of England (1552-1634), says that to arrive at the real meaning it is always necessary to take a broad general view of the act so as to get an exact conception of its aim, scope and object. The rules of Lord Coke are:

1. What was the law before the act was passed?
2. What was the mischief or defect for which the law had not provided?
3. What remedy the legislature has appointed, and
4. The reason of the remedy.

The true meaning is to be found not merely from the words of the act but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances. The true meaning of any passage is to be found not merely in the words of that passage, but comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from these circumstances which the Congress had in view. What were the cause and occasion of the passage of the act and the purpose intended to be accomplished by it in the light of the circumstances at the time and the necessity of its enactment?

The courts of the United States have developed what is known as the American Rules, and those having reference that are useful are as follows:

2. It is not permitted to interpret what has no need of interpretation. When an act is expressed in clear and precise terms; when the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to elude it.

4. It is the duty of courts so to construe statutes as to meet the mischief and to advance the remedy and not to violate fundamental principles.

6. Statutes must be interpreted according to the intent and meaning, and not always according to the letter.

7. The intention of the legislature may be found from the act itself; from other acts *in pari materia*; and sometimes from the cause or necessity of the statute, and wherever the intent can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute; this is the rule where the words of the statute are obscure.

8. A thing within the *intention*, is within the statute, though not within the letter, and a thing within the letter, is not within the statute, unless within the intention.

9. Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction for the purpose either of limiting or extending their operation. Courts cannot correct supposed errors, omissions or excesses, of the legislature.

11. The spirit of a law may be referred to in order to interpret words admitting of two meanings; but not to extend a law to a case not within its fair meaning.

17. All statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute, and were enacted at the same time.

In 36 Cyc. 1106 we have the general statement:

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. Where the language of the statute is of doubtful meaning or where an adherence to the strict letter would lead to injustice, to absurdity or to contradictory provisions, the duty devolves upon the court to ascertain the true meaning.

In the case of *Darlington v. Railway Company* (216 Mo. 658, 116 S.W. 530). The court says:

When the meaning of a statute becomes doubtful from the provisions of cognate statutes, such statutes must be construed with it in determining the meaning.

In *Bankers' Trust Company v. Bowers* (295 Fed. 89) the court says:

In interpreting a statute the construction placed thereon should avoid unjust consequences unless the language compels such a result, and a construction should be had with reference both to the history of the legislation and other sections of the law with which it is *pari materia*.

In *Jackson v. Collins*, 3 Cowan (N.Y.), 89, the court says:

Such a construction ought to be put on a statute as may best answer the intention which the makers had in view, and this intention is sometimes to be collected from the case or necessity of making the statute and sometimes from other circumstances; and whenever such intention can be discovered it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute, as a thing which is within the letter of the statute is not within the statute unless it is within the intention of the makers.

Bridgeman v. Derby (104 Conn. 1; 114 Atl. 25) :

The intent of the lawmakers is the soul of the statute and the search for this intent we have held to be a guiding star. It must prevail over the literal sense and the precise letter of the language of the statute.

In *Brown's Appeal* (72 Conn. 148; 44 Atl. 22), it is stated :

When one construction leads to public mischief which another will avoid, the latter is to be favored unless the terms of the statute absolutely forbid.

The Supreme Court of the United States has considered questions of statutory construction on many occasions, and its theories are enunciated in the following cases: *Atkins v. Fiber Distributing Company* (18 Wall. 272); *The United States v. Hunt* (14 Wall. 550); *Beley v. Naphtaly* (169 U.S. 353); *White v. United States* (191 U.S. 545); *United States v. Riggs* (203 U.S. 136); *Williams v. United States Fidelity and Guaranty Company* (236 U.S. 549); *Sacramento Navigation Company v. Salz* (273 U.S. 326); *United States v. Stone and Downer Company* (274 U.S. 225). In the case of *Beley v. Naphtaly* (169 U.S. 353-360), the court said :

Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui haeret in litera, haeret in cortice*. In Bacon's Abridgment, Statutes 1, 5; Puffendorf, book 5, chapter 12; Rutherford, pp. 422, 527; and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: "*Aequitas est correctio legis generaliter latae qua parti deficit.*" *Riggs v. Palmer*, 115 N.Y. 506, 510. Opinion by Earl, J.

In *Ozawa v. United States* (260 U.S. 178), the court says :

It is the duty of this court to give effect to the intent of Congress. Primarily this intention is ascertained by giving the words their natural significance. But if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with the design and purpose, sacrificing if necessary the literal meaning in order that the purpose may not vary. *Holy Trinity Church v. United States* (143 U.S. 457; see also *Hydenfeldt v. Daney Gold Mining Company* (93 U.S. 634). See also *United States v. Shreveport Grain & Elevator Company*, decided by the United States Supreme Court November 7, 1932.

In endeavoring to determine the construction to be placed upon the words "Government irrigation project" certain questions arise which aid in determining the intent of Congress: Did Congress intend to defer construction charges due from Indians in possession

of irrigable land on a Government reclamation project constructed by the Bureau of Reclamation with money obtained from the reclamation fund? If such purpose is carried out it would mean that Congress amended the reclamation act and thereby intended to deplete the reclamation fund. Is it not more reasonable to presume that Congress referred to a Government irrigation project, constructed, pursuant to acts of Congress making appropriations for the Indian Service, for the primary benefit of an Indian tribe, or Indians on a reservation?

If it had been presumed that the legislation affected Government reclamation projects, constructed by the Bureau of Reclamation, the legislation would have been referred to that Bureau for report, or it would have been asked to appear before one of the Congressional committees when the legislation was under consideration. No one appeared before the committees except employees of the Office of Indian Affairs, and the hearings clearly indicate that the bills proposed were to benefit Indians on Government *Indian* irrigation projects. As to the construction charges on the 30 acres of excess land in each homestead it is believed that these homesteads are not within the first proviso to the act of July 1, 1932, *supra*. The proviso bears express reference to and is an amendment of the Indian appropriation act approved February 14, 1920 (41 Stat. 408). It is in *pari materia* with that act, which has reference to Government Indian reclamation projects.

In connection with this reclamation legislation it appears that only three months earlier, by the act of April 1, 1932 (47 Stat. 75), Congress had covered quite fully the matter of deferment of the payment of construction charges on Government irrigation projects that have been constructed by the Bureau of Reclamation, and it would be an unusual procedure for Congress to make a further deferment on such projects for the benefit of one class of landowners, thus amending the act of April 1, 1932, without expressly so stating. The Honorable Scott Leavitt, who was manager of the legislation in the House, repeatedly referred to the bill which became the act of July 1, 1932, as relating to *Indian reclamation* and *Indian irrigation projects*, and the whole history of the legislation shows such to be the case. This act of July 1, 1932, was the result of combining two bills (H.R. 8898 and H.R. 10886) into one. The part relating to irrigation projects was taken from H.R. 8898, and the House report on that bill stated: "The provisions of this bill apply only to Indian lands on *Indian irrigation projects*." (Emphasis supplied.)

In connection with the Yuma Indian homesteads, contracts have been made for the payment into the reclamation fund of the construction charges, and the obligation of these contracts would be

impaired if it were held that the statute applied to construction charges payable into the reclamation fund. While Congress is not prohibited by the Constitution, like the States, from enacting laws impairing contracts, it has studiously refrained from enacting legislation impairing them.

I am of the opinion that the interpretation of the act of July 1, 1932, *supra*, requires that it shall be applicable only to Indian irrigation projects as understood by the preceding legislation, and does not defer construction charges due or payable to the reclamation fund.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

JAMES W. KINART AND E. E. McFERRIN

Decided November 30, 1932

PUBLIC LANDS—RIPARIAN RIGHTS—AVULSION—COLOR OF TITLE—HOMESTEAD ENTRY.

Land that has been cut off by avulsion from a tract of land owned by the United States abutting on a watercourse retains its status as public land, but one who has held and occupied it for many years under claim or color of title may acquire title thereto under the act of December 22, 1928, or under some other applicable public-land statute as against one attempting to enter it under the homestead law.

EDWARDS, *Assistant Secretary:*

The land involved in this controversy is described as lot 1, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 20, T. 19 N., R. 12 E., 6th P. M., Nebraska, containing 141.10 acres, as shown upon a plat of survey approved February 4, 1857. The case is before the Department on appeals by James W. Kinart and E. E. McFerrin from decision of the Commissioner of the General Land Office dated July 8, 1932, rejecting Kinart's application to make homestead entry for said tracts because of the superior right of McFerrin, based upon occupation under claim of title, and holding that McFerrin would be permitted to perfect title to said lands under the act of December 22, 1928 (45 Stat. 1069), or other applicable public-land law.

Kinart contends, in substance, that his application was wrongfully rejected, inasmuch as the land was not, prior to May, 1931, when he filed his homestead application, occupied, improved, or in the possession of McFerrin, and that McFerrin has no claim to equitable consideration. McFerrin contends, in substance, that the lands described in Kinart's application have no existence in fact as surveyed lands of the United States; that there is no such land in Nebraska

subject to disposal as public land; that the lands so described were long ago washed away by the Missouri River, and that the area in question is his private property, having been formed by the receding of the river, or by accretion to lands held in private ownership along the shore and bank of the river where it formerly flowed between Harrison County, Iowa, and Washington County, Nebraska, and that the property has been occupied by himself and his predecessors in interest for upwards of 20 years under claim of right and title. He adduces evidence to show that in 1910 he acquired title to certain patented Iowa lands bordering the old bed of the Missouri River, opposite Sec. 20, T. 19 N., R. 12 E., Nebraska, together with accretions thereto; that in 1913 he acquired title to the west one-third of the so-called Richard Davis's patented homestead in Sec. 20, said T. 19 N., R. 12 E., Nebraska, together with all accretions thereto, and that he has for many years held, occupied, and paid taxes upon the area so produced by accretions to the lots originally purchased by the patentees from the Government, and has pastured and cultivated so much of it as was fit for cultivation. He says that the Missouri River has gradually worked its way westward from its original bed and that it now occupies a channel about a mile west of Sec. 20 as returned by the original survey.

Numerous affidavits and exhibits, consisting of maps, plats, transcripts of court proceedings, *et cetera*, have been submitted by the opposing claimants, such evidence being directed not only to the questions of occupation, improvement, and possession of the disputed area, but also to the numerous shifts and changes in the channel and course of the Missouri River in the locality.

The land in fractional T. 19 N., R. 12 E., Nebraska, adjacent to the right bank of the Missouri River, was surveyed in 1856, and, as above stated, is shown upon a plat approved February 4, 1857. Sec. 20 was returned as containing 613.80 acres, being fractional because abutting the Missouri River, lots 1, 2, and 3 being bounded by the meander line. Lot 1, returned as containing 61.10 acres, occupied the position of the $W\frac{1}{2}NW\frac{1}{4}$. Lots 2, 3, and 4, in the order named, lie directly eastward. Most of the lands in the section, except those in dispute, have long since been disposed of in accordance with the governing plat of survey. Lots 2, 3, and 4, and the $SW\frac{1}{4}NE\frac{1}{4}$ Sec. 20 were patented to one Richard Davis, April 21, 1897.

Much confusion in titles has arisen from the frequent shifts of the channel of the Missouri River, and there has been a great deal of litigation involving the question whether certain areas along its course were formed by accretion to surveyed lands, or were cut off either from Iowa or Nebraska by avulsion. *Coulthard v. Davis et al.* (70 N.W. 716); *Coulthard v. McIntosh* (122 N.W. 233);

Coulthard v. Davis et al. (131 N.W. 1088); *Kitteredge v. Ritter* (151 N.W. 1097); *Coulthard v. McFerrin et al.* (190 N.W. 940); *Jefferies v. East Omaha Land Company* (134 U.S. 178); *Nebraska v. Iowa* (143 U.S. 359).

From the evidence before the Department it appears that the area here in dispute is part of a larger tract concerning which the Supreme Court of Iowa, in decision rendered April 10, 1897, in the case of *Coulthard v. Davis et al.* (70 N.W. 716), stated:

We think the land claimed by plaintiff is not accretion to his lots. We are of the opinion that this large body of land, which was originally west of the Missouri river, was separated from the mainland by reason of a sudden change in the channel of the river whereby said channel was made more than a mile west of its location in 1856, when the government survey was made. Cottonwood trees, some of them 15 inches in diameter, and one two feet in diameter, are growing on this tract of land. Now, it is shown by the evidence that it takes 13 years for a cottonwood tree to reach a diameter of one foot, and about 20 years to reach a diameter of two feet. If this be true, then this one tree must have been growing on this land as early as 1867. It also appears that there was a grove on a part of the land, and that a large part of the land is good, tillable land. The soil on the Davis farm is blacker than the rest. According to several of plaintiff's witnesses, the river, as late as 1868, was running along the old meander line; so that this tract of land, more than a mile and a quarter wide, composed largely of good farm land, and having trees on it of all sizes, up to two feet in diameter, is claimed to have been gradually forming. It may be possible, but, under the circumstances and evidence, we think it is not probable, that such is the fact. As early as 1874, some of the land, which must also be accretion if plaintiff's witnesses are correct, was occupied by settlers. It is not likely, if this land in controversy formed gradually since the year 1868, or even since an earlier period, that it would be of the character it now is. We should in such case expect to find the soil poor, mostly sand; nor would it be reasonable to expect to find trees of the size of some of those testified to.

See also *Coulthard v. McFerrin* (190 N.W. 940).

Upon the record presented, and in view of the history of the locality as above set out, it must be concluded that the disputed area does not come within the law of accretion, but of that of avulsion, and that the land in Sec. 20 is the same, or nearly the same as that surveyed by the Government in 1856 and shown upon the plat of 1857. Hence, McFerrin's contention that said tracts are his private property is groundless. It sufficiently appears, however, that McFerrin and his predecessors in interest have held and occupied the land for many years under claim of right, and if he desires to acquire title under an applicable public land law, he should be afforded opportunity so to do. *Helphrey et al. v. Coyle* (49 L.D. 624); *Earl E. Baughn and Charles Lord* (50 L.D. 239).

The action of the Commissioner was correct and is

Affirmed.

JAMES W. KINART AND E. E. McFERRIN

Motion for rehearing of Departmental decision of November 30, 1932 (54 I.D. 102), denied by Assistant Secretary Edwards, January 31, 1933.

TAXABILITY OF HOMESTEAD ALLOTMENTS OF MEMBERS OF THE OSAGE TRIBE

Opinion, November 30, 1932

INDIAN LANDS—HOMESTEAD ALLOTMENT—CERTIFICATE OF COMPETENCY—TAXATION—OSAGE TRIBE.

The provision in the act of March 2, 1929, which extended until January 1, 1959, the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency had not issued had reference only to such Indians as were not holding certificates of competency on the former date, but as to those having certificates of competency outstanding on that date which were subsequently revoked the taxation of their homesteads is to be governed by subsection 7 of section 2 of the act of June 28, 1906, under which the period of exemption terminated on June 28, 1931.

FINNEY, Solicitor:

You [Secretary of the Interior] have requested my opinion as to whether lands allotted as homestead to Julia Lookout, a full blood member of the Osage Tribe of Indians, are subject to taxation by the State of Oklahoma. This question arises by reason of the revocation on March 10, 1932, under authority of section 4 of the act of February 27, 1925 (43 Stat. 1008), of the certificate of competency theretofore issued to Julia Lookout by authority of section 2, subdivision 7, of the act of June 28, 1906 (34 Stat. 539). The date of issuance of the certificate of competency was September 27, 1924.

Under the provisions of the act of June 28, 1906, *supra*, Julia Lookout received in allotment some 600 acres of land. Out of the land so allotted 160 acres were designated as homestead and the balance, surplus. The certificate of competency issued to her released the surplus lands from restrictions against alienation and empowered the allottee to dispose of same free from Federal supervision. See *McCurdy v. United States*, 246 U.S. 263; Solicitor's Opinion of August 13, 1930, 53 I.D. 169.

The issuance of the certificate had no effect whatever upon the homestead lands, which, notwithstanding the certificate, remained inalienable and nontaxable for a period of 25 years (Paragraph 2, subdivision 7, of the act of 1906). This period expired on June 28, 1931, whereupon the lands became subject to taxation by the State

of Oklahoma (Solicitor's Opinion of November 28, 1931, 53 I.D. 564).

Subsequent revocation of the certificate of competency, the issuance of which in no way affected the homestead lands, obviously would not reimpose the restrictions against alienation and taxation of those lands in the absence of statutory direction to that effect. The act authorizing revocation (Sec. 4 of the act of February 27, 1925, *supra*) contains no such direction, but confines the effect of the revocation to the income flowing to the member from tribal sources, with a provision for protection of transactions entered into by reason of the issuance of the certificate.

The act of March 2, 1929 (45 Stat. 1478), however, contains certain provisions relied upon as protecting the homestead lands of Mrs. Lookout from taxation. These provisions read:

The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until January 1, 1959, unless otherwise provided by Act of Congress.

* * * * *

Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

In my opinion of November 28, 1931, cited above, I had occasion to consider at length the scope and effect of the foregoing provisions as applied to members of the Osage Tribe having certificates of competency. In that opinion it was said, *inter alia*:

The provision in the act of March 2, 1929, continuing restrictions and Federal supervision contains nothing relating expressly to the taxation of the homestead allotments of these Indians, and it can not be regarded as having any bearing upon that subject in view of the fact that Congress saw fit to deal specifically in that legislation with the taxation of such homesteads. This it did by enactment of the provision of law last above quoted which continues the exemption from taxation in terms so clear as to remove any doubt of congressional intent in the matter. The benefit of the continued exemption was extended only to Indians of the degree of blood mentioned—one-half or more—"not having a certificate of competency." The irresistible import of this language is that Indians having certificates of competency are excluded from the benefit of the exemption and that their lands in so far as taxation is concerned were to remain in the same status as before.

Had Mrs. Lookout's certificate of competency been revoked prior to the above enactment of March 2, 1929, then, as a member of the tribe of one-half or more Indian blood not having a certificate of competency, she would have had the requisite status to entitle her to

the benefit of the continued exemption from taxation. But her certificate of competency had not then been revoked. It was still outstanding and in full force and effect. The statute, under its plain language, speaks as of the date of enactment, and as Mrs. Lookout then held a certificate of competency, she was not within its terms. Accordingly, the period during which the homestead lands were exempt from taxation was not extended. The period having expired and the lands having become subject to taxation by the State of Oklahoma, revocation of the certificate would not of itself, as we have seen, operate to restore or reimpose the tax exemption.

The decision of the Circuit Court of Appeals, Fourth Circuit, in *United States v. Wright* (53 Fed. 2d, 300) urged as authority for the proposition that these lands are not taxable, is not in point. In that case, Congress had not only expressly provided that the lands involved, which belonged to the Eastern Band of Cherokee Indians of North Carolina, should be exempt from taxation, but the title to the lands had been conveyed to the United States. (See act of June 4, 1924, 43 Stat. 376.) These important and conclusive elements are absent in the present case. The question here presented is not one involving the power of Congress to exempt these lands from taxation, but whether it has exercised that power in the statutes under consideration. An examination of those statutes calls for a negative answer.

I am of the opinion, therefore, that the lands under consideration are now taxable and have been taxable since the expiration of the 25-year period fixed by subdivision 7 of section 2 of the act of 1906. Approved:

JOS. M. DIXON

First Assistant Secretary.

WISCONSIN LANDS ERRONEOUSLY MEANDERED—ACT OF FEBRUARY 27, 1925

REGULATIONS

[Circular No. 994]

[Reprint and revision of regulations of April 7, 1925 (51 L.D. 107)]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., December 8, 1932.

The act of February 27, 1925 (43 Stat. 1013), authorizes the Secretary of the Interior in his judgment and discretion to sell any of those lands situated in the State of Wisconsin, which were originally erroneously meandered and shown upon the official plats as water-

covered areas, and which are not lawfully appropriated by a qualified settler or entryman claiming under the public land laws. Section 2 of this act allows either or both of the following two classes of persons to file applications to purchase erroneously meandered lands in Wisconsin within 90 days from the filing of the plat of survey which involves such lands:

(a) Any owner in good faith of land shown by the official public land surveys to be bounded in whole or in part by such erroneously meandered areas, and who acquired title to such land prior to February 27, 1925.

(b) Any citizen of the United States who, in good faith under color of title or claiming as a riparian owner, had prior to February 27, 1925, placed valuable improvements upon or reduced to cultivation any of such erroneously meandered lands.

1. Applications under this act must be filed with the Commissioner, General Land Office, Washington, D.C., within 90 days from the filing of the plat of survey, involving such erroneously meandered land. No special form of application is provided, but it should be in typewritten form or in legible manuscript and must be under oath and corroborated by the affidavits of at least two disinterested persons having actual knowledge of the facts alleged therein.

2. Applicants desiring to take advantage of the benefits of this act must show the following matters in their applications:

A. Full name and post-office address and, if a female, whether married or single.

B. The description by legal subdivision, section, township and range of the land which the applicant desires to purchase, together with reference to the above act.

C. If the applicant is claiming under class (a) above, he or she must furnish the legal description of the land upon which the preference right to purchase is based, together with the date of acquisition thereof and whether or not the ownership of such land is vested in the applicant at the time of filing of the application to purchase. Concerning the acquisition and present ownership of the land, an abstract of title will establish these matters, if furnished.

D. If the applicant is claiming under class (b) above, he or she must furnish evidence of citizenship, a full disclosure of all the facts which form the basis of the color of title or claim as riparian owner to the land sought to be purchased, a full disclosure of whether or not there are any valuable improvements on the land applied for, together with their location, nature, value, date of erection and by whom erected, and if there has been any cultivation of the land applied for, the nature, location and date thereof should be set forth.

E. It must be shown whether or not the land sought to be purchased is in the legal possession of any adverse claimant, and whether or not the land is appropriated by any settler or entryman claiming under the public land laws. If the lands applied for are in possession of an adverse claimant or person claiming under public land law, the name and post-office address of such claimant, together with a statement as to the nature of the claim, should be furnished.

3. If, upon examination in the General Land Office, the application is found to be in accordance with the foregoing regulations and

appears to present a *bona fide* claim under the said act, the Chief of Field Service will be directed to appraise the land applied for, in accordance with section 4 of the above act.

4. Upon receipt of the report from the Field Service on the appraisal of the land, if it shall then be determined that the applicant is entitled to a preference right to purchase the land applied for, such applicant will be required to submit the purchase price of the land in accordance with section 5 of the act, and also to begin publication of notice of the application to purchase. Such notice shall be published at the expense of the applicant, once each week for a period of five consecutive weeks, in a newspaper designated by the Commissioner of this office and having a general circulation in the vicinity of the lands applied for. The purpose of said notice will be to afford all persons claiming the land adversely to the applicant, a reasonable opportunity to file their protests or objections to such purchase in the General Land Office. A copy of such notice will be posted in a conspicuous place in the General Land Office during the entire period of publication. Upon the completion of the publication of notice, the publisher of the newspaper shall file in the General Land Office his affidavit as to publication, together with a copy of the notice as published.

Upon receipt of the purchase price of the land and proof of publication of notice, and if no protest, contest or other objection appears, and the law and regulations have been fully complied with, final certificate will be issued and the claim will be approved for patenting.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

STATUS UNDER THE RETIREMENT LAW OF SERVICE IN THE SCHOOLS OF THE FIVE CIVILIZED TRIBES

Opinion, December 9, 1932

RETIREMENT—SERVICE CREDIT—SCHOOLS OF THE FIVE CIVILIZED TRIBES.

Service in the schools of the Five Civilized Tribes prior to the act of June 28, 1898, was not service performed for the United States, and service in those schools between that date and the date on which the act of April 26, 1906, which placed the control thereof under the Secretary of the Interior, became effective, is creditable under the civil service retirement act only where the appointment was made by that official or by his authority.

FINNEY, Solicitor:

My opinion has been requested as to whether service in the schools of the Choctaw and Chickasaw Nations, Indian Territory or Oklahoma, from the autumn of 1896 to the year 1905, would be creditable under the civil service retirement law. Also whether service in the schools of the Five Civilized Tribes following the act of April 26, 1906 (34 Stat. 140), would be creditable.

There would seem to be no doubt that such service would be creditable from March 5, 1906, under the act of April 26, 1906, *supra*, because that act expressly provided in part as follows:

That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable.

See instructions issued under that act, dated July 7, 1906, wherein it was provided that the superintendent of schools should nominate suitable persons for all authorized positions, subject to the approval of the Secretary.

Prior to the act of June 28, 1898 (30 Stat. 495), referred to as the Curtis Act, the educational affairs of the Five Civilized Tribes were conducted entirely by the tribal governments. It is therefore quite clear that any service as teacher in those schools prior to the date of that act, at least, would not be subject to credit as service performed for the United States. Between the dates of these two acts there appears to be a twilight zone where it is difficult to ascertain the facts as to the degree of authority exercised by the United States over said schools. Considerable search is indicated by the memoranda submitted, and I have pursued the inquiry still further in the preparation of this opinion. My conclusion from all of the information available is that there was not uniformity in respect to all of the schools in the matter of appointments of teachers.

In a memorandum prepared in the Indian Office it is stated:

After passage of the Curtis Act the Department assumed supervision of the schools of the Five Civilized Tribes and expenditures were disbursed by a Government disbursing officer. It is, of course, understood that the salaries and school expenses were paid from the tribal funds both before and after the passage of the Curtis Act. * * * It will be noted, however, that in the case of the applicant, the selection and appointment were made by the duly appointed tribal officials, and not by the Federal Government.

In the instructions of November 4, 1898, issued under the Curtis Act, no provision was made for the appointment of teachers in such schools by the Federal Government. For the purpose of proper supervision of the schools of any tribe or nation it was provided

that a supervisor of schools in the Indian Territory should be appointed by the Secretary of the Interior, whose duty it would be to "visit from time to time, examine into and supervise the conduct of schools of such tribe or nation and to report, etc." If any teacher was found incompetent or immoral or whose continuance in the service would for any reason be detrimental, the matter was to be reported to the Secretary for consideration and action.

In a report by the Superintendent of Schools for Indian Territory dated July 25, 1900, I find indications that the appointing power was exercised by Federal officials to some extent. He stated that early in the year 1899 the Secretary of the Interior ruled that as the Curtis Act provided for the gradual extinction of all tribal offices and of all of their governmental machinery, and in view of his responsibility in respect to the proper use and expenditure of the funds, that thereafter all appointments of employees in the schools maintained by the royalty fund should be made by him or under his direction; that acting under instructions, he attended a meeting of the Choctaw board of education and explained the ruling of the Secretary, to which no objection was then made, and for several months they did not question "our authority to make appointments"; that examinations were held "and about 100 of the best available teachers were put in charge of their schools on the first of September"; that in October, however, the Choctaw Council met and denied the right of the Secretary of the Interior to control the schools.

I infer from the report of the Commissioner of Indian Affairs dated October 1, 1900 (pages 110, 112, 113), that control of the schools of the Chickasaw, Cherokee and Creek Nations was not taken over by the Department under the Curtis Act; that only supervisory direction was exercised by the Federal Government, leaving the appointment of teachers to the tribal authorities.

It will be seen that no general rule can be given for crediting such service between the dates of the two acts mentioned, except that the controlling question should be whether or not the appointment was made by the Secretary of the Interior or by his authority. If not so made the employee should be regarded as having been the employee of the particular tribe or nation with which the contract of employment was made.

More intensive research will probably have to be made to determine the facts in the case of John D. West. The above citations would indicate that such of his service as was rendered in the schools of the Choctaw Nation, or some part of it, may have been under appointment by Federal authority, and therefore subject to credit.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

STATE OF NEW MEXICO, ROBERT M. WILSON, LESSEE, v. ROBERT S. SHELTON AND JOHN T. WILLIAMS

Decided December 14, 1932

PUBLIC LANDS—HOMESTEAD ENTRY—POSSESSION UNDER CLAIM OF RIGHT, ETC.

By a long-settled rule of the Land Department, homestead claimants are charged with knowledge that land in the actual possession and occupancy of one under claim of right or color of title is not subject to entry by another.

SCHOOL LAND—INDEMNITY SELECTION—ERRONEOUS CANCELLATION—MAINTENANCE OF CLAIM BY SELECTOR—WHEN LACHES IMPUTABLE.

Where a State did not acquiesce in an erroneous decision of the Land Department resulting in the cancellation of a school-land selection; but, on the contrary, gave and continued to give notice to the world, by its actions, of its continued claim to the land, laches may not be imputed, even though a long period of time has elapsed following the erroneous cancellation of the selection and though there has been tardiness in seeking correction of the erroneous decision.

INDEMNITY SCHOOL-LAND SELECTION—ERRONEOUS WITHDRAWAL—CLAIMANT COMPLYING WITH REQUIREMENTS ACQUIRES EQUITABLE INTEREST.

Where a State, possessed of the right, files an indemnity school-land selection for public land subject thereto, and performs all things needful to perfect the selection, its right may not be defeated by a subsequent withdrawal of the lands from entry, and a homestead entry of lands included within such withdrawal will not prevail against the State or a qualified grantee of the State.

INDEMNITY SCHOOL-LAND SELECTION—STATE'S TITLE EQUITABLE ONLY—LEGAL TITLE IN UNITED STATES—JURISDICTION OF LAND DEPARTMENT—VOIDABLE JUDGMENT.

The title a State has in an indemnity school-land selection is equitable only, the legal title being in the United States, from which it follows that, until legal title passes from the United States, inquiry as to all equitable rights is within the cognizance of the Land Department, which is clothed with jurisdiction to determine whether the land should be listed to the State or not; accordingly, the judgment of the Department, even though erroneous, is voidable only, and not void, and is therefore entitled to respect until set aside by direct attack in some manner recognized by law.

REAL PROPERTY—PEACEABLE POSSESSION UNDER CLAIM OF RIGHT—LAPSE OF TIME—LACHES—WHEN AFFIRMATIVE ACTION REQUIRED.

Laches may not be imputed from mere lapse of time in asserting an equitable right, and, as a rule, one in peaceable possession of real estate under claim of right is not called upon to take affirmative action unless and until his title or possession is attacked; and failure to appeal to equity during the period is no defense to a suit subsequently brought to establish, enforce, or protect his right. *Summers Creek Coal Company v. Doran* (142 U.S. 417); *Ruckman v. Cory* (129 U.S. 387).

SCHOOL LAND—INDEMNITY SELECTION—ERRONEOUS CANCELLATION—NOTICE FROM STATE'S CONTINUED CLAIM OF TITLE—TARDINESS IN ASSERTION OF RIGHT—NEW MEXICO.

Where cancellation of a State selection was the result of an erroneous decision of the Land Department, and the State did not acquiesce in such decision, but, on the contrary, took action which, in effect, gave notice to the world that it claimed title to the land, such notice was effective, even though the State has been somewhat tardy in seeking correction of the erroneous decision which resulted in cancellation of its selection.

LAND DEPARTMENT—ERRONEOUS CANCELLATION OF ENTRIES—REINSTATEMENT DENIED WHEN—INTERVENING EQUITIES.

An examination of the cases wherein the Department, following erroneous action in canceling entries, selections, and other filings, has later declined to reinstate them, discloses that there were commonly present in such cases elements of affirmative acquiescence in the decision sought to be vacated, laches in passively permitting the initiation of adverse rights, or other equitable bar.

CASES CITED AND DISTINGUISHED.

Cases of *Honey Lake Valley Company et al.* (48 L.D. 192), *Northern Pacific Railway Company* (48 L.D. 343, 347), *Hobart L. Pierson et al.* (49 L.D. 436), *Charles R. Haupt* (48 L.D. 355), and *Lillie M. Kelly* (49 L.D. 659), cited and distinguished.

EDWARDS, *Assistant Secretary*:

February 2, 1917, the State of New Mexico filed indemnity school-land selection lists, Las Cruces 015285, for Sec. 31, and 015287 for W $\frac{1}{2}$ Sec. 34, T. 22 S., R. 8 W., N.M.P.M. June 6, 1918, these tracts were included in a withdrawal for military purposes. At the date of withdrawal all was done that was needed to be done to perfect the selections. In accordance with the view then held, that equitable title did not vest in the State until the approval of the selections, the Commissioner of the General Land Office, by letter of July 24, 1918, held the selections for rejection because of the withdrawal, but accorded the State the right to ask for their suspension on certain terms or appeal within 30 days from notice, but warning the State if it failed to do either, the selections would be finally canceled without further notice. Evidence of the reception of this letter on August 5, 1918, by the Commissioner of Public Lands of the State is with the record. The State took no action, and the selections were finally canceled by letter of November 6, 1918. The tracts were released from the withdrawal February 11, 1921, and opened to homestead entry generally July 24, 1921, and remained free for filings of record until January 24, 1931, when applications were filed under the stock-raising homestead act, 043057 by Robert S. Shelton for Sec. 31, and 043058 by John T. Williams for Sec. 34, and both allowed January 26, 1931.

On February 27, 1931, the State applied for reinstatement of the canceled selections and requested that the entrymen be required to show cause why their entries should not be canceled. The State averred that its record contained no notice of the cancellation of its selections; that it never intended to permit cancellation of the lists, and, under the belief that they remained in good standing, it issued a grazing lease for the tracts to Robert M. Wilson on October 1, 1919, who at all times since then has been in actual, open and notorious possession under color of title and claim of right under said lease and renewals thereof, and has made valuable improvements on said tracts, and that Williams and Shelton had full knowledge of such possession and improvement when they applied for entry. Wilson corroborated the allegations as to his actual occupation, improvement and use of the land and further alleged that his possession was in good faith under the belief that he held a valid lease from the State. On March 16, 1931, Wilson filed a protest against the entries, repeating substantially the averments of his prior affidavit, and requested a hearing between the parties.

The application for reinstatement is accompanied with the usual nonsaline, nonmineral, nonwater-hole affidavits, and tenders \$6.00 in fees, although it appears that the fees originally paid were never returned nor was application made for their return. The base land offered originally is reoffered.

Shelton and Williams, in reply to the application of the State, alleged, each for himself, among other things, that the tract he had entered was vacant and unclaimed by anyone seeking to acquire title thereto under the homestead law when he made his application, and that he had been under considerable expense in making entry and establishing residence. They did not deny the actual possession of Wilson, but alleged he was not qualified to make homestead entry, had not lived on the land, and disputed his valuation of the improvements thereon.

On March 25, 1931, the Commissioner held the entries intact and rejected the application for reinstatement of the canceled selections. On May 15, 1931, the Department reversed that decision, and remanded the case with instructions that Shelton and Williams be required to show cause why their entries should not be canceled, and the selection lists reinstated, directing hearing if such cause was shown. On a showing by the entrymen a hearing was ordered and took place October 1, 1931, all parties participating. Upon consideration of the evidence adduced thereat, the register recommended cancellation of the homestead entries to the extent of conflict and reinstatement of the State selections. By decision of July 21, 1932, the Commissioner reversed the register. An appeal by the State and its lessee brings the case again before the Department.

The uncontradicted evidence shows that in 1914 Wilson purchased from one Cook for \$2,000 the improvements then existing on the tracts in question, consisting of wells, windmills, corrals, tanks, troughs, and other structures, and that ever since then he has actually and exclusively occupied and used the tracts, with other lands, for the watering and feeding of his cattle, except during the period of entry upon his possession by the present homestead claimants; that he induced the State to make the selections, has leased the land from the State as alleged, paid the required rent therefor, and substantially added to the stock-raising improvements; and at the time of actual entry on the W $\frac{1}{2}$ Sec. 34, by Williams, one Davis, a caretaker of the cattle for Wilson, was residing in a two-room house thereon placed there by Wilson. Both entrymen admit knowledge of the improvements and actual use and occupation of the land by Wilson, but assert that they were advised by the United States commissioner and an inspector of the General Land Office that the land was, nevertheless, free from lawful claim and subject to homestead entry. Wilson testified that early in February, 1932, Williams came to him and told him that he had filed on "these lands" and the filing had been allowed, and that he let Williams have the use of the house, but did not surrender possession of any of the land; that he never had anything to say to Shelton.

The undisputed testimony of Williams is to the effect that he entered and took up his abode with his family in the house on the W $\frac{1}{2}$ Sec. 34, vacated by Davis, on April 7, 1932; that Davis moved into a tent on the same tract, and both have been so living ever since then; that Wilson continued to use the land for his cattle and on April 10, he notified Wilson to move them off and make a disposition of his improvements; that he also notified Davis to move off; that he afterwards locked the gates against Wilson's cattle and followed that up with written notices to Wilson of May 1 and 10, 1932, to vacate the premises; that subsequently he was served with a writ of injunction issued out of the United States District Court for New Mexico, restraining him from in any manner interfering with Wilson's possession of the lands, which he had obeyed to the best of his ability; that prior to the service of this writ, he had repaired and annexed another room to the house, hauled some pipe, a water tank and over 500 fence posts upon the land, and had begun to build a porch to the house, when the injunction stopped him. He valued the improvements he had added to the house at \$175.00. It also appears that he caused a well to be drilled on the east half of the section, costing him \$310.00. Documentary evidence theretofore supplied by Wilson shows an order issuing out of the court above mentioned on April 29, 1932, required both Williams and Shelton to

show cause why they should not be restrained from interfering with the possession of Wilson of the tracts in question here.

As to Sec. 31, all that appears is that Shelton, apparently without active opposition by Wilson until the injunction was served, took up his abode in a tent on the land, which he still continues to occupy, and hauled materials to build a dwelling. There is some testimony as to the discharge of Shelton's rifle while Davis was engaged in his duties on the land, which Davis took as a menace, and which Shelton said was an accident, but there is not enough to find violence or intimidation in connection with the intrusions of the entrymen on the premises.

The Department has recognized and approved the rule that every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire title, or hold the possession. *United States v. Hurliman* (51 L.D. 258, 263) and cases there cited. But it is clear from the evidence that Wilson was not a naked trespasser, but was in actual, notorious, long-continued and exclusive possession under a claim of right derived by a lease from the State. Although the entrymen may not have known of the existence of such lease, nevertheless, as the Department said in its previous decision in this case, actual possession and improvements put them on inquiry as to the right under which Wilson claimed. That inquiry, if properly pursued, would have disclosed to them substantially the facts as hereinabove set forth, as to what the State had done to acquire title to the land, the reason for the rejection of its claim, and the fact that it had not abandoned its claim under the selections but had openly and continuously asserted the same through the actual possession of Wilson under its lease.

In *Payne v. New Mexico* (255 U.S. 367) and *Wyoming v. United States* (255 U.S. 489) the Supreme Court held, in effect, that when a lieu indemnity selection by the State is made and completed in accordance with the applicable law and regulations, the equitable title to the selected land becomes vested in the State, and its rights can not thereafter be affected by an attempt thereafter by Executive order to withdraw the land from appropriation, and that the cancellation of the selection because of such subsequent withdrawal was erroneous and due to a misconception of the rights of the selector and the authority of the Secretary.

To the State's contention that under the rule above declared by the Supreme Court it is entitled to have its equitable title recognized and the selections reinstated, the Commissioner, in the decision appealed from, observes that the cancellation was long prior to such

decisions of the Supreme Court; that adverse interests have intervened since then; that "The Department has decided in a number of cases that the decisions referred to have no retroactive effect. (48 L.D. 317, 243, 258, 192; 49 L.D. 436)."

But the circumstances as above set out show there was no room for the initiation of an adverse right. The State did not acquiesce in the erroneous decision canceling its selections, but, on the contrary, gave notice to the world, through the actual possession of Wilson under its lease, of its claim of title to the premises. Though it was unquestionably tardy in seeking correction of the erroneous decision canceling the selections, laches can not be imputed from mere lapse of time. As a rule, one in peaceable possession of real estate under a claim of right may rest in security until his title or possession is attacked, and the failure to appeal to equity during the period is no defense to a suit subsequently brought to establish, enforce, or protect his right. *Summers Creek Coal Company v. Doran* (142 U.S. 417); *Ruckman v. Cory* (129 U.S. 387); *Seefeld v. Duffer* (179 Fed. 214; 21 C.J. 230). The record shows that when the title and right to possession of the State were attacked, reasonably prompt steps were taken to assert its rights and that of its lessee. Furthermore, the homestead claimants must be charged with knowledge of the long-settled rule that land in the actual possession and occupancy of one under claim of right or color of title is not subject to entry by another. *United States v. Hurliman, supra*; *Wagoner v. Hanson* (50 L.D. 355), and cases cited. It should further be noticed that the decisions of the Department cited by the Commissioner do not justify the broad statement that the rules announced by the Supreme Court in *Payne v. New Mexico* and *Wyoming v. United States* "have no retroactive effect." The different construction of the law by the Supreme Court did not change the existing law but declared what it was at the time the selections were made.

The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decisions. (See "Court", sec. 358, 15 C.J. 960.)

Examination of the cases wherein the Department declined to reinstate canceled State or other indemnity selections and other filings, or to readjudicate a claim previously denied, urged on the ground that the construction of the law by the Department was subsequently held erroneous by the Supreme Court in a similar and separate case, discloses that they all present elements of either or both affirmative acquiescence in the decision attacked and sought to

be vacated, or laches in passively permitting the initiation of a hostile right in reliance upon such erroneous decisions, which elements were assigned as material in declining to reopen the case and readjudicate the claim. As instances, it will be noticed that in *Honey Lake Valley Company et al.* (48 L.D. 192), the State's selection was canceled July 31, 1915. A second selection of the same land, assigning new base and purporting to be amendatory of the first, was not filed until January 20, 1919. Desert entry had been allowed for the land March 21, 1916, and a successful contestant thereof had secured a preference right of entry at the date of the second selection. There was no suggestion of actual possession under the State's title, although it had been transferred. Reinstatement was held to be barred by laches and intervention of an adverse claim. In *Northern Pacific Railway Company* (48 L.D. 343, 347) the indemnity selection was canceled March 3, 1915, and the company used thereafter in the same year all the base land for other selections. Shortly after the Supreme Court's decision in *Payne v. Central Pacific Railway Company* (255 U.S. 228), on February 28, 1921, the company sought to revive its selection, asking for the substitution of new base. Here, too, no question of actual possession by the railroad's transferee was involved. The Department held "That the company had acquiesced in that rejection and in effect abandoned the selection by the use of the NE $\frac{1}{4}$ (base land) as the base for other and later selections", and refused to reinstate. In *Charles R. Haupt* (48 L.D. 355), also cited by the Commissioner, a reinstatement of an oil and gas permit, rejected on the ground of a subsequent designation of the land within a known oil and gas field, was denied because the land was actually known to be within a known producing field at the date of permit application, and therefore not within the rule of *Payne v. New Mexico, supra*, and other like cases. In *Hobart L. Pierson et al.* (49 L.D. 436) a State indemnity selection was canceled March 7, 1919, because the land was included in a subsequent petroleum withdrawal. Homestead entry was made March 25, 1919, residence immediately established, and improvements thereafter made to the value of \$800. Among other grounds, reinstatement was denied because no nonincumbrance certificate had been filed at date of withdrawal, and selection was not therefore then complete. In *State of California, Robinson, transferee* (48 L.D. 384), the selector was required to consent to mineral reservation in its patent because of a subsequent petroleum withdrawal. The State consented. Application of transferee for exchange of unrestricted for restricted patent, because of error in imposing the restriction, was denied because of the express waiver by the State.

In *Lillie M. Kelly* (49 L.D. 659), the heir of entrywoman, who would have been entitled to an unrestricted patent, under a later construction of the applicable law in *Stockley v. United States* (260 U.S. 532), accepted a restricted one. Five years later she applied for an unrestricted patent in exchange for the restricted one. Her application was denied under the rule: "That a decision made in accordance with the practice prevailing at the time it was rendered, if accepted by the parties affected as final, will not be reopened for the reason that the practice then prevailing has subsequently been held erroneous by the Supreme Court."

The appellants do not rely, however, on the fact that they did not acquiesce in the erroneous decision. Their application for reinstatement appears to be based chiefly on the contention, deduced from certain language of the Supreme Court in *Payne v. New Mexico*, *supra*, and *Wyoming v. United States* and related cases, that the Department's judgment of cancellation was absolutely void and it was immaterial whether the State ignored it or not. That contention is not tenable. It should not be overlooked that the State had merely the equitable, not the legal title. Until legal title passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown v. Hitchcock* (173 U.S. 473, 476); *Plested v. Abbey* (228 U.S. 42). Confessedly the land belonged to the United States when it was listed, and the Land Department had jurisdiction to determine whether it should be listed to the State or not. "Having such jurisdiction, it had jurisdiction in making the necessary determination to render an erroneous and voidable judgment." *Stutsman v. Olinda Land Company* (231 Fed. 525, 527). The judgment, though voidable, was entitled to respect until set aside by direct attack in some manner recognized by law. *Noble v. Union River Logging Co.* (147 U.S. 165); *Burke v. Southern Pacific Railroad Company* (234 U.S. 669). Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors and irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. Until set aside it is valid and binding for all purposes and can not be collaterally attacked. See "Judgments," sec. 39 (33 C.J. 1078).

The case of *Leutholtz v. Hotchkiss* (259 Pac. 1117), decided by the Court of Appeals of the First District, Division 2, California, shows that the court considered a contention substantially the same as appellants are making here, in connection with a state of facts closely paralleling those at bar. The case also shows the importance of the

elements of acquiescence in the same error of law by the Department that is conceded to have been committed in the case at bar, and the application of the doctrine of laches where the State or one claiming under it has been dilatory in seeking to enforce its or his equitable rights.

In that case, in January, 1908, one Clarrage applied to purchase the land—then public land of the United States—from the State. The State filed indemnity lieu selection for the same February 17, 1908, issued a certificate of purchase to Clarrage in 1912, who sold the land to defendant on March 12, 1921, and gave him a grant deed January 9, 1923. By reason of a classification of the land as valuable for oil and gas subsequent to the completion of the selection, the State's application was suspended in 1909, and on July 17, 1916, the State and its transferee received notice of the Commissioner's order, requiring them within 30 days to accept a patent with reservation of oil and gas, or appeal, to which no reply was made by either, and the selection was ordered canceled July 20, 1927. *Neither the transferee nor his grantee ever occupied the land*, and the land, in so far as the record showed, being open for prospecting, an oil and gas permit was issued to plaintiff on May 23, 1921, who entered thereon and drilled a well to the depth of 2,600 feet at an expense of \$70,000. The court, after stating the rule in the Supreme Court cases relied on in the case here at bar, and observing that the Land Department's action on the selection was erroneous, said:

The trial court concluded that the State and its transferee had accepted the construction of the law as announced by the Commissioner of the General Land Office by failing to appeal from his decision to the Secretary of the Interior and thereby abandoned his claim; "also that defendant is barred from relief by the court by his long delay, including that of his predecessor in interest, in asserting an interest in the land.

Appellant attacks these conclusions. He claims that an equitable interest having once vested in the State upon making the lieu land selection, it was not defeated by the erroneous ruling of the Land Department on a question of law; that, it being a mistake of law, the Secretary of the Department of the Interior should, and can, correct it at any time on application; that it is his function and duty to correct such mistake, and, until the Secretary has determined the question of whether the land was known to be mineral or non-mineral at the time of selection, the appellant's equitable title cannot be questioned. In support of the authority or duty of the Secretary to correct a mistake of law, appellant cites the case of *Gage v. Gunther*, 136 Cal. 338, 68 P. 710, 89 Am. St. Rep. 141. This might be urged, were it not for the intervening rights of the respondent, and it could be said without question that appellant and his predecessors in interest had not by their acts and delay led one to the conclusion that they had abandoned whatever right they may have had to the land. Appellant did not avail himself of his right of appeal to the Secretary of the Interior from the Commissioner's ruling. The State's

selection was canceled, and both the State and Clarrage acquiesced in such cancellation. True, the right once having vested, it could not be lost merely by the subsequent discovery of the land's being mineral in character, but the right could be, and was, we think, lost by permitting the Government's cancellation of the selection duly made according to its rules and regulation to stand for the time it did. After the cancellation, the prospecting permit was duly issued to respondent, and at that time it does not appear that respondent was aware of any outstanding claim to the land. The land was open for prospecting for oil so far as the Government's records showed. Neither appellant nor his grantor has ever occupied the land. Appellant took no steps to establish any equitable interest he may have had in the land until suit was brought by respondent to quiet title to her prospecting right, and this notwithstanding the fact that the Supreme Court of the United States had decided the Payne case, *supra*, and Wyoming case, *supra*, some two years before. Such delay as is shown here must, we think, be treated as abandonment of his claim. The appellant slept on his rights. As was said by the court below:

"A party defeated by the decision of the Land Department may not wait many years after an adverse decision there, especially of an intermediate department, and, when the Supreme Court shall have announced a new construction of the law in an entirely different action, successfully reassert his claim under such circumstances as are here disclosed. * * * The Government, through its cancellation of the State selection, reasserted its title to the land, and resumed control of it for a much longer period than the statute of limitations (Code Civ. Proc. Secs. 315-328) provides, and which may be relied upon in adverse proceedings to quiet title to real property."

For the reasons stated, the judgment is affirmed.

The cases above discussed are readily distinguishable from the instant case. In the latter, nothing appears wherein the State by its acts acquiesced in the erroneous decision of the Department, or abandoned its claim. On the contrary, at all times it, through its lessee, has continuously asserted its equitable title by actual possession and improvement of the land, thus effectually precluding the lawful initiation of any rights under the homestead laws. The homestead entries must be canceled and the State's selections should be reinstated and the list approved.

The Commissioner's decision is accordingly

Reversed.

STATE OF NEW MEXICO, ROBERT M. WILSON, LESSEE, v. ROBERT S. SHELTON AND JOHN T. WILLIAMS

Motion for rehearing of Department's decision of December 14, 1932, *supra*, denied by Assistant Secretary Edwards, January 28, 1933, and petition for exercise of the Secretary's supervisory authority denied by Assistant Secretary Chapman, June 3, 1933.

HUNTING ON PRIVATELY-OWNED LANDS IN YELLOWSTONE NATIONAL PARK

Opinion, December 27, 1932

YELLOWSTONE NATIONAL PARK—FEDERAL JURISDICTION—CESSION BY STATE OF MONTANA—RESERVATIONS.

The State of Montana has ceded and relinquished to the United States exclusive jurisdiction over and with respect to all lands within the State which were or might be embraced within the Yellowstone National Park (Laws of Montana, 1891, p. 262), reserving only a concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of the State. See *Yellowstone Transportation Co. v. County of Gallatin* (31 Fed. 2d, 644); petition for writ of certiorari denied (280 U.S. 555).

YELLOWSTONE NATIONAL PARK—AUTHORITY OF SECRETARY OF THE INTERIOR—REGULATIONS—CONSERVATION OF WILD LIFE.

By the terms of section 2 of the act of March 1, 1872, establishing the Yellowstone National Park, exclusive control thereof was vested in the Secretary of the Interior, and this embraced the power to make and publish regulations for the care and management of the park, including the conservation of wild life.

YELLOWSTONE NATIONAL PARK—AUTHORITY OF SECRETARY OF THE INTERIOR—HUNTING FORBIDDEN.

In the exercise of the authority vested in him by section 5 of the act of August 25, 1916, as amended by the act of June 2, 1920, the Secretary of the Interior has promulgated regulations declaring the Yellowstone National Park is "a sanctuary for wild life of every sort, and all hunting * * * of any wild bird or animal, except dangerous animals, when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of the park."

FEDERAL AUTHORITY—WILD GAME, FISH, ETC.—YELLOWSTONE NATIONAL PARK.

Under the generally recognized doctrines of the law, the ownership of wild game, in so far as it is capable of ownership, is in the Government, for the use of the whole people, and private persons can not acquire an exclusive property in wild game except by lawfully taking and reducing it to their possession.

WILD GAME, FISH, ETC.—RIGHTS OF PROPRIETOR OF LANDS CONTAINING SAME—QUALIFICATIONS.

The proprietor of privately-owned lands has the exclusive right to kill and take game on his own premises and may forbid others from doing so; but his exercise of this right is subject to the power of the Government to regulate the time and manner thereof, and it may even forbid outright his killing or taking of game upon land owned by him. See 27 Corpus Juris, 943, and cases cited.

YELLOWSTONE NATIONAL PARK—KILLING OR TAKING OF GAME, ETC.—AUTHORITY OF FEDERAL GOVERNMENT—PRIVATELY OWNED LANDS WITHIN PARK LIMITS.

The Federal Government has authority to declare a perpetually closed season for the killing or taking away of game at any place within the limits of the Yellowstone National Park, including privately owned lands within newly added park areas.

FINNEY, *Solicitor*:

My opinion has been requested on the question submitted by the Acting Director of the National Park Service, as to whether the Federal Government can prohibit hunting on certain privately owned lands in the State of Montana included within the area added to the Yellowstone National Park by the President's proclamation of October 20, 1932.

It appears that some of the privately owned lands within the newly added park area are within the limits of a State game preserve established prior to the extension of the park boundaries, but this fact is not important in determining the jurisdictional question involved.

The proclamation above mentioned provided—

that the area hereinafter described shall be, and is hereby, subject to all valid existing rights, added to and made a part of the said park and is hereby made subject to the provisions of the act of August 25, 1916 (39 Stat. 535-536), entitled "AN ACT To establish a National Park Service, and for other purposes," and all acts supplementary thereto and amendatory thereof and all other laws and rules and regulations applicable to and extending over the said park, within T. 9 S., Rs. 7 and 8 E., described as follows:

PRINCIPAL MERIDIAN, MONTANA

Beginning at a point on the north line of said Yellowstone National Park where said line crosses the divide between Reese Creek and Mol Heron Creek, thence northeasterly along said divide to the junction of said divide with the branch divide north and west of Reese Creek; thence along said branch divide in a northeasterly and easterly direction around the drainage of Reese Creek, to the Yellowstone River; thence southerly and southeasterly along the west bank of the Yellowstone River to the line marking the western limits of the town of Gardiner, Mont.; thence south on said town-limits line to the northern boundary of Yellowstone National Park; thence west along the north boundary of Yellowstone National Park to the point of beginning, containing approximately 7,600 acres.

The Yellowstone National Park was established by the act of March 1, 1872 (17 Stat. 32). Section 2 of the act provided:

That said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same.

* * * * *

He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and generally shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act.

The act approved May 7, 1894 (28 Stat. 73), provides:

That the Yellowstone National Park, as its boundaries are now defined, or as they may be hereafter defined or extended, shall be under the sole and exclusive jurisdiction of the United States; and that all the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park; Provided, however, That nothing in this Act shall be construed to forbid the service in the park of any civil or criminal process of any court having jurisdiction in the States of Idaho, Montana, and Wyoming. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Wyoming.

SEC. 2. That said park, for all the purposes of this Act, shall constitute a part of the United States judicial district of Wyoming, and the district and circuit courts of the United States in and for said district shall have jurisdiction of all offenses committed within said park.

The act of August 25, 1916 (39 Stat. 535, 536), created the National Park Service, and section 5 thereof, as amended by the act of June 2, 1920 (41 Stat. 731), provides that:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this act shall be punished by a fine of not more than \$500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceedings.

Pursuant to the authority so vested in the Secretary of the Interior, the following regulation has been promulgated for the protection of wild life within the limits of Yellowstone National Park:

Hunting.—The park is a sanctuary for wild life of every sort, and all hunting, or the killing, wounding, frightening, or capturing at any time of any wild bird or animal, except dangerous animals, when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of the park.

The State of Montana has ceded and relinquished to the United States exclusive jurisdiction over and with respect to all lands within the State which were or might be embraced within the Yellowstone National Park, reserving only a concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of the State. See *Yellowstone Transportation Co. v. County of Gallatin* (31 Fed. 2d, 644); petition for writ of certiorari denied (280 U.S. 555).

It follows that the laws of the State of Montana are absolutely inoperative within the limits of the Yellowstone National Park, except as to the right to serve process, as above stated, and except as to the right of taxation of private holdings within the area added to said park by the President's proclamation of October 20, 1932, which right of taxation is expressly recognized by sections 3 of the

act of May 26, 1926 (44 Stat. 655), pursuant to which the said proclamation of October 20, 1932, was issued. In all other respects the laws of the State have been displaced within the limits of the park, and superseded by the laws applicable to places under the sole and exclusive jurisdiction of the United States. *Arlington Hotel Co. v. Fant* (278 U.S. 439); *The United States v. Unzeruta* (281 U.S. 138); *Surplus Trading Co. v. Cook* (281 U.S. 647).

Having exclusive sovereignty and jurisdiction within the park, except as above noted, the Federal Government has, as an attribute of sovereignty, the power, among others, to regulate and control the killing and taking of game, fish, etc., therein. See *Solicitor West's Opinion of September 20, 1915, in re Glacier National Park*.

In this connection, it may be observed that under the generally recognized doctrines of the law the ownership of wild game, in so far as it is capable of ownership, is in the Government for the use of the whole people generally, and private persons can not acquire an exclusive property in it except by lawfully taking and reducing it to their own possession. *Geer v. Connecticut* (161 U.S. 519): But notwithstanding this rule, the proprietor of privately owned lands has the exclusive right to kill and take game on his own premises and may forbid others from doing so. His exercise of that right is, nevertheless, subject to the power of the Government to regulate the time and manner in which such game may be taken or killed, and he can not kill or take game, even from his own land, when the prevailing law forbids him from doing so. See 27 C.J. 943, and cases cited.

From what has been said it is clear beyond all question that the Federal Government has the power to declare a perpetually closed season with respect to territory within its exclusive jurisdiction and control, and has the authority to prohibit the killing or taking of game at any place within the limits of the Yellowstone National Park.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

AUTHORITY TO ANTICIPATE APPROPRIATIONS FOR ROAD PURPOSES IN ALASKA

Opinion, December 29, 1932

ALASKA—HIGHWAYS—JURISDICTION—SECRETARY OF THE INTERIOR.

The act of June 30, 1932, which transferred to the Secretary of the Interior all of the authority theretofore conferred upon the Board of Road Commissioners in Alaska and the Secretary of War relating to the construction

and maintenance of roads and trails in that Territory, carried with the transfer authority to anticipate the appropriations for the supervision of that activity to the extent and under the conditions stated in the act of February 12, 1925.

FINNEY, *Solicitor*:

My opinion has been requested on the question submitted by the Governor of Alaska, as to whether the act of June 30, 1932 (47 Stat. 446), is effective to transfer to the Secretary of the Interior the authority granted to the Secretary of War to incur obligations for road purposes in Alaska prior to actual appropriation therefor, under the conditions prescribed in the act of February 12, 1925 (43 Stat. 930; Title 48, sec. 326, U.S. Code).

The provision last above mentioned was contained in an appropriation item for road purposes in Alaska for expenditure by the Board of Road Commissioners, then under the jurisdiction of the Secretary of War, and reads as follows:

Hereafter when an appropriation for this purpose for any fiscal year shall not have been made prior to the 1st day of March preceding the beginning of such fiscal year, the Secretary of War may authorize the Board of Road Commissioners to incur obligations for this purpose of not to exceed 75 per centum of the appropriation for this purpose for the fiscal year then current, payment of these obligations to be made from the appropriation for the new fiscal year when it becomes available.

All of the authority theretofore conferred upon the Board of Road Commissioners and the Secretary of War by the act of January 27, 1905 (33 Stat. 616), as amended by the act of May 14, 1906 (34 Stat. 192), and acts supplemental thereto and amendatory thereof, relative to the construction and maintenance of roads and trails in Alaska, was transferred to the Secretary of the Interior by the said act of June 30, 1932. The transfer was full and complete of all records, equipment, supplies and other property, and all appropriations theretofore made or thereafter to be made for the purposes stated, and the Secretary of the Interior was substituted for the Secretary of War in the supervision of that activity. I see no reason whatever to doubt that the authority conferred by the said act of February 12, 1925, may be exercised by the Secretary of the Interior unless that provision of law has been repealed. There is no suggestion of its having been repealed, and I have found none. It is carried in the United States Code as permanent legislation.

Accordingly, you are advised that, in my opinion, you are empowered to anticipate the appropriations to the extent and under the conditions stated in the said act of February 12, 1925.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

INFORMATION FOR PROSPECTIVE HOMESTEADERS

[Circular No. 1264]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 3, 1932.

1. *Purpose of this circular.*—The information given below has been prepared to furnish persons making inquiries relative to the homestead laws and regulations, briefly, the most important requirements thereof.

2. *Examination of lands.*—Prospective homesteaders should first fully inform themselves as to the character and quality of the lands they desire to enter. Each applicant is required to swear that he is well acquainted with the character of the land described in his application.

3. *Status of lands.*—Information as to whether a particular tract of land is subject to entry may be obtained from the register of the land district in which the tract is located. The location of the district land offices and the prices of plats and diagrams showing the vacant lands are set forth in the Vacant Land Circular of this office.

4. *Kind of land subject to homestead entry.*—All unappropriated surveyed public lands adaptable to any agricultural use are subject to homestead entry if they are not mineral or saline in character, are not occupied for the purposes of trade or business, and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city.

5. *Initiation of claims.*—Claims under homestead laws may be initiated by settlement or entry on surveyed lands of the kind mentioned in the foregoing paragraph or by settlement on unsurveyed lands of such character.

Under the law relating to ordinary homesteads, an entry is limited to 160 acres; but this area may sometimes be slightly exceeded where the tract is made up of irregular subdivisions.

6. *Settlement and entry.*—Settlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon; he thus gains the right to make entry for the land as against other persons.

Entry should be made within three months after settlement upon surveyed lands or within that time after the filing in the district land office of the plat of survey of lands unsurveyed when settlement was made. Otherwise, the preference right of entry may be lost.

¹ NOTE.—The instructions contained herein relate to original homestead entries. Persons who have heretofore made homestead entries and who desire to make second or additional entries may obtain information as to their further rights, if any, under the homestead laws, by addressing this office and identifying their former entries.

7. *Absences by settlers.*—A settler is entitled to one or two leaves of absence during each residence year, aggregating not more than five months in each year, after establishment of residence, subject to the conditions governing such leaves by homestead entrymen.

8. *Qualifications required.*—A homestead entryman must be 21 years of age or the head of a family, a citizen of the United States, or have declared his intention to become such citizen, and not the owner of more than 160 acres of land in the United States. One who has acquired title to or is claiming under any of the agricultural public land laws, through settlement or entry made since August 30, 1890, any other lands which with the lands last applied for would amount to more than 320 acres in the aggregate is not qualified to make homestead entry. A married woman is not qualified to make such entry, except as hereinafter explained.

9. *Married woman.*—A married woman who has all of the other qualifications of a homesteader may make a homestead entry if she has been actually deserted by her husband or if he is incapacitated by disease or otherwise from earning a support for his family and she is really the head and main support thereof.

10. *Widow.*—A widow, if otherwise qualified, may make a homestead entry notwithstanding the fact that her husband made an entry.

11. *Homestead applications.*—A homestead entry may be made by the presentation to the land office for the district in which the desired lands are situated of an application which must be executed on the proper form, which will be furnished by the district land office on request. The application must be sworn to before either the register or acting register, or before a United States commissioner, a notary public, a judge or clerk or prothonotary of a court of record, or the deputy of such clerk or prothonotary or before a magistrate, authorized by the laws of or pertaining to any State, to administer oaths, in the county, parish, or land district in which the land lies, or before any officer of the classes named who resides nearest or most accessible to the land although he may reside outside the county and land district in which the land is situated. If the application is executed outside of both the county and land district the applicant must show by affidavit satisfactory to the Commissioner of the General Land Office that the officer before whom it was executed was because of topographic or geographic conditions nearer or more accessible to the land. An application is not acceptable if executed more than 10 days before its deposit in the mails for filing in the district land office.

12. *Widow, heirs, or devisees of claimant.*—If a homestead settler dies without having filed application for entry, the right to enter

the land covered by his settlement passes to his widow. If there be no widow, said right passes to his heirs or devisees.

If a homestead entryman dies without having submitted final proof, his rights under the entry pass to his widow, or, if there be none and the children, if any, are not all minors, then to his heirs or devisees. However, if all the heirs be minor children of the entryman or entrywoman, and their other parent be dead, the entry is not subject to devise. In such a case the right to a patent vests in the children, subject to compliance with certain requirements.

13. *Residence.*—Except where otherwise provided by law, a homestead entryman must establish residence upon the tract entered within six months after date of the entry, unless an extension of time is allowed, and must maintain residence there for a period of three years.

14. *Absences.*—During each year, beginning with the date of establishment of actual residence, the entryman may absent himself from the land for not more than two periods, aggregating as much as five months. In order to be entitled to such absences, the entryman need not file application therefor, but must each time he leaves the land file at the local land office (by mail or otherwise) notice of the time of leaving; and upon his return to the land he must notify said office of the date thereof.

15. *Cultivation.*—Cultivation of the land for a period of at least two years is required, and this must generally consist of actual breaking of the soil, followed by planting, sowing of seed, and tillage for a crop other than native grasses. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year will be deemed cultivation within the terms of the act (without sowing of seed) where that manner of cultivation is necessary or generally followed in the locality.

During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had. These requirements are the same as to homesteads under the general law and under the enlarged homestead acts, and the years in question begin to run, not from the establishment of residence, but from the date of the entry.

16. *Reduction of required area of cultivation.*—The Secretary of the Interior is authorized to reduce the requirements as to cultivation. This may be done in certain cases where the cultivation of the required amounts is not practicable.

A reduction may be allowed also if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area.

No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. Nor will a reduction in the area of cultivation based on the physical conditions 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.

Application for reduction must be filed in the district land office on the prescribed form.

17. *Habitable house.*—The homestead entryman must have a habitable house upon the land entered, at the time of submitting proof.

18. *Completion of entry by widow, heirs, or devisees.*—Persons succeeding as widow, heirs, or devisees to the rights of a homestead entryman are not required to reside upon the land covered by the entry, but they must cultivate it as required by law for such period as will, added to the entryman's period of compliance with the law, aggregate the required term. They must in all cases show at the time of proof that they are citizens of the United States. An entry may not be completed by the widow, heirs, or devisees of a homestead entryman unless he himself had complied with the law in all respects to the date of his death.

19. *Office holders.*—Persons appointed or elected to public office and civil-service employees are not entitled to any special privileges in connection with their homestead claims.

20. *Extension of time to establish residence.*—Where, for climatic reasons, or on account of sickness, or other unavoidable cause, residence can not be established on the land within six months after the date of the entry, additional time, not exceeding six months, may be allowed. Application for such extension must be made in affidavit form, corroborated by the affidavits of two persons acquainted with the facts.

21. *Leave of absence.*—Leave of absence for one year or less may be granted by the register of the district land office to entrymen who have established actual residence on the lands in cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent on him by cultivation of the land. Application for such leave of absence must be made on the prescribed form.

22. *Change in residence requirements.*—The register may grant to such homesteaders as make proper showing that the climatic conditions make residence on the homestead for 7 months in each year a hardship, a reduction in the terms of residence to 6 months in each year over a period of 4 years, or to 5 months in each year over a period of 5 years.

23. *Commutation proofs.*—In order to make satisfactory commutation proof, where authorized, the entryman, or his statutory succes-

sor, must, as a general thing, show substantially continuous residence upon the land for 14 months, maintained until the submission of the proof or filing of notice of intention to submit same, the existence of a habitable house upon the claim and cultivation of not less than one-sixteenth of its acreage.

A person submitting commutation proof must, in addition to certain fees, pay the price of the land; this is ordinarily \$1.25 per acre, but is more in certain cases.

24. *Submission of proof.*—Either final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land, that the required residence and cultivation have been had and that claimant is a citizen of the United States. Proof must be submitted within five years from date of entry. When a claimant is ready to submit proof he will be given full instructions as to the procedure which must be followed.

25. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the register a fee of \$5 if his entry is for less than 81 acres, or \$10 if he enters 81 acres or more. And in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of \$1 for each 40-acre tract entered outside of the limits of a railroad grant and \$2 for each 40-acre tract entered within such limits. Generally, where an entry is commuted no commissions are payable. On all final proofs the register is entitled to receive 15 cents for each 100 words reduced to writing.

Where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, the commissions due and the testimony fees under final proofs are 50 per cent more than those above specified.

26. *Alienation of land.*—The alienation of all or any part of the land embraced in a homestead prior to making proof, except for certain public purposes, will prevent the entryman from making satisfactory proof.

27. *Mortgage.*—A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof.

28. *Relinquishments.*—No person obtains any right to the land by the purchase of a relinquishment. Upon the filing of a relinquishment in the district land office the land, in the absence of a withdrawal, becomes subject to settlement and entry by the first qualified applicant.

29. *Enlarged homesteads.*—The law provides for the making of homestead entries for areas of not exceeding 320 acres of public land in the States of Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, designated by the Secretary of the Interior as nonmineral, nontimbered, nonirrigable. In Idaho the land must be arid.

Where the land desired has not been designated under the enlarged-homestead law, an applicant may file an application for entry under such law, accompanied by a petition for the designation of the land. He thus secures a preference right of entry if the land be thereafter designated.

Applications to make an enlarged entry must be submitted on the proper form and must be executed before an officer authorized to administer oaths in homestead cases. The entry may be completed by showing residence and cultivation, in like manner as in ordinary homestead cases, and that there is a habitable house on the land. Such an entry is not subject to commutation.

30. *Stock-raising homesteads.*—The act of December 29, 1916 (39 Stat. 862), provides that the Secretary of the Interior may designate unappropriated, unreserved public lands as "stock-raising lands," where the surface thereof is, in his opinion, chiefly valuable for grazing and raising forage crops, provided they do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, are of such character that 640 acres are reasonably required for the support of a family, and contain no water holes or other bodies of water needed or used by the public for watering purposes. Where lands are thus designated, entry may be made for not exceeding 640 acres.

An entryman under this law is required to comply with the provisions of the general law with respect to residence and the erection of a habitable house. No specific amount of cultivation is required but it must be shown, on submission of proof, that the entryman has made permanent improvements upon the tract tending to increase its value for stock-raising purposes, of the value of not less than \$1.25 per acre, half of which improvements must be placed there within three years after entry; also that the land has been used for three years for raising stock and forage crops.

Applications to enter accompanied by petition for designation may be filed where the land has not been designated.

31. *Reservation of minerals.*—Where an entry is made under the general or enlarged homestead law, the United States does not reserve the minerals in the land so entered, except in certain cases where the land is withdrawn for mineral classification, classified as

mineral, known to contain valuable mineral, or is embraced in a mineral prospecting permit or lease prior to the submission of satisfactory final proof. When an entry is made under the stock-raising homestead law, the United States reserves all mineral in the land so entered, together with the right to prospect for, mine, and remove the same.

32. *Soldiers' and sailors' homestead rights.*—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, the Spanish-American War, the Philippine insurrection, the Mexican border operations, or the war with Germany, or any person who rendered 30 days' or more military service in the Indian wars from January 1, 1817, to December 31, 1898, and who was honorably discharged and who makes a homestead entry, is entitled 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.

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, 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.

Where the entry is made under the stock-raising provisions of the homestead law, the soldier must, in addition to other requirements, make the improvements on the land required of other persons.

33. *Soldiers' and sailors' preference rights.*—On the opening of public or Indian lands to entry or the restoration to entry of public lands theretofore withdrawn from entry, officers, soldiers, sailors, or marines who have served in the Army or Navy of the United States in any war, military occupation, or military expedition, and have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve are accorded a preferred right of entry under the homestead laws, if qualified thereunder, except as against prior existing valid settlement rights and preference rights

conferred by existing laws or equitable claims subject to allowance and confirmation, for a period of not less than 90 days before the general opening of such lands to disposal.

34. *Other rights of war veterans and their widows and minor orphan-children.*—Information relative to the other rights and privileges accorded persons of the classes named, in connection with the homestead laws, will be sent to any person interested, on request.

35. *Where there is no district land office.*—In the public-land States having no district land office, all business relating to the entry of lands is conducted by this office.

THOS. C. HAVELL,
Acting Commissioner.

INFORMATION IN REGARD TO MINING CLAIMS ON THE PUBLIC DOMAIN

[Circular No. 1278]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., July 21, 1932.

The purpose of this circular is to furnish brief information pertinent to the location and purchase of mining claims under the United States mining laws.

1. *Initiation of rights to mineral lands.*—Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon (see 10), and complying with the State laws regarding the recording of the location in the county recorder's office, discovery work, etc.

2. *State mining laws.*—As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. Information as to State laws can be obtained locally or from State officials.

3. *Lands subject to location and purchase.*—Vacant public surveyed or unsurveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase, as are also lands in national forests in the public-land States (forest regulations must be observed), lands entered or patented under the stock-raising homestead law (title to minerals only can be acquired), lands entered under other agricultural laws but not perfected, where prospecting can be done peaceably, and lands within the railroad grants for which patents have not issued.

4. *Status of lands.*—Information as to whether any particular tract of land is shown by the records to be vacant and open to prospecting may be obtained from the register of the land district in which the tract is situated. Since location notices of mining claims are filed in the office of the county recorder, ordinarily no information regarding unpatented mining claims is obtainable from the district land office or the General Land Office unless application for patent has been filed.

5. *Minerals subject to location.*—Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. Deposits of coal, oil, gas, oil shale, sodium, phosphate, potash, and in Louisiana and New Mexico sulphur, belonging to the United States, can be acquired under the mineral leasing laws, and are not subject to location and purchase under the United States mining laws.

6. *Mining locations—Areas.*—Lode locations for minerals discovered in lode or vein formation may not exceed in length 1,500 feet along the vein and in width 300 feet on each side of the middle of the vein, the end lines of the location to be parallel to each other. Placer locations, which include all minerals not occurring in vein or lode formation, may be for areas of not more than 20 acres for each locator, no claim to exceed 160 acres made by not less than eight locators. Placer locations must conform to the public surveys wherever practicable.

7. *Who may make locations.*—Citizens of the United States, or those who have declared their intention to become such, including minors who have reached the age of discretion and corporations organized under the laws of any State. Agents may make locations for qualified locators.

8. *Number of locations.*—There is no limit to the number of lode or placer locations which an individual or association may locate, except that in Alaska a person is restricted to the location of two placer claims in any calendar month.

9. *Valid locations—Discovery after conveyance.*—A location is not valid until an actual discovery of mineral is made within the limits thereof. A placer location of more than 20 acres, made by two or more locators and conveyed to a less number before discovery is made, is valid to the extent of 20 acres only for each owner at date of discovery.

10. *Locations to be marked on ground—Notice.*—Except placer claims described by legal subdivision, all mining claims must be distinctly marked on the ground so that their boundaries may be readily

traced, and all notices must contain the name or names of the locators, the date of location and such a description of the claim by reference to some natural object or permanent monument as will serve to identify the claim.

11. *Locations on streams and bodies of water.*—Beds of navigable waters are subject to the laws of the State in which they are situated and are not locatable under the United States mining laws. Title to the beds of meandered nonnavigable streams is in the riparian owner. The beds of unmeandered, nonnavigable streams are subject to location under the United States mining laws if they are unoccupied, as are also the beds of meandered nonnavigable streams when the abutting upland is unappropriated.

12. *Maintenance—Annual assessment work—Adverse claim—Jurisdiction.*—The right of possession to a valid mining claim is maintained by the expenditure annually of at least \$100 in labor or improvements of a mining nature on the claim, the first annual assessment period commencing at 12 o'clock noon on the 1st day of July succeeding the date of location. Failure to perform the assessment work for any year will subject the claim to relocation, unless work for the benefit of the claim is resumed before a relocation is made. The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court. (See 18.)

13. *Expenditures on claim for patent purposes—Lode—Placer—Mill site.*—Five hundred dollars in labor or improvements of a mining nature, must be expended upon or for the benefit of each lode or placer claim, and compliance with the United States mining laws made otherwise, to entitle the claimant to prosecute patent proceedings therefor. Such expenditures must be completed prior to the expiration of the period during which notice of the patent proceedings is published. Patent expenditures on a mill site are not required, but it must be shown that the mill site is used or occupied for mining or milling purposes at the time an application for patent therefor is filed.

14. *Patent not necessary.*—One may develop, mine, and dispose of mineral in a valid mining location without obtaining a patent, but possessory right must be maintained by the performance of annual assessment work on the claim in order to prevent its relocation by another.

15. *Procedure to obtain patent to mining claims.*—The owner or owners of a valid mining location, or group of locations, on which not less than \$500 has been expended on or for the benefit of each claim, may institute patent proceedings therefor in the district land office. Information as to patent procedure can be obtained from

the register of the local land office or from the General Land Office. In general, a survey must be applied for unless the claim is a placer claim located by legal subdivisions, the application for survey to be made to the public survey office in the State wherein the claim is situated. Applications for patent are filed in the district land office. A notice of the application is required to be posted on the land prior to filing the application and to be published by the register after the application is filed.

16. *Blank forms.*—No set form of location notices nor of the papers filed in patent proceedings for mining claims is required and no blank forms are furnished by the General Land Office, or by the district land offices, for use in mineral cases. Forms containing essentials are printed by local private parties or concerns. The registers of the local land offices can usually advise you where such forms may be obtained.

17. *Common improvements.*—An improvement, made upon one of a group of contiguous claims (cornering is not contiguity) owned in common, may be applied to such claims of the group, in existence at the time the improvement is made, shown to be benefited thereby.

18. *Adverse claims.*—An adverse claim may be filed during the period of publication of notice of an application for patent by one claiming a possessory right under another mining location to all or some portion of the land applied for, and must show fully the nature, boundaries, and extent of the area in conflict, to be followed, within 30 days after filing, by suit in a court of competent jurisdiction. If suit is filed, all proceedings on the application, except the filing of the affidavit of the notice, are stayed to await the outcome of the court proceedings.

19. *Co-owners.*—A co-owner not named in the application for patent can not assert his rights by filing an adverse claim, a protest being proper to cause his alleged rights to be considered when the case is adjudicated. If a co-owner fails to do his proper proportion of annual assessment work on a claim, or fails to contribute his proportion of the cost thereof, the co-owners who have caused the work to be done during any assessment period, may, at the expiration of the assessment year, give such delinquent co-owner personal notice in writing, or notice by publication in a newspaper published nearest the claim for at least once a week for 90 days, and if at the expiration of 90 days after such notice in writing, or 180 days after the first newspaper publication, such delinquent should fail to contribute his proportion of the expense required, his interest in the claim becomes the property of his co-owners who have made the expenditure.

20. *Lode in placer.*—If a placer mining applicant fails to state that there is a known lode within the boundaries of the claim, it is taken

as a conclusive declaration that he has no right of possession thereto. If no such vein or lode be known the placer patent will convey all valuable mineral and other deposits within the boundaries of the claim. A known lode not included in an application for patent to the claim may be applied for even after issuance of patent to the placer mining claim. Where a placer mining claimant makes application for a placer containing within its boundaries a lode claim owned by him the lode must be surveyed, the lode being paid for on the basis of \$5 per acre and the remaining portions of the placer at the rate of \$2.50 per acre.

21. *The United States mining laws are applicable to the following:* Alaska (subject to certain modifications), Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

22. *National parks and monuments.*—Mining locations may not be made on lands in national parks and monuments after their establishment.

23. *Withdrawals.*—Withdrawals usually bar location under the mining law, but those made under the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), permit locations of the withdrawal lands containing metalliferous minerals, subject however to section 24 of the Federal water power act when controlled by that act.

24. *Minerals in Indian lands.*—In general, the mineral deposits in Indian reservations are subject to leasing and are under the administration of the Bureau of Indian Affairs.

25. *Mineral land in agricultural entries—Protest—Contest.*—Where lands known to be valuable for minerals are embraced in an agricultural filing, other than a stock raising homestead filing, a mineral claimant may initiate a contest thereagainst by filing a protest sworn to and in duplicate, in the local land office, alleging sufficient facts, which, if proven, will establish the mineral character of the land, and warrant cancellation of the agricultural filing: The protest must be corroborated by one or more witnesses having knowledge of the facts alleged. In the case of stock raising homestead entries, a mineral claimant, whose location antedates the homestead filing, must protest such filing in order to protect his title to the surface of his mining claim.

26. *Cost of patent proceedings for mining claims.*—With the exception of the fixed charges, such as the fee for filing an application for patent, which is \$10, the purchase price of lands in lode claims and millsites at \$5 per acre, and \$5 for each fractional part of an acre, and \$2.50 per acre or fraction of an acre for placer lands, unless

otherwise provided by law as to certain lands, no estimate can be furnished as to what it will cost to procure a patent. The cost of publication, survey, and abstract of title depends upon the services rendered and varies in each case.

C. C. MOORE, *Commissioner*.

EXTENSION OF PERIOD FOR SUBMISSION OF FINAL PROOF ON HOMESTEAD ENTRIES

SUPPLEMENTAL INSTRUCTIONS

[Circular No. 1288]*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., August 24, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

By Circular No. 1269 [53 I.D. 663] you were furnished with the text of the act of May 13, 1932 [47 Stat. 153], and with the instructions thereunder.

You are further advised that the act does not operate as an extension of time, nor does it in terms exempt an entry from contest even if the failure to meet the statutory provisions incident to offering satisfactory proof was caused by adverse weather or economic conditions. It does, however, authorize the Secretary of the Interior to grant an extension for the submission of proof for a period of two years upon a showing that owing to adverse weather or economic conditions it would be a hardship to meet the requirements incident to final proof. To secure the benefits of the act an entryman must file an application for extension of time, and where there has been a failure to comply with the law in matters of residence, cultivation, and improvements the applicant must show that such failure was caused by adverse weather or economic conditions, and that by reason of such conditions it would be a hardship to meet the statutory requirements incident to offering satisfactory final proof within the period fixed by law. The filing of an application for extension of time, accompanied by proofs entitling the applicant to the relief granted by the act, will operate as a stay against contest based upon the charge that the entryman has failed to comply with the provisions of law in the matter of residence, cultivation or improvements.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

* Superseded by Circular No. 1311, *post*.

REGULATIONS GOVERNING SALE OF LANDS UNDER SECTION 17,
ACT OF FEBRUARY 25, 1920 (41 STAT. 437)DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 22, 1932.

PROCEDURE OF SALE

The land will be sold in units under the conditions set forth in the "Notice of sale of oil and gas leases" to the qualified bidder offering the highest amount per acre as a bonus for the privilege of leasing the land (whether the bids solicited be oral and/or sealed).

STIPULATIONS TO BE AGREED TO

The successful bidder to whom the lease may be awarded shall agree in writing to the following stipulations which shall bind himself, his successors, assigns, and all others claiming under or through him:

(a) *Cooperative development and unit plans.*—The lessee agrees that whenever determined by the Secretary of the Interior to be necessary or advisable in the public interest, he will unite with others in adopting and operating under a cooperative or unit plan of development or operation in accordance with the provisions of the act of March 4, 1931 (46 Stat. 1523), such plan to be acceptable to the Secretary of the Interior or to be prescribed by him and to provide for the adequate protection of the correlative rights of all permittees and lessees of Government land and other parties in interest, including the United States.

(b) *Production under unit operation or other cooperative plan.*—The lessee agrees that no oil or gas in commercial quantities shall be produced from the leasehold except pursuant to a plan of unit operation, or other cooperative plan approved by the Secretary of the Interior, or in the absence of such approved plan except by written permission of the Secretary.

(c) *Operating methods.*—The lessee agrees to conform to the operating regulations of the Secretary, which may likewise be incorporated in any cooperative or unit plan of development or operation approved, particularly such regulations as pertain to location and spacing of wells, time and method of drilling, well casing and production programs and/or may in the opinion of the Secretary be necessary to secure the conservation or increased ultimate recovery of oil and gas.

(d) *State and Federal Conservation Laws.*—The lessee agrees to comply with all State and Federal laws, regulations and orders, and

to conform to any allowance of production fixed for the field, pool or area by the State in which the leasehold is situated and to proration of market outlet equitably among all producers of said field, pool or area.

(e) *Drainage*.—The lessee agrees on demand to protect the United States currently against loss of royalty through drainage from the leasehold area (except such loss as may be occasioned by operations under a cooperative or unit plan regularly adopted and approved of which the leasehold is a part) the amount of such drainage and loss of royalty resulting therefrom to be fixed monthly by the supervisor of oil and gas operations, subject to the right of appeal to the Secretary of the Interior, whose decision shall be final.

(f) *Assignments*.—The lessee agrees to make no assignment or other disposal of interest, whether royalty, working, or otherwise, and to enter into no operating agreement, or sales contract, except with the approval of the Secretary of the Interior.

Approved:

Jos. M. DIXON,
Acting Secretary.

RESERVOIR RIGHTS OF WAY UNDER ACT OF MARCH 3, 1891
(26 STAT. 1095)

INSTRUCTIONS

[Circular No. 1291]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., January 4, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

In handling cases involving lands affected by rights of way for reservoirs granted under the act of March 3, 1891 (26 Stat. 1095), it has been noted that the procedure followed is not uniform.

The Department has construed the grant under this act to be a fee (base or qualified) and in the case of the *Windsor Reservoir and Canal Company v. Miller* (51 L.D. 27, 305), held that such grants can not be disturbed by subsequent disposals. These rulings are affected, however, by the more recent act of May 21, 1930 (46 Stat. 373), which permits, in certain instances, the leasing of lands in such rights of way for the extraction of oil and gas. For regulations under said act of May 21, 1930, see Circular No. 1224, approved July 3, 1930 [53 L.D. 137].

Therefore, when any application other than oil and gas is received involving lands affected by a right of way for a reservoir under said

act of March 3, 1891, you will consult the map of the reservoir site on file in your office to determine the extent of the conflict. If any subdivision is wholly within a subsisting right of way, the application should be rejected as to such subdivision, subject to the usual right of appeal to this office.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FLETCHER v. RASOR

Decided January 18, 1933

POTASH LANDS—PROSPECTING PERMIT—EXPIRATION—COMPUTATION OF TIME.

A potash prospecting permit issued for a period of two years expires, in the absence of statutory provision for extension of time, at the close of the second anniversary of the date on which it was issued.

EDWARDS, *Assistant Secretary:*

On April 21, 1930, C. D. Fletcher was granted a permit to prospect for potash on Secs. 1, 11, 12 and the N $\frac{1}{2}$ Sec. 13, T. 21 S., R. 28 E., N.M.P.M., New Mexico. By letter of March 10, 1932, the Commissioner of the General Land Office directed that the permittee be called upon to show cause why the permit should not be canceled for failure to comply with the terms thereof. On April 2, 1932, the permittee filed a statement that he had caused a core test for potash to be commenced on March 21, 1932, on the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 1.

On April 20, 1932, Fletcher filed a potash prospecting permit application for the same land. On April 21, 1932, at 9 a.m., James H. Rasor filed a similar application for said land.

By decision of June 17, 1932, the Commissioner rejected Fletcher's application on the ground that the same was filed while his permit was outstanding. In response Fletcher filed a showing that the test hole was drilled to a depth of 1382 feet at a cost of about \$6,000. He requested that his application be allowed, or, in the alternative, that the old permit be extended for a period of two years.

By decision of September 9, 1932, the Commissioner held that the expenditures made in drilling could not be recognized as basis for right to a new permit, and that because of Rasor's application, which, it was stated, was "filed immediately upon the land becoming subject to a potash filing", no extension of time could be granted on the old permit.

Fletcher has appealed from the denial of his application for extension of time.

The permit involved was granted "for a period of two years from date hereof", that is, from April 21, 1930. In Circular No. 926, approved December 1, 1928 (52 L.D. 516), instructions are given that potash permits are issued for terms of two years without provision for extension of time; and that—

If application for patent or lease, based on claim of discovery within the 2-year period, is not filed, the permit 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.

The question arises as to when Fletcher's permit expired.

When time is to be computed from a particular day or when an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated and to include the last day of the specified period. 26 R.C.L., sec. 19.

The Department has definitely ruled on this question. In the case of *Letnik Oil Association v. Davis* (50 L.D. 493) it held that a six months' period from a given day included all of the corresponding day of the sixth month.

In the case of *In re Babjak* (211 Fed. 551), in construing the act of June 29, 1906 (34 Stat. 596), in which it is provided that not less than two years nor more than seven years after an alien has made his declaration of intention to become a citizen he shall make and file a petition in writing for naturalization, the court held that the day of the date of the declaration should be excluded in computing the seven-year period, and that, therefore, a petition for naturalization filed on the seventh anniversary of that date was in time.

Fletcher's permit did not expire until the end of April 21, 1932, and Rasor's permit application was premature even as was that of Fletcher filed the preceding day. Inasmuch as Rasor's application was not made for land subject to such filing, it was no bar to Fletcher's application for extension of time on his permit.

The act of May 7, 1932 (47 Stat. 151), provides that the Secretary of the Interior may extend potash prospecting permits for a period not exceeding two years, upon a showing of satisfactory cause.

The permit involved expired by operation of law at the end of April 21, 1932. The permittee has applied for extension of said permit, and in the absence of objection of record other than what is now before the Department, the permit will be considered revived and extended for two years.

Fletcher apparently did not serve notice or copy of his appeal upon Rasor, but inasmuch as Rasor's application has been found to be premature and consequently without validity, it must be rejected.

It appears that one W. A. Snyder filed a similar application on April 21, 1932; that the Commissioner rejected the same on the ground that Rasor had prior rights; and that Snyder, after due notice, failed to appeal. Under these circumstances the case of Snyder's application may be considered closed.

The decision appealed from is reversed and the case is remanded with directions that Rasor be served with a copy hereof and given opportunity to object or file motion for rehearing. If within 15 days from service of notice he fails to take such action, the Commissioner will act upon Fletcher's permit in accordance with the views hereinbefore expressed.

Reversed.

ROBERT J. EDWARDS AND J. C. JAMIESON v. OSCAR T. S. SAWYER

Decided January 27, 1933

PUBLIC LANDS—HOMESTEAD ENTRY—WATER RIGHTS UNDER SEC. 2339 OF THE REVISED STATUTES.

The water rights acquired and safeguarded by section 2339, Revised Statutes, are distinct from any right in the land itself, and the existence of such rights is no bar to acquisition of the land under subsequent homestead entries or locations, but all patents granted or homesteads allowed are subject to any vested accrued rights that may have been acquired under or recognized by this section.

PUBLIC LANDS—HOMESTEAD ENTRY—PRIOR WATER RIGHTS—DEPARTMENT OF THE INTERIOR—JURISDICTION.

This Department has repeatedly decided that it is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts. *Silver Lake Power & Irrigation Company v. City of Los Angeles* (37 L.D. 152, 153) and cases there cited; and the remedy of the owner of such a water right lies in recourse thereto.

PUBLIC LANDS—PUBLIC WATER RESERVE—APPROPRIATION OF WATER UNDER STATE LAW.

A withdrawal for a public water reserve (see Executive order of April 17, 1926, and regulations thereunder, in 51 L.D. 457) does not contemplate the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use, and the owner of a right, obtained from the State to such water, acquires no color of title or exclusive possessory right to the subdivision upon which the water was appropriated and used, but, at most, merely an easement.

PUBLIC LANDS—DEPARTMENT'S RULES OF PRACTICE.

Rules of Practice limiting the time in which appeals may be taken and motions for rehearing made are of the greatest practical importance, being necessary to put a period to vexatious litigation and to secure to the parties litigant the termination of their legal controversies, and, at least in cases *inter partes*, will be strictly enforced in the absence of valid

excuse or of circumstances strongly calling for the exercise of the directory and supervisory power conferred upon the Department by law.

PUBLIC LANDS—RULES OF PRACTICE—RULE 76.

Rule 76 of Practice prescribes that notice of appeal from the Commissioner's decision must be served on the adverse party and filed in the office of the register or in the General Land Office within 30 days from the date of service of notice of such decision.

EDWARDS, *Assistant Secretary*:

August 19, 1929, Oscar T. S. Sawyer filed application Phoenix 066378 under the enlarged homestead act for S $\frac{1}{2}$ Sec. 17, T. 8 S., R. 12 E., G. & S. R. M., and application 066379 under the stock-raising homestead act for NW $\frac{1}{4}$ Sec. 17 and NW $\frac{1}{4}$ Sec. 20 in the same township and range. The applications were allowed respectively on January 8 and 29, 1930. Contest was instituted by Robert J. Edwards against both entries, alleging the existence of conflicting lode mining claims; namely, Giant Cactus Nos. 1 to 3, located July 1, 1926, and Nellie Nos. 1 to 3, located in February, 1929, and that, at the date the applications were filed, the land was claimed, occupied and being worked under the mining laws. John C. Jamieson was allowed to intervene upon allegations of equities in the land based upon a claim of ownership of a water right and reservoir for stock-watering purposes situated on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, acquired under provisions of the State law, and upon further allegation of the ownership of one mile of pasture fence on the homestead. Hearing was held between all parties on June 1, 1931. The register found that: "The evidence proves the existence of the mining claims and the reservoir site. The value of the ore may be questionable, but there is no doubt about the mining claims." He therefore recommended cancellation of both entries as to the land embraced in the reservoir site and land embraced in the Gold Eagle claims Nos. 1 to 6, inclusive, which, the evidence shows, were located July 1, 1930, after both homestead entries had been allowed. The contestant testified that he kept up the assessment work at all times on the claims asserted in his contest. He at the same time characterized the Eagle claims as valid, refused to state whether he had an interest in them, and said "that he did not have them now."

Upon review of the evidence on appeal, the Commissioner held that contestant's interest in the land ceased on July 1, 1930, and that he had abandoned his claims, but the mineral character of the enlarged entry was, nevertheless, drawn in issue; that there can be no valid mining claim without discovery of mineral within its limits, and that contestant did not sustain the burden of proof and show that the claims were valid or the land mineral in character. He therefore dismissed the mineral contest. He, however, upon con-

flicting evidence, held that the tank or reservoir claimed by Jamieson was situated on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, and that Jamieson was in possession of this subdivision under claim of right and Sawyer's attempt to acquire title thereto was illegal, but as to the water right filed on the mine shaft in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, he held that: "The evidence failed to show that such use has been made of it as to bring it within the purview of Sec. 2339, Revised Statutes", holding the entry for cancellation only as to the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17.

Notice of this decision was served on all parties May 23, 1932. Jamieson appealed on the ground that the homestead entry should be canceled as to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ for the reason that water-right appropriation thereon under State law was protected by section 2339, Revised Statutes. Sawyer having died in the meantime, his widow appealed from the action canceling the homestead as to SE $\frac{1}{4}$ SW $\frac{1}{4}$, contending that the water right was not valid under the law of the State. Both of these appeals were timely filed. On July 6, 1932, Edwards appealed from the Commissioner's decision. Sawyer's widow filed a motion to dismiss the appeal of Edwards because not taken within 30 days from notice of the Commissioner's decision. The Commissioner denied the motion on the ground that the other appeals, timely filed, preserved the status of all parties to the litigation even if they are not properly appellants, and that "the case will necessarily have to go to the Department for consideration, at which time, in view of the circumstances in the case, an examination of the entire record will be necessary and the rights of all parties concerned will be put in issue." The case of *Cosby et al. v. Avery et al.* (24 L.D. 565) was cited as authority for this action.

The appeals filed in time drew in question solely the claim of prior possessory right to part of the land by virtue of Jamieson's appropriation of water under the State law, and required no consideration of the question as to the mineral character of the land or the validity of the alleged mining claims.

In the case of *Cosby et al. v. Avery et al.*, *supra*, there was an award of a town lot, the back end being given to one set of claimants and the remainder to another set. One set of claimants appealed, claiming the whole lot. Those who timely appealed necessarily drew in question the rights of the others who did not appeal and entitled the latter to appear as appellees. There is no analogy in the facts and the case is not in point. Rule 76 of Practice prescribes:

Notice of appeal from the Commissioner's decision must be served on the adverse party and filed in the office of the register or in the General Land Office, within 30 days from the date of service of notice of such decision.

Rules of Practice limiting the time in which appeals may be taken and motions for rehearing made are obviously of the greatest

practical importance, being necessary to put a period to vexatious litigation and to secure to the parties litigant the termination of their legal controversies, and, at least in cases *inter partes*, will be strictly enforced in the absence of a valid excuse or of circumstances strongly calling for the exercise by this Department of its directory and supervisory power conferred on it by law. *Sheldon v. Warren* (9 L.D. 668); *Jubien v. Hunter* (18 L.D. 151); *Graham v. Lansing* (13 L.D. 697); *Vradenburg's Heirs et al. v. Orr et al.* (25 L.D. 323).

The evidence as to mineral character of the enlarged entry and as to validity of the claims asserted as well as those subsequently made, has, however, been reviewed by the Department, and no error is seen in the findings of fact or in the application of rules of law and evidence. Specific data in support of conclusions that discoveries of valuable copper ore had been made on the claims are conspicuously lacking. One witness for contestant testified to a ledge of ore 20 feet wide with pretty fair showing in the bottom of a 100-foot shaft on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, but admitted it was not uniform in value and "if you go a little ways on the vein you lose it, and then probably you spend a lot of money trying to find it again." The witnesses that testified to ore shipped after the entries were made did not specify the tract or the claim from which the ore came, knew nothing of the values of the shipment, and it can not be determined whether or not the returns justified further operations. Furthermore, it is shown that contestant permitted one Luthey to relocate the claims for himself shortly after the shipment, which operated as an abandonment of contestant's rights (*Lindley on Mines*, section 644), and also discloses that he has no present rights which can be prejudiced by the decision. There must be either a discovery of mineral or actual possession of the claim by the claimant thereof diligently engaged in the search for mineral at the date of the inception of the homestead entryman's rights, and if neither of these conditions exists the lands can not be deemed to be claimed, occupied and worked under the mining law. *United States v. Hurliman* (51 L.D. 258); *Ainsworth Copper Co. v. Bea* (53 I.D. 382, 383); *Thomas H. B. Glaspie* (53 I.D. 577). Neither of these conditions is shown in the present case. The entryman, therefore, did not make a false statement when he averred in his application that the land was not claimed, occupied, or being worked under the mining laws. There is nothing apparent that calls for the exercise of supervisory power by the Secretary. The appeal of contestant is therefore dismissed for failure to observe Rule 76 of Practice.

Turning now to the appeal of Jamieson, it is noticed that his claim is based solely on rights to *water* on public land acquired under the law of Arizona, and not under any appropriation of public *land*

under Federal law. The rights so acquired and safeguarded by section 2339, Revised Statutes, are distinct from any right in the land itself (*Simons v. Inyo Cerro Gordo Mining & Power Company et al.*, 192 Pac. 144), and under section 2340, Revised Statutes, "All patents granted or preemptions or homesteads allowed are subject to any vested accrued rights" as may have been acquired under or recognized by this section. The existence of such right is no bar to acquisition of the land by a timber and stone entry (*John H. Parker*, 40 L.D. 431), or a stock-raising homestead entry (*Thomas H. B. Glaspie*, 53 I.D. 577), or other subsequent homestead entries or locations. See numerous cases, United States Code Annotated, Title 43, section 661, notes 32, 38. The Department has repeatedly decided that it is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts. *Silver Lake Power & Irrigation Company v. City of Los Angeles* (37 L.D. 152, 153) and cases there cited. Jamieson obtained, at the most, but an easement by the purchase of the existing water right. He obtained no color of title or exclusive possessory right to the subdivision upon which the water was appropriated and used. The only valid challenge he could make to the entry of Sawyer would be to the effect that the land contained "a spring or water hole" providing enough water for general use for watering purposes within the purview of the Executive order of withdrawal of April 17, 1926, and regulations thereunder (See Circular 1066, 51 L.D. 457), and therefore was not subject to entry. The evidence shows that the artificial tank or reservoir which the Commissioner found was on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and was designed for and has been utilized for the collection and storage of surface water, and consists of a dam a few feet high, thrown across a dry wash to collect run-off water from the hills, and which at times is dry. The Department has held that the above-mentioned withdrawal for public water reserve does not contemplate the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. *Santa Fe Pacific Railroad Company* (53 I.D. 210). As for the water in a mining shaft 100 feet deep on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, which was the subject of water appropriation by intervenor's assignor for stock-watering purposes, nothing appears as to source or quantity of flow of the water, if any, therein. It is shown that it is close to the margin of the reservoir on SE $\frac{1}{4}$ SW $\frac{1}{4}$; that a pump has been installed there which was used on one occasion to unsuccessfully unwater the shaft for mining purposes, and on another to furnish water for livestock when the reservoir was dry. It does not appear that the source of supply for the reservoir is from

this shaft, or that it is capable of providing enough water for general use for watering purposes, or that it is a public necessity in that locality, or that it has the true status of a public watering place, but, to the contrary, it has been claimed for some years under private appropriation by one Mitchell. Sawyer testified that at the time he filed his application, he saw some dirt thrown up and supposed it was done in connection with abandoned mining works; that there was no water there and no indications of a reservoir and he had no actual notice of an appropriation of the water at that time. There are no circumstances disclosed that show the contrary or to show that his statement in his application that "there is no spring, water hole or other body of water except water which collects in low places during the rainy season" was false.

As the land is not of the character contemplated by the withdrawal of April 17, 1926, and as the existence of a vested water right acquired under State law on part of the land, if any, would not prevent appropriation of the land under the homestead law, Jamieson has disclosed no valid ground for cancellation of any part of the entry. If his right to the water is in any way interfered with by the homestead claimant, his remedy is in the State courts. *Thomas H. B. Glaspie, supra.* Unlawfully inclosing vacant public land by a pasture fence is the basis of no right.

The decision of the Commissioner canceling the entry as to the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 17, is therefore reversed. His refusal to cancel the entry as to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ is affirmed.

ASSIGNMENTS, ETC. OF INTEREST IN OIL AND GAS PROSPECTING PERMITS

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., January 31, 1933.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

In considering assignments or other disposal of interest, whether royalty, working or otherwise, in oil and gas prospecting permits referred to in paragraph 1-g of the regulations of April 4, 1932, you will require such assignments or transfers to include, or be accompanied by, written agreement of the assignees to be bound by the stipulations set forth in said regulations of April 4, 1932, before recommending the approval thereof.

The question of the qualifications as to citizenship and holdings under the leasing law of assignees of royalty and/or working interests need not be determined until an application for lease is filed for the permit lands.

RAY LYMAN WILBUR,
Secretary.

DRAKE ET AL. v. SIMMONS (ON REHEARING)

Decided February 4, 1933

OIL AND GAS LANDS—PROSPECTING PERMIT—DEEDS—HEIRS.

The common law rule which declares a deed to one that is dead at the time of its execution to be a nullity is subject to exception, and, assuming that the rule applies to oil and gas prospecting permits as well as to deeds, it is within the exception where the Department issues a permit to an applicant knowing him to be dead at the time and where the intention was by the formal use of his name as permittee to confer rights upon existing persons who are to succeed to his property.

OIL AND GAS LANDS—PROSPECTING PERMIT—VESTED RIGHTS—HEIRS—SECRETARY OF THE INTERIOR.

While an applicant for an oil and gas prospecting permit acquires no property right by virtue of such application that he can transmit or that can pass to others on his death, yet nothing contained in the leasing act or in any other law prevents the Secretary, in the exercise of his discretion and in the absence of a valid intervening claim, from recognizing that the deceased applicant was entitled to such equitable consideration as would warrant the granting of a permit to those who would succeed to or have an interest in his property.

OIL AND GAS LANDS—PROSPECTING PERMIT—ADVERSE CLAIM—CITIZENSHIP—WAIVER—PROTEST.

In the absence of any adverse claim, irregularity in the showing as to citizenship of an applicant for an oil and gas prospecting permit at the time the permit was granted may be waived by the Department and such irregularity can not be taken advantage of by a subsequent applicant nor will a failure to comply with the law which is apparent from the records be ground for protest.

PRIOR DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT.

Case of *Haynes v. Smith* (50 L.D. 208), overruled so far as in conflict.

WILBUR, Secretary:

Frank Drake *et al.* have filed motion for rehearing of the Department's decision of October 28, 1932, which affirmed a decision of the Commissioner of the General Land Office, wherein he canceled a reinstated oil and gas permit, Cheyenne 044173, of Drake *et al.*, to the extent of the SW $\frac{1}{4}$ Sec. 4, T. 36 N., R. 93 W., and NW $\frac{1}{4}$ Sec. 34, T. 37 N., R. 93 W., 6th P. M., for the reason that the tracts were covered by prior outstanding, reinstated, like permit 048600, issued to North K. Simmons.

Specifications of error are as follows:

First. To hold that an oil and gas prospecting permit, issued to a person then deceased, operated to pass any right to the estate of such decedent.

Second. To wholly disregard and to ignore explicit holdings by the United States Supreme Court, cited in petitioner's brief in support of appeal, to wit: The decisions in *Hall v. Russell* (101 U.S. 503); *Missouri, Kansas & Texas Railway Company v. Kansas Pacific Railway Company* (97 U.S. 491); *Davenport v. Lamb* (13 Wall. 418).

Third. To ascribe superior and controlling weight and effect to rulings of the Interior Department, construed in the decision whereof review is prayed, as stating a rule wholly at variance from that laid down by the United States Supreme Court in the cases cited.

Fourth. To hold, in effect, although not in terms, that North K. Simmons earned or acquired a proper claim to equitable consideration by mere purchase of stock or by contributing to drilling syndicates or associations, said Simmons not being then the holder of any oil prospecting permit, so far as alleged by him in his application for the permit which later issued to him, after his death.

Material facts necessary to consider in connection with grounds of error above set out are, briefly, as follow:

The Drake permit, covering the tracts above described, was canceled September 11, 1928, effective October 8, 1928, after due notice and without resistance, for failure to comply with the drilling requirements. Simmons's application for permit, filed November 28, 1928, was rejected April 3, 1929, as one banned by the oil conservation order of March 16, 1929. Simmons promptly applied for reinstatement. June 30, 1931, the Department approved a recommendation of special departmental committee that this and other applications be reinstated and granted, with extension of permit to July 1, 1933. The basis of this recommendation was a showing of contributions in stock purchase and cash to a test well drilled in the locality, such being deemed an equity which excepted the applications from the terms of the oil conservation order. November 12, 1931, a letter was received from an attorney for North K. Simmons to the effect that the latter was dead, his estate probated and settled, and the executor discharged, and inquiring whether permit could not be issued to the heirs of North K. Simmons. By letter of November 19, 1931, citing an unreported decision of the Department of March 16, 1922, entitled *John R. Magill*, holding that by the filing of a complete application for an oil and gas permit the applicant acquires a right that will pass to his legal representatives upon his death, and that permit will issue in such a case in the name of the applicant, the Commissioner expressed the view that the permit could be issued in the name of the heirs, and called upon the attorney to furnish proof of the settlement of the estate, the discharge of the executor, and the names and addresses of the heirs. On December 29, 1931, the Department issued permit

in the name of North K. Simmons for the tracts above described and other lands.

April 5, 1932, application for reinstatement of a group of canceled permits, including 044173 of Drake *et al.*, was filed. The permit was reinstated May 14, 1932, and extended to May 5, 1934, upon a showing of equities similar to that made by Simmons, but was held for cancellation by Commissioner's letter of July 19, 1932, when attention was drawn to the conflict with the prior permit of Simmons as to the tracts above described. The Department's decision, affirming such cancellation, is alleged to be in error as above set forth.

When the permit of Drake *et al.* was canceled October 8, 1928, all rights thereunder ended. The land became vacant unappropriated public land, and, it being later held, in effect, that the equities of Simmons excepted him from the order of March 16, 1929, there existed no legal impediment to the allowance of his application for the land. Even if the issuance of the permit in the name of Simmons was erroneous and it was subject to cancellation, until canceled and so noted on the local records, it operated to segregate the land, and Drake *et al.* gained no rights by the issuance of a permit to them. *Hiram M. Hamilton* (38 L.D. 597); *Martin Judge* (49 L.D. 171); *Harvey V. Craig* (50 L.D. 203). The grant of appellant's permit was clearly an inadvertence.

The theory advanced on appeal and in the instant motion, appears to be that North K. Simmons, being dead on the date the permit was issued, the issuance of the same in his name was a nullity, and the land therefore remained open for the subsequent grant of a permit to Drake *et al.* The appellant concedes that the permit is but a license, but, nevertheless, insists, under the authority of *Landes v. Brant* (10 How. 348) and those cases above mentioned in his second specification of error, that the Department is bound to apply the common law rule, which declares a *deed* to one that is dead at the time of its execution is a nullity.

As to these cases, in *Davenport v. Lamb* and *Landes v. Brant*, land patent issued to a deceased party, and the Supreme Court observed that, had it not been for the act of May 20, 1836 (5 Stat. 31), providing that the title would inure to and become vested in the heirs, devisees or assignees, it would result that, under the common law rule, the patent would have been ineffectual to pass the title for lack of a grantee. In *Hall v. Russell*, one of the questions was whether a settler under the Oregon Donation Act who died after a residence of less than one year on the land, had by the act, an interest subject to devise by will. The court held that act required four years' residence to acquire a complete title to the soil, and that he had nothing in the land that he could transmit; that by other provisions of the act his possessory right passed direct from the United States to

his heirs. The court observed that under the common law rule, there could not be a present grant without a grantee. The case of *Missouri, Kansas & Texas Railway Company v. Kansas Pacific Railway Company*, *supra*, was cited in *Hall v. Russell* for the proposition that a Congressional grant is a law as well as a conveyance, but it has no pertinent bearing on the question here.

Whether there is a substantial distinction between the character and incidents of a permit and deed, sufficient to decline to extend the rule applicable to the latter to the former, need not here be considered, for assuming that there is sufficient reason for the applicability of the rule to permits as well as deeds, under the view that the Department takes, the circumstance of this case constitutes an exception to the general common law rule, distinctly recognized by the court, and stated in well-known treatises on the subject. That circumstance is that both the Department that granted the permit and the parties that solicited it as heirs of North K. Simmons, knew that Simmons was dead, and the intention was by the formal use of his name as permittee to confer rights upon existing persons who would succeed to his property.

In *City Bank of Portage v. Plank* (124 N.W. 1001), it was held that where a deed was made to a grantee well known to be dead, and the residue of whose estate, which would include the land conveyed if belonging to it, was to pass to a certain person as executor, subject to a charge in favor of the widow and also to the possibilities of other claimants against his then unsettled estate, and all such interests were represented by such person as executor, and it appeared that the deed was made to the decedent to protect on the record all such rights by using the decedent's name to designate the executor in his official capacity, such intention will be effectuated by enforcing the deed in favor of the executor.

The court said:

Appellant attacks the holding that the deed to E. D. Plank was ineffective to convey any title or interest in the mortgaged premises. It is a rule asserted from early times that no grant can exist without a grantee. This is of course axiomatic. The title cannot pass from the grantor unless it passes to some one. As a corollary, it is declared in many cases that a deed or grant to a person who does not exist at the time of the grant is void. Such statements are unassailable if properly understood. If the grant, in the intention of the parties, is attempted to be made to some person who has no existence, it cannot take effect. *Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428, 53 Am. St. Rep. 590. Many technical rules, however, have yielded to more rational views in modern times. The real intention of the parties is to be sought and effectuated by courts when possible. If it was the intention both of grantor and grantee that the grant should be to some person or persons in existence, that intent may be effectuated by ascertaining under proper rules of evidence the intention of the parties, although such person be not designated by his legal or usual name. * * * When a person well known is

named, and that person has gone out of existence without the knowledge of the parties, it may well be that no inference is justifiable that any one else was intended; but when the person formerly bearing the name written in the deed is known to both parties to be dead, the inference is very strong that by the use of that name they mean to designate not the dead man but some existent person or persons. In such case the authorities mainly support the power of courts to inquire into the situation, the general design of the parties, the equities between them, and the like, in order to infer who was intended or who equitably ought to have been.

The doctrine of this case was followed in *Black v. Brown* (195 S.W. 673) where a tax deed was upheld, issued by the county clerk in the name of the purchaser at the tax sale at the instance of the purchaser's son and sole heir, both knowing that the tax purchaser was dead, the title being held to pass to the representatives of the decedent.

The *Plank case* was also cited and applied in upholding a deed made by a woman naming as grantee a daughter 13 years after the daughter's decease. *Lott v. Dashiell* (233 S.W. 1103).

In *Fidelity Securities Company v. Martin* (201 Pac. 301) it was held (syllabus) that:

Where purchaser, pursuant to a contract with third person to so do, caused deed to be executed in the name of third person, the fact that third person had died before execution and delivery of deed to purchaser did not affect the validity of the transaction, since in such case the conveyance will be treated by equity as one to third person's estate.

See also Devlin on Real Estate (Vol. 1, sec. 187; 8 R.C.L., "Deeds," sec. 27).

The grant of the permit to North K. Simmons was, under the doctrine above stated, a grant to those who would be entitled to his estate. It is not necessary to justify such procedure to rely upon the proposition stated in the unreported decision of *John R. Magill, supra*, or *Haynes v. Smith* (50 L.D. 208), that the rights of the applicant under such a permit application pass, on his death, to his personal representatives as other personal property. On further consideration, the Department has held, consistent with the views expressed in the oil and gas regulations and other decisions of the Department and the courts, that such an applicant has no property right by virtue of such application that he can transmit or that can pass to others on his death. *Walter Kearin and legatees of Peter Fern*, decided June 10, 1932 (53 I.D. 699). In so far as the cases of *John Magill* and *Haynes v. Smith* hold to the contrary, they are hereby overruled. Nothing is perceived in the leasing act or in any other law that would prohibit the Department in the exercise of its discretion in the absence of a valid intervening right—and there was none in this case—to recognize that the deceased applicant had done certain things that entitled him to equitable

consideration, and because of the same to grant a permit to those who would succeed to, or have an interest in, his property. The permit when granted was a direct grant by the Government to the persons entitled to his estate because of existing equities and not because any property right therein was transmitted by the deceased applicant. No reason is perceived why the specific person or persons to succeed to the property of Simmons, or the person entitled to represent them, may not be definitely ascertained by further showings on the part of such persons, with a showing as to their qualifications, and, if necessary, the permit reformed to contain their names. Any irregularity in the showing as to citizenship at the time the permit was granted could be waived by the Department in the absence of any adverse claim. The irregularity can not be taken advantage of by a subsequent applicant (*John B. O'Rourke*, 48 L.D. 215), and if the failure to comply with the law is one apparent from the records, it is not ground of protest by a subsequent applicant. *Purvis v. Witt* (49 L.D. 260); *Stahl v. Stiffler* (49 L.D. 406).

As to any question whether Simmons had earned a proper claim for equitable consideration, which is raised by the fourth specification of error, nothing is seen of merit, and it also comes too late. The appellants have not presented any substantial ground, either from a legal or equitable standpoint, warranting the cancellation of the permit issued in the name of North K. Simmons, on the faith of which grant, according to the showing of an heir, possession has been taken, and expenditures incurred in surveying and marking the claim. The motion is accordingly

Denied.

RIGHT OF WAY ACROSS PUBLIC LAND FOR APPROACH TO BRIDGE LEADING TO COLONIAL NATIONAL MONUMENT, VIRGINIA

Opinion, February 15, 1933

PUBLIC LANDS—RIGHT TO USE AND OCCUPY—WHEN SPECIFIC LEGISLATIVE AUTHORITY REQUIRED.

In the absence of specific legislation no authority of law exists to grant a permit to occupy and use Government land for purposes which, in their nature, involve a permanent right or estate.

RIGHTS OF WAY—NATIONAL MONUMENT LANDS—ACT OF JULY 3, 1930— ADMINISTRATIVE AUTHORITY OF SECRETARY OF THE INTERIOR.

The administrative authority vested in the Secretary of the Interior by the act of July 3, 1930 (46 Stat. 855), must be exercised within the limits prescribed by that act, and does not include authority to grant rights of way, by permit or otherwise, over Government land within the Colonial National Monument, Virginia.

FINNEY, Solicitor:

In accordance with the reference of the Assistant Secretary, I have considered the question submitted by the Director of the National Park Service regarding the authority of the Secretary of the Interior to grant the right to the York River Bridge Corporation to construct, upon Government-owned land within the Colonial National Monument, Virginia, approaches to a proposed bridge across York River.

The facts involved and the question submitted are stated in the Director's memorandum as follows:

There is transmitted herewith letter dated January 27, 1933, from the York River Bridge Corporation, together with maps submitted by the Company showing the site of a toll bridge proposed to be erected over the York River for the purpose of connecting Gloucester Point and Yorktown, in which letter application is made for permit to cross over and to erect two bents of the viaduct approach to said proposed bridge, on Government-owned land. The right of way asked for is 80 feet wide and approximately 175 feet in length.

The property in question was purchased by the United States for the Colonial National Monument under authority of the Act of Congress approved July 3, 1930 (46 Stat. 855), as amended by the Act approved March 3, 1931 (46 Stat. 1490) and by the Act approved February 6, 1931 (46 Stat. 1069), from the Jamestown Corporation. The tract involved is designated as "Parcel No. 5" of certain tracts of land acquired by the United States in a deed dated February 16, 1931, from the Jamestown Corporation.

There is no specific authority of law under which such uses of national monument property may be authorized.

It is therefore respectfully requested that this matter be referred to the Solicitor for consideration and his opinion as to whether or not, if deemed advisable and in the interest of the United States, the Secretary may legally grant the right requested by the York River Bridge Corporation by permit or other proper authorization.

Section 5 of the act of July 3, 1930 (46 Stat. 855), providing for the creation of the Colonial National Monument, reads as follows:

That the administration, protection, and development of the aforesaid national monument shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provisions of the act of August 25, 1916, entitled "An Act to establish a National Park Service (U.S.C., Title 16, secs. 1-4, 39 Stat. 535), and for other purposes," as amended.

Sections 1 to 3, Title 16, U.S. Code, relate to the administration of national parks and monuments. Section 4 relates to rights of way for telegraph and telephone lines, electrical plants, canals and reservoirs, in certain national parks, and is not applicable here. The granting of such rights without specific authority of Congress was largely prohibited by the act of March 3, 1921 (41 Stat. 1353).

Rights of way for wagon roads, railroads or other highways over and across national forests are authorized, under certain conditions, by act of March 3, 1899 (30 Stat. 1233; U.S. Code, Title 16, sec. 525),

but no such authority has been granted with respect to national parks and monuments.

The question here presented is whether, in the absence of express statutory authority, the Secretary may grant the right requested, by permit or other proper authorization under the administrative authority conferred by the act of July 3, 1930, *supra*, providing for the creation of the monument and its administration.

Under the authority conferred by law, the National Park Service, under the direction of the Secretary of the Interior, is authorized to promote and regulate the uses of national parks, monuments, and reservations, to conform to their fundamental purposes, to supervise, manage, and control the same, to make and publish rules and regulations for the use and management of the parks, and further, the Secretary of the Interior "may also grant privileges, licenses, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations, but for periods not exceeding twenty years."

The administrative authority thus conferred must be exercised within the limits prescribed by the applicable acts of Congress.

The question as to the authority of administrative officers to grant rights or estates for certain purposes in real property belonging to the Government has been considered by the Attorney General in numerous decisions concerning military reservations.

In an opinion dated November 27, 1928 (35 Op.A.G. 485), involving the question as to the power of the Secretary of War to issue revocable licenses or permits for use of Government property for railway purposes, the subject was reviewed at considerable length. In that opinion, among other things, it was said:

The Secretary of War has no power to grant any permanent right or estate for railway purposes in real property belonging to the Government, and there is no express statutory authority for the grant of revocable licenses or permits for temporary use of Government property for railway purposes, but it has long been the practice for the Secretary of War to grant revocable licenses for the use of parts of military reservations, and the long-continued exercise of this power and the open use of Government reservations by such licensees without legislative objection from Congress implies the tacit assent of Congress to this custom.

* * * * *

As long ago as 1878 the Attorney General, in 16 Op. 152, held that although the Secretary of the Navy had no power to grant to the city of Chelsea any legal title or permanent right to maintain a sewer on naval hospital grounds, he could grant a revocable permit to the city to proceed with the construction and operation of the sewer, pending application to Congress for grant of a permanent right.

In 19 Op. 628 it was held that a revocable license could be granted by the Secretary of War for the construction of an irrigating ditch through a military reservation, and in that opinion the Attorney General referred to cases where

revocable permits had been granted for the construction and operation of railways on military reservations.

In 22 Op. 303 it was held that the Secretary of War could grant a revocable license for the erection on a military reservation of a building to be used as an Indian mission and quarters for necessary teachers.

In 22 Op. 240 it was held that the Secretary of War had authority to grant a revocable license to a street railway company for the location of a street railway line across the Washington Aqueduct Reservation.

In 30 Op. 470 it was held that a revocable license could be granted to a railroad company to construct and maintain a line of railroad over Government land at the south end of the Aqueduct Bridge.

The opinion in 21 Op. 537, which related to an application for permission to erect a Roman Catholic chapel on the military reservation at West Point, and in which it was held that the Secretary of War had no power to grant the permission, is not inconsistent with the other opinions referred to. In the West Point case the application for permission to erect the chapel contained a condition that after its completion the property would be taken over by the United States and permanently maintained. That case, therefore, did not involve a revocable license.

* * * * *

The essential thing is to preserve unimpaired the title of the United States and its right at any time to occupy and use its property and to prevent any use by the licensee which would permanently damage or destroy the property for governmental use. If the permit is revocable at will by its terms, and if the structures which the licensee proposes to erect are capable of being removed in case of revocation, and if upon revocation the land may be left in suitable condition for Government use, the fact that the licensee expects that the United States may not soon find it to its interest to revoke the license has no real bearing on the legal situation.

The above opinions suggest the limitations within which the authority of administrative officers to grant permission for the use of Government property reserved for military purposes may be exercised, and the principles announced are believed applicable to the case here presented. It appears that no power exists to grant a permit to occupy and use Government property for purposes which in their nature involve a permanent right or estate, without specific legislative authority.

The improvement here concerned clearly contemplates a substantially permanent right. While in my view, the granting of a revocable permit affecting Government-owned property within the Colonial National Monument for the purposes here proposed, without express statutory authority, would be unauthorized, it conclusively appears that the grant of the right requested for permanent occupancy and use of the Government property for such purposes, even though it be deemed in the interest of the United States, is not within the authority conferred upon the Secretary of the Interior by existing law. The question submitted by the Director of the National Park Service, therefore, is answered in the negative.

Authority for the use of the Government property for the proposed purpose, if it appears advisable and in the interest of the United States, may be sought through appropriate legislation.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

STATE OF NEW MEXICO

Decided February 17, 1933

SCHOOL LAND—INDEMNITY—FRACTIONAL TOWNSHIP—PROTRACTION SURVEY.

School land indemnity may be allowed for loss based upon the fractional condition of a township even though the township is only partly surveyed, where such loss is shown by a protraction survey of the unsurveyed portion embraced within a reservation added to the portion actually surveyed.

PRIOR DEPARTMENTAL DECISION OVERRULED.

Decision in case of *State of New Mexico* (49 L.D. 314), overruled.

EDWARDS, *Assistant Secretary.*

The State of New Mexico appealed from decision of the General Land Office dated August 10, 1932, holding for cancellation indemnity selection for the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 10, T. 18 N., R. 2 W., N.M.P.M., subject to the right to file new and valid base therefor:

Complaint is made of that part of the decision which refused to recognize as valid base the area of 62.50 acres claimed for loss in T. 17 S., R. 10 E., based upon fractional condition of that township. The claim was denied because the township is only partially surveyed.

It appears that the two western tiers of sections in that township have been surveyed, showing an area of 7519.92 acres. The balance of the township is within the Lincoln National Forest, with the exception of three sections.

It is stated in the said decision that a protractational diagram of the Lincoln National Forest shows Sec. 36 to be fractional, with an estimated area of 390 acres. The total estimated area of that part of the township within the reservation is not stated, but the record indicates that the township contains well over 17,280 acres, which amount, under the grant to New Mexico, would entitle the State to four sections.

In order to expedite the adjustment of school grants to the States, it is the duty of the Secretary of the Interior to determine by protraction or otherwise the number of townships that will be included

within reservations, and where the townships are found to be fractional it is, of course, necessary to estimate the area thereof as a basis for calculating the area of indemnity to be allowed for loss to the school grant on account of the fractional township. An estimate or approximation of the area arrived at in that manner is a proper basis for an indemnity selection for loss by reason of the township being fractional. See *State of California* (20 L.D. 103). The decision in the case of *State of New Mexico* (49 L.D. 314), which announced a rule to the contrary, is hereby overruled.

As regards unsurveyed townships outside of reservations, there is no authority for estimating the areas by protraction for the purpose of adjusting school grants, but where there has been sufficient survey of the township whereby it is made certain that a school section is lost to the State, indemnity for such loss may be allowed, even though the fractional township has not been subdivided. See *State of Oregon* (10 L.D. 498).

In the instant case, the area of the township within the reservation should be determined by approximation, and if the area so determined when added to the surveyed area outside the reservation is such as to leave no doubt, as now appears probable, that the said fractional township contains 17,280 acres or more, then the State should be allowed an area equal to four sections for that township.

The decision appealed from is modified accordingly, and the case is remanded for further appropriate action in harmony herewith.

Modified.

AUTHORITY TO CANCEL PATENT OF INDIAN ALLOTTEE AFTER LAND IS INCUMBERED BY LIEN—ACTS OF FEBRUARY 26, 1927, AND FEBRUARY 21, 1931.

Opinion, February 18, 1933

INDIAN ALLOTMENT—CANCELLATION OF PATENT—ACTS OF FEBRUARY 26, 1927, AND FEBRUARY 21, 1931.

While in the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205), the express limitations upon the authority of the Secretary of the Interior to cancel patents in fee to Indian allottees do not include one forbidding such cancellation where the allottee has conveyed an interest in oil and gas royalty rights since patent in fee was issued, such conveyance would bring the case within the spirit, if not the letter, of the inhibition contained in said acts.

INDIAN ALLOTMENT—CANCELLATION OF PATENT—AUTHORITY OF SECRETARY OF THE INTERIOR—ACTS OF CONGRESS—TRUST PATENT.

The acts of February 26, 1927, and February 21, 1931, authorizing the Secretary of the Interior to cancel patents in fee issued by him to Indian allottees upon his own initiative and without request or consent on the part of the Indian, make no provision for conditional cancellation of such

patents, which form of cancellation would also be inconsistent in principle with the purpose of such acts, which is to restore the land to the same status as though such fee patent had never issued and to issue a new trust patent having the form and legal effect of one issued under the provisions of the act of February 8, 1887, and amendments thereto.

INDIAN ALLOTMENT—ACTS OF FEBRUARY 26, 1927, AND FEBRUARY 21, 1931—
CANCELLATION OF PATENT IN FEE—LEGISLATIVE INTENT.

The language of the act of February 26, 1927, and of the supplemental act of February 21, 1931, evinces an intent on the part of Congress that patents in fee simple issued to Indian allottees before the expiration of the trust period or authorized extensions thereof should not be canceled by the Secretary of the Interior if the land involved is not free of liens attaching subsequent to issuance of the fee simple patent.

INDIAN ALLOTMENT—CANCELLATION OF PATENT—OIL AND GAS ROYALTY OUT-
STANDING.

Where an Indian allottee applied for cancellation of the patent in fee issued to him by the Secretary of the Interior upon that official's initiative and without the Indian's application or consent, and the allotment has since become subject to an oil and gas royalty interest, cancellation of the fee patent is not authorized.

FINNEY, *Solicitor*:

You have requested my opinion upon a question arising under the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205). These acts, which will be respectively referred to hereinafter as the original act and supplemental act, read:

Original act.

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.

Supplemental act.

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indians heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage,

and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the Act of February 8, 1887 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this Act shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired.

Pursuant to the foregoing statutes, Rush Roberts, Pawnee Indian allottee No. 29, has applied for cancellation of the patent in fee issued November 30, 1917, by the Secretary of the Interior upon his own initiative and without an application from the allottee. The patent covered 120 acres of land allotted to Mr. Roberts and described as the E $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 22, N., R. 6 E., in Oklahoma. An abstract of title presented with the record shows that subsequent to the issuance of the patent, Mr. Roberts, by an instrument executed June 8, 1920, conveyed to one T. J. Redd an undivided one-half of his one-eighth oil and gas royalty rights in the 120-acre tract; that Mr. Redd, by instrument executed February 10, 1921, conveyed to Mrs. Jane T. Redd one-half of the interest so acquired; and that by a judgment of the District Court of Pawnee County, Oklahoma, handed down June 2, 1924, in case No. 6077, T. J. Redd and Jane T. Redd v. Rush Roberts and Rose H. Roberts, the plaintiffs were adjudged to be the owners in equal shares of a one-half interest in the oil and gas royalty rights in the land under consideration, subject to certain conditions not here material. Other than these outstanding oil and gas royalty interests, Mr. Roberts, the patentee, appears to still retain the unincumbered fee simple title to the lands.

Efforts to obtain relinquishments of the rights of T. J. and Jane T. Redd having proved without avail, it has been suggested that the patent in fee be canceled conditionally; that is, such cancellation to be made expressly subject to the rights vested in the Redds under the above conveyances and judgment of the District Court of Pawnee County.

The question thus presented is whether the acts above mentioned authorize such a conditional cancellation of the fee patent.

The object of both statutes, of course, was to correct or remedy the administrative error of casting the fee title upon the Indian without his application or consent, by authorizing the Secretary to cancel the patent so issued. The authority to cancel, however, is not absolute. Rights acquired in the patented lands by purchase or mortgage could not, of course, be invaded or taken away without due process of law,

and Congress was careful to protect such rights from impairment by placing a limitation upon the Secretary's authority. This was done in the original act by withholding the power conferred in all cases where the patentee had "mortgaged or sold any part of the land." Likewise in the supplemental act the authority to cancel extends only to "unsold lands not encumbered by mortgage," with the further limitation that the act should not apply "where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired." The express limitations upon the authority of the Secretary thus do not extend to the instant case, in which the title of the patentee is subject only to the interest acquired and now held by T. J. and Jane T. Redd in the oil and gas royalty rights. Nevertheless, it is fairly plain, upon principles well stated in an opinion by former Solicitor Patterson (53 I.D. 325), that an unconditional or qualified cancellation of the patent would not be authorized. In that opinion, which discussed at length the scope of the Secretary's authority under the original act, the Solicitor said:

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.

Cancellation of the patent subject to the royalty interests of T. J. and Jane T. Redd seemingly would afford protection to those interests and at the same time afford the Indian the relief contemplated by Congress is so far as it may be done. That such a conditional cancellation of the patent was neither authorized nor contemplated,

however, is made plain by the declaration in both the original and supplemental acts that the object of cancellation is to restore the land to "the same status as though such fee patent had never issued." Obviously, this end can not be attained where, as here, property rights have been acquired and are outstanding in other parties. Moreover, the supplemental act provides that upon cancellation of the fee patent a new trust patent shall be issued to the allottee or his heirs of the form and legal effect provided by the act of February 8, 1887 (24 Stat. 388), and the amendments thereto. Patents so issued declare, in conformity with the statute, that the United States will hold the land in trust for the sole use and benefit of the allottee or his heirs, as the case may be, for a definite period, with the solemn promise to convey the fee at the end of that period—unless the time be extended by the President—discharged of the trust and "free of all charge or incumbrance whatsoever." So long as the title is burdened by rights or interests subsisting in third parties, such as now rest in T. J. and Jane T. Redd, it is obvious that this promise to convey the unencumbered fee title at the end of the trust period can not be fulfilled.

For reasons stated, it is my opinion that cancellation of the patent in the form suggested is not authorized.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

EXTENSIONS OF TIME UNDER POTASH PERMITS—ACT OF MAY 7, 1932 (47 STAT. 151)—CIRCULARS 926 AND 1274 (50 L.D. 364; 53 I.D. 704) SUPERSEDED.

INSTRUCTIONS

[Circular No. 1292]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D.C. February 23, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of Congress approved May 7, 1932 (47 Stat. 151), the Secretary of the Interior was authorized to grant an extension of time for a period of two years on any potash prospecting permit issued under the act of February 7, 1927 (44 Stat. 1057). The act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved February 7, 1927, entitled 'An Act to promote the mining of potash on the public domain',

is hereby amended by adding thereto a section, to be numbered 7, reading as follows:

'Sec. 7. Any prospecting permit issued under this Act may be extended by the Secretary of the Interior for a period not exceeding two years, upon a showing of satisfactory cause.'

Accordingly, a permittee who has been unable to complete prospecting and who desires to prosecute further prospecting, may, if he shows satisfactory cause, be granted an extension of time for not exceeding two years, 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.

In any case where the permittee is required to maintain a bond under his permit, he must furnish with his 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 should be filed in the local land office having jurisdiction over the land involved prior to the cancellation of the permit and should state what the plans are for continuing prospecting work with information tending to show that the work may be completed within the time, if extended.

Since the life of a potash prospecting permit may be extended beyond two years for which granted, it does not automatically expire at the end of that time. Therefore, until such permit is canceled by the affirmative action by this office or the Department, after permittee has had an opportunity to show cause, it is a bar to other filings of like character for the same land.

These instructions supersede those contained in Circulars Nos. 926 and 1274.

You will give the widest publicity possible to these instructions without expense to the Government.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

H. LESLIE PARKER ET AL.

Decided February 23, 1933

MINING CLAIM—OIL AND GAS LANDS—OIL PLACER.

An application for patent to an oil placer claim based upon a discovery of oil in a certain well thereon must be rejected, where the well was drilled

under the authority of an oil and gas permit granted under the Leasing Act of February 25, 1920.

OIL AND GAS LANDS—PROOF.

In the proof required in oil and gas claims, geologic inferences can not be allowed to prevail over the results of actual tests made of the sand penetrated.

OIL AND GAS LANDS—LOCATION—WORK LOOKING TO DISCOVERY OF OIL OR GAS.

The mere making within a period of several years geophysical examinations to determine the structure of an area including an oil placer to which claim is asserted, and endeavors to induce oil companies to employ their financial resources in drilling further test wells on the claims, do not constitute diligent prosecution of work within the meaning of the mining laws.

OIL AND GAS LANDS—PROSPECTING PERMIT—ELECTION.

One who elects to take an oil and gas permit is bound by such election, and rights under the mining laws which might otherwise be asserted must be deemed abandoned.

OIL AND GAS LANDS—PROSPECTING PERMIT—PLACER MINING LAW—DISCOVERY.

The basic conditions authorizing the grant of a prospecting permit under section 13 of the Oil and Gas Leasing Act are that the deposits belong to the United States and the land applied for is not within the geologic structure of an oil and gas field, and an application under this section is inconsistent and incompatible with a vested right to the oil and gas deposits under the Mining Law by virtue of the discovery of valuable deposits of oil thereon.

OIL AND GAS LANDS—TEST WELL—PLACER MINING CLAIM—ESTOPPEL.

One who is granted permission to drill a test well under the provisions of section 13 of the Oil and Gas Leasing Act, who does not at the time disclose that he is a claimant under the placer mining laws, is estopped from afterwards making such claim.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION FOR PATENT UNDER MINERAL LAW—BURDEN OF CONTESTING.

Where an oil and gas prospecting permit was granted prior to the publication of an application for patent to the land under the Mineral Law, it is the duty of the patent applicant to contest the permit and not the duty of the permittee to adverse the patent application.

OIL AND GAS LANDS—LOCATION—DISCOVERY—DEPARTMENTAL DECISIONS CITED.

Case of Oregon Basin Oil and Gas Company (on rehearing), 50 L.D. 253, cited and followed; cases of *Freeman v. Summers* (52 L.D. 201) and *United States v. Ruddock* (52 L.D. 313, 323) distinguished.

WILBUR, *Secretary*:

November 7, 1930, H. Leslie Parker, M. D. Wheeler, S. B. Wheeler, L. S. Worthington, R. S. Rhoads, and Calvert C. Kirk filed application Cheyenne 051990 for patent to the Middy No. 16 and Middy No. 21 oil placers, covering respectively the SE $\frac{1}{4}$ Sec. 14 and NE $\frac{1}{4}$ Sec. 23, T. 35 N., R. 77 W., 6th P.M. April 23, 1931, adverse proceedings were directed against the application, and on June 9,

1932, upon consideration of the evidence adduced at a hearing of the cause, the Commissioner of the General Land Office reversed the local register and held that no discovery of oil or gas had been made on either claim prior to February 25, 1920, the date of the passage of the Leasing Act, and that the work then in prosecution looking to discovery of oil was not diligently continued to discovery, and that no discovery was made at any time for the benefit of these claims. He therefore held the claims void and the application for rejection. Applicants have appealed, specifying errors of both law and fact.

The undisputed evidence shows that the locations were made in December, 1916, upon lands that are a part of the "Midway Dome." In 1917, Marion N. Wheeler procured an oil and gas lease from the then title-holders of these two and other adjacent oil placer claims and in accordance with a drilling contract he made with the Producers Oil Company, which, among other things, provided that "as soon as oil or gas in commercial quantities is found lessors will apply for patent and lessee will pay costs," a well was begun, May 19, 1917, in the northwest part of Middy 16 and drilled to the depth of 3850 feet, and abandoned on September 19, 1918, because of the loss of the drill stem and failing attempts to find it. Wheeler thereafter made a similar contract with the Midwest Refining Company to drill a well to a depth of 4500 feet unless the Wall Creek Sand was sooner encountered. Under said contract a well was begun December 30, 1919, on the northwest part of Middy No. 21, and called Midwest No. 1. This well was abandoned December 13, 1920, at a depth of 2730 feet because of a crooked hole. Under the requirements of said contract, the drilling rig was skidded about 100 feet and a third well begun on Middy No. 21, called the Midwest No. 2. It was begun March 12, 1921, and drilled 4822 feet to the First Wall Creek sand, wherein was disclosed a minor showing of gas and heavy and dead oil. This well was abandoned August 16, 1923, at said depth, because the well, by successive tapering in size, became too small to drill deeper. No further exploratory operations or development work of any kind followed upon either claim until a drilling cellar was dug and rig erected in April, 1930, a well spudded in May 4, 1930, by the Midwest Refining Company, on the Middy 21, and completed in November, 1930. In this well oil in commercial quantities was encountered at about 4800 feet in the Second Wall Creek sand and also at about 6000 feet in the Middy sand.

The well is identified in the testimony as 11A, which the records of this Department show was drilled by permission of the Secretary of the Interior, given April 24, 1930, as a test well on the land covered by permit application of Stacey E. Boyer, Cheyenne 048864,

approved for reinstatement February 24, 1930, and issued May 9, 1930, and embracing the land in question. Boyer and the Midwest Refining Company, with whom he had a drilling contract, joined in the request to drill this well, and petitioned to have the area within this permit included in an area covered by a development program set forth in a cooperative drilling contract made July 6, 1929, between certain other holders of oil and gas permits on the Midway structure and said company, which program had theretofore been approved by the Secretary, October 2, 1929, to the extent of authorizing two test wells to be drilled. The order of the Secretary of April 24, 1930, consented to the inclusion of Boyer's permit area in that covered by the cooperative drilling contract and permitted drilling of one of the test wells theretofore authorized on such permit area.

To this cooperative drilling contract, to which Boyer became a party, H. Leslie Parker, M. N. Wheeler, and other of these applicants for patent were parties or beneficiaries thereunder, and it was presented for approval in their behalf in the character of suppliants for extension of time upon certain oil and gas permits in which they had interests.

After the abandonment of the Midwest No. 2 well in August, 1923, until certain road-building was begun in February, 1930, preliminary to the drilling of the 11A well, all that was done towards further exploratory work by these claimants and their associates was the making of geophysical examinations with torsion balance and magnetometer to obtain or confirm data relating to structural geology and endeavoring to induce a number of large oil companies to enter into drilling contracts and test the structure covered by these claims and numerous other holdings under permits or other claim of title.

All of the wells mentioned passed through the Shannon sand, encountered from 2400 to 2430 feet. This sand was found to be parted by a layer of impervious shale seven or eight feet thick, the upper measure of which sand was about 25 or 30 feet thick and the lower 10 to 15. When this sand was reached water rose in the well in one instance to 200 feet from the surface. The back pressure when the lower Shannon sand was encountered in the well first drilled with rotary drill amounted to 1100 pounds per square inch, and the water in the Midwest Well No. 1, drilled with cable tools, exerted at similar depth a like pressure of 1000 pounds per square inch. In each of the three wells first drilled indications of oil and the presence of gas were revealed. The showings thereof in all three wells as detailed by the witnesses were substantially the same, the most pronounced being described as bubbles of gas, froth or cut mud extending across the entire fluid stream, having a distinct

odor of petroleum, which when ignited would explode a throw of flame four or five or less feet long. Rainbow colors were noticed in the bubbles and film, indicating the presence of oil. The gas could be ignited at will from off the bailer. In none of these wells was any attempt made to ascertain the volume of gas encountered by shutting off the water, and the drilling was continued without interruption below the Shannon sand, although it appears that the question of testing was raised but not attempted in the first well drilled, and also considered when the gas in the Midwest No. 2 was encountered, but put aside because such a test would involve the loss of a string of casing and imperil the chances of reaching the objective, the First Wall Creek sand, by reason of the inadequacy of the type of drilling rig then available for such drilling. The drillers of the Midwest No. 2 and 11A wells testified that they were instructed to **disregard the Shannon sand.**

A scout for another oil company, who kept track of the drilling through the Shannon sand in the first well, and who detailed what he saw as to disclosures of oil and gas, testified that when the drilling of that sand was completed "our interest was pretty well washed up," as he figured that the Wall Creek sand was too deep to be commercial, and no production had been established; that though he believed the Shannon sand was not then adequately tested, he could not say a commercial body of oil was disclosed. The two drillers who drilled Midwest No. 2 testified also in substance that they paid little attention to the showing of oil and gas in this well at the time and did not think it amounted to much, but that later experience in drilling the Shannon sand in the Salt Creek field, where gas in commercial quantities was shown to have been smothered or killed by similar water pressure, had led them to change their opinion as to this well.

Like views were expressed by defendants Wheeler and Parker in their testimony, the latter stating that he considered the well commercial when the gas showing was disclosed. Wheeler gave what he termed a "rough estimate" and Parker what he termed a "dependable guess" that from 1,500,000 to 5,000,000 cubic feet of gas per day would have been shown in any of the three wells, as coming from the Shannon sand, had a proper test thereof been made. Both of these defendants, however, admitted the execution and presentation to the Department of affidavits made by them in the character of oil and gas permittees under permits on the Midway structure in connection with applications for extension thereof, and for permission to drill test wells on the Midway and other structures. These affidavits, after specific reference to the wells which the affiants now assert resulted in adequate discoveries of gas in suffi-

cient volume to be commercial, contain statements that "substantial showings of oil and gas were obtained, but not sufficient for profitable production * * * and notwithstanding the discouraging results so far (the affiants) are still desirous of testing said lands in said three fields," and other statements of like import.

The District Geologist for the Midwest Company, called by defendants, testified to the effect that the various formations between the oil sands on the Midway Dome, so far as known, are impervious and there is no disclosed faults from which migration of oil or gas from one sand to another could be inferred.

The Commissioner rejected the contentions of the defendants—

(1) That the showing in the three wells first mentioned constituted valid discoveries of oil or gas; and

(2) That the drilling of well 11A was diligent prosecution of work in behalf of these asserted oil placer claims.

In both of these rulings the Commissioner was clearly right. The evidence shows that the actual disclosures of oil or gas in the three first wells were negligible and inconsequential. The conduct of the claimants and their lessee thereafter convinces the Department that they were in no wise induced by what they saw or found in the Shannon sands to rely upon them as a discovery or to expend further time or money in the hope of developing therein oil or gas in commercial quantities. On the contrary, their objective was thereafter the sand that laid below. The so-called estimates of gas volume in these wells is mere surmise, with no demonstration of its proven presence in such quantities, and their assertions now as to their beliefs that there was adequate discovery are not compatible with the statements and position taken in the affidavits mentioned. The reasoning that because a head of water in a well elsewhere, comparable with that disclosed in these wells, smothered and suppressed gas in sufficient quantities to be commercial, therefore it must have done the same in these wells, is plainly a mere supposition. The Commissioner, therefore, correctly applied the rule in *Oregon Basin Oil and Gas Company* (On Rehearing), 50 L.D. 253, that—

To support a mining location, the discovery upon which the validity of the location is based must be of the particular deposit actually discovered within the limits of the claim for the reasonable prospect of the development of which into a valuable mine the evidence warrants further expenditure of time and money.

Counsel for the defendants, in their brief, attempt to distinguish the facts in the Oregon Basin case from the one at bar, in that in the former the asserted discovery was found in a small local lens of sandstone not capable of production anywhere, while exploration in the Shannon sand in the Big Muddy Field, 18 miles distant, and in the Salt Creek field and other fields at greater distances, exhibiting

similar conditions of sand porosity and hydrostatic pressure as in the Midway field, disclosed some production of oil and gas in commercial quantities.

Geologic inferences, however, cannot be substituted for or be allowed to prevail over the results of the actual tests of this sand within the claims. The Oregon Basin case and the case at bar are alike in this, that the deposits within the claims actually encountered, relied upon as discoveries, were not shown to contain oil and gas in sufficient quantities to render the land valuable on account thereof, and are wholly separate and distinct from oil sands at much lower depth, in which valuable deposits were encountered.

Appellants seek support for their contention that a discovery was made in the three wells first mentioned in the unreported case of *United States v. Dudley Oil Company*, decided October 3, 1918, and the case of *Freeman v. Summers* (52 L.D. 201). The facts in the Dudley Oil Company case were clearly distinguished from the facts in the Oregon Basin case in the Department's decision on appeal in the latter (50 L.D. 244, 251), and in *United States v. Ruddock* (52 L.D. 313, 323), and the facts in the Oregon Basin case were clearly distinguished from those in the Freeman Summers case in the decision rendered in the latter.

In the Dudley case, oil in commercial quantities was produced from wells on nearby land from the same stratum of sand reached by alleged discovery well in that case, which had an estimated yield in itself of 15 barrels per day. In the Freeman v. Summers case, the finding of discovery was predicated on the evidence that the oil shale there in question "is one massive homogeneous deposit of like material * * * one stratum, one bed, from its base to its topmost reaches; that all sections of the stratigraphic column of this formation contain either shale, sandy shale, or sand that will yield oil upon destructive distillation; that the whole body will be commercially developed and is all valuable."

This being so, the Department said that "having made his initial discovery at or near the surface, he (the locator) may with assurance follow the formation through the lean to the richer beds."

The Commissioner declined to consider the evidence as to the exploration and discovery in the 11A well, as for the benefit of these claims, first because it did not constitute diligent prosecution of work within the rules stated in *McLemore v. Express Oil Company* (158 Cal. 559), and second, because the well as shown by records of this Department was drilled as a test well by express authority of the Secretary "at the instance of several prospecting permittees all of whom are not parties to this proceeding."

In enumerating certain activities by mineral claimants which would not constitute diligent prosecution of work, the court in the

McLemore case said that "it did not mean the pursuit of capital to prosecute the work." This statement has been approved and applied in later cases. *Borgwardt v. McKittrick Oil Company* (130 Pac. 417), *Pacific Midway Oil Company et al.* (44 L.D. 420, 426). The evidence shows that all these claimants and others associated with them were doing for over six years after the Midwest No. 2 was abandoned was to induce oil companies to make geophysical examinations of a large area, including these claims, and endeavoring to have them employ their financial resources in drilling further test wells. This was plainly not diligent prosecution of work looking to discovery of oil or gas.

In addition to what has heretofore been stated as to the circumstances under which well 11A was by the Department permitted to be drilled, the records in this Department show that defendants Wheeler and Parker joined with Boyer and presented in August, 1930, an assignment of permit 048864, dated February 21, 1929, from Boyer to them jointly, and an assignment dated August 7, 1930, from Parker of his interest to Dawn F. Parker, who he admitted in testifying in the case was his wife. Approval was sought of these assignments. It is further shown that said Wheeler and Dawn F. Parker, as such assignees, on January 26, 1931, applied with Boyer and the Midwest Refining Company, as operator, for an oil and gas lease of the land within such permit, based upon a discovery of oil and gas in the very same well, 11A, which Wheeler and H. Leslie Parker are now attempting to assert was drilled in behalf and for the development of the Middy 16 and 21 claims. These last two named also, in the character of such assignees, joined with the permittee and Midwest Refining Company in an application for the enlargement of the permit. The basic conditions authorizing the grant of a prospecting permit under section 13 of the Leasing Act are that the deposits belong to the United States and the land applied for is not within the geologic structure of an oil and gas field. When Wheeler and Parker and the Midwest Oil Company sought and obtained the permission of the Department to drill this test well and acquired interests under the Boyer permit, they necessarily represented that these basic conditions for authorizing operations under a prospecting permit existed. At no time did they assert that they had a vested right to the oil and gas deposits under the Mining Law by virtue of discovery of valuable deposits of oil thereon, which would have precluded the grant of such a permit to them and the permission to drill a test well. Neither they nor anyone in whose behalf they acted can be heard to say that this well was drilled for the benefit of the asserted mining locations. Having thus attorned to the Government they cannot dispute its title to such deposits. It

is a settled principle that where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he can not afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another who has acted in reliance on such conduct and representation. (21 C.J. 1202, "*Estoppel*," sec. 204). The Commissioner rightly disregarded all evidence as to the drilling of the 11A well as prosecution of work in behalf of these mining claims.

There is much in the record that suggests that applicants for the mineral patent, other than Wheeler, who admits a present interest in the Boyer permit, have by agreements in connection with the cooperative drilling program become partakers in the benefits from the sale of oil and gas produced in the well drilled under said permit, and therefore asserting contemporaneously rights under the mining laws and the Leasing Act, which can not be permitted. *Joseph E. McClory* (50 L.D. 623); Departmental letter to C. L. Richards (50 L.D. 650). As to such beneficiaries, they are bound by their election to take an oil and gas permit, and their asserted rights under the mining laws must be deemed abandoned. *Honolulu Cons. Oil Co.* (48 L.D. 303); *Hodgson v. Midwest Oil Co.* (297 Fed. 273); *Robins v. Elk Basin Cons. Petroleum Co.* (285 Fed. 179); *Metson v. O'Connell* (52 L.D. 622).

It is not necessary, however, to make further inquiry as to the extent of such interests, as under the view the Department takes of the evidence the mining claims never had any valid existence.

There is no merit in the contention of the appellants that the failure of the permittee to adverse the patent application during the period of publication thereof, forecloses any assertion of right under the permit. The permit was granted before the application for patent was filed. It was the duty of the patent applicants to contest the permit and first show that they had a superior right under the mining locations. Appendix to Oil and Gas Regulations, Circular 672 (47 L.D. 463, 470). Under the long established policy of the Department to treat as excluded from entry or filing lands to which the claims of others have been allowed, these appellants by their application acquired no legal status other than that of a contestant. *State of Utah, Pleasant Valley Coal Company Intervener, v. Braffet* (49 L.D. 212); *Work v. Braffet* (276 U.S. 560). The mineral application should, therefore, never have been permitted to proceed to publication, and no adjudication in this proceeding solely between the Government and the mineral claimant that the mineral claims were valid, had the evidence so warranted, would have been binding upon the permittee or his privies in interest, to the extent they are not actually parties to the proceeding. Furthermore, an

oil and gas prospecting permit is not granted under the general mining laws, and the rule, that a mineral claimant's failure to adverse an application for patent to a mining claim results in the conclusive presumption that no such claim exists, has no application.

By leave of the Department, additional showings in support of the appeal have been filed by the applicants, which relate to the drilling of an additional test well in 1932 upon the land claimed under the Middy 16 location, and the reconditioning the well, heretofore mentioned, drilled by consent of the Secretary on the land within the Middy 21 location, resulting in increased production of oil therefrom. A statement is made as to the showings of oil and gas encountered in the series of sand strata penetrated in the prosecution of these operations, and of the aggregated costs of all the exploration and development upon the lands within the two claims, all of which is asserted to have been done for the benefit of the original locators of the mining claims.

In view of the conclusions above reached and fully stated, the operations set forth in this additional showing can not be regarded as work in behalf of the mining claims and do not in the least change the Department's view that Middy Nos. 16 and 21 are void claims, and that the application for patent thereto is totally without merit.

For the reasons herein stated, the Commissioner's decision is
Affirmed.

INDIVIDUAL SURETY BONDS

AMENDMENT OF REGULATIONS

[Circular No. 1293]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., February 25, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

Hereafter where bonds are furnished, with individuals as sureties, in connection with permits and leases under the General Leasing act, such individuals must be residents of the State and the United States Judicial District in which the lands involved are located.

Evidence of such residence must be furnished by affidavits of the sureties.

Existing circulars relating to such bonds are hereby modified only to the extent above stated.

You will give as much publicity to this circular as possible without expense to the Government.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

UNITED STATES v. STATE OF NEW MEXICO

Decided February 28, 1933

SCHOOL LANDS—INDEMNITY SELECTION—OIL AND GAS—EVIDENCE—ACT OF JULY 17, 1914.

The action of a State in granting an oil and gas lease of lands embraced within an uncompleted school indemnity selection list is tantamount to an oil and gas classification, within the meaning of the Act of July 17, 1914 (38 Stat. 509), when the prospective oil and gas value is confirmed by the Geological Survey, or from other sources.

EDWARDS, *Assistant Secretary:*

By decision of December 31, 1929 (52 L.D. 741), the Department, in modification of a decision by the Commissioner of the General Land Office, directed that a hearing be ordered to determine the character of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1, T. 21 S., R. 33 E., N. M. P. M., New Mexico, embraced in an indemnity school land selection list of the State of New Mexico, completed August 22, 1927. It was stated:

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 ordered 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.

The facts in the case up to the time of said decision are fully set forth therein and need not be repeated here. A hearing was duly ordered and held. Upon consideration of the testimony taken, the register found that the Government had proved that the land was prospectively valuable for oil and gas on August 22, 1927, and recommended that the selection be canceled unless a waiver of oil and gas content be filed. The State appealed, and by decision of November 12, 1932, the Commissioner affirmed the decision of the register, stating:

After the date of original filing, and on January 28, 1925, the State issued an oil and gas lease covering the tract. This, as well as the evidence submitted at the hearing, clearly shows that the tract was known to be prospec-

tively valuable for minerals, including oil and gas, on August 22, 1927, when the selection was completed, as well as on March 9, 1915, when it was first filed.

The State has appealed to the Department.

A mining engineer of the General Land Office testified that he first became acquainted with land in the general vicinity of the tract involved in 1923, when he was engaged in examining lands selected by the State of New Mexico; that from 1924 to 1928 he usually came into the general locality about once a year for the same purpose; that on February 12, 1932, he examined the tract in particular to determine its prospective value for oil and gas; that the surface was gently rolling; that the overlying covering of sand and soil was several hundred feet thick, so that the structure of underlying rocks could not be determined from surface indications; that the tract was in a producing oil area known as the Lea field; that there was a producing oil well three-fourths of a mile northwest; that there was a producing well on the NW $\frac{1}{4}$ Sec. 34, T. 20 S., R. 34 E., which was begun December 13, 1928, and completed April 11, 1929; that said well was the first producer in this field, had a depth of 3730 feet, and produced 1200 barrels of oil per day; that there was another producing well on lot 9, Sec. 2, T. 21 S., R. 33 E., which was begun June 1, 1929, completed August 21, 1929, produced 1700 barrels per day, and was approximately one mile northwest from the tract here involved; that there were two other productive wells on said lot 9, begun and brought in later; that two productive wells on Sec. 1, T. 21 S., R. 33 E., were begun in 1929 and finished in 1930; that about 1923 or 1924 he saw oil bailed from a well in the vicinity of Dayton; that in 1924 or 1925 he was in the Artesia field when the first producer in that field was brought in; that about 1926 he read of discovery of oil in the Winkler field; that in about 1927 he learned of production in the Jal field; that since then there had been discovered other fields; that from study of rocks west of the Pecos River in 1923 and 1924 and from knowledge of the drilling and bringing in of oil wells later he was convinced that the lands in southeastern New Mexico had a prospective value for the production of oil and gas and that the only means of positively determining the value of the various areas would be to drill and determine whether or not the land would produce. On cross-examination the witness testified that there were some dry holes near the tract in question, but that the area was not necessarily thereby condemned.

The testimony of the mining engineer was in a measure corroborated by the testimony of Jim Berry, a driller of oil wells, who had been acquainted with this land from 1925.

Two geologists for oil companies testified on behalf of the State that they were acquainted with the Lea field and that in their opinion the prospect of finding oil in paying quantities in the land involved was not such as to warrant large expenditures to that end. One admitted on cross-examination that he would call the land part of the Lea area and that it had prospective value for oil and gas. The other witness was of the opinion that this tract was three-fourths of a mile outside of the Lea field, but admitted that there was a possibility that it contained oil and gas.

It has been fully established by the evidence that the land in question was known to be prospectively valuable for oil and gas on August 22, 1927, the date when the State's selection was regarded as completed.

At the hearing the district law officer of the General Land Office directed attention—

* * * to the fact, as evidenced by the original records pertaining to this case, that the State of New Mexico, on the 28th day of January, 1925, issued an oil and gas lease, No. 2062, embracing the land in question, to J. G. Roberts, which lease by certain assignments ultimately was assigned, and which assignment was approved by the State of New Mexico on April 5, 1929, to Brice McCandless, and that said lease No. 27 and assignments are evidenced in the appeal filed in this case by photostatic exhibits A and B, respectively.

In section 3 of the act of July 17, 1914 (38 Stat. 509), it is provided:

That any person who has * * * selected * * * or * * * shall hereafter * * * select * * * under the nonmineral land laws * * * any lands which are subsequently withdrawn, classified, or reported as being valuable for * * * oil, gas * * * may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable.

In its regulations under said act of 1914 (Circular No. 393, 44 L.D. 32, 33) the Department has ruled:

The term "person" used in this act will be interpreted as covering a State (See State of Utah, 38 L.D. 245), or other corporation, or association when duly qualified.

The question arises as to whether any effect is to be given to the State's action in granting an oil and gas lease for the land involved more than two and one-half years prior to the date when equitable title could pass to the State, if it could pass at all.

In connection with the case of *Heirs of Robert H. Corder* (50 L.D. 185), the Department used the following language:

The Department has held in a number of cases that where an entryman files an application for prospecting permit, as this entryman did, expressing the belief that the lands contained oil, this expression constituted an admission

that the land had a prospective oil and gas value and offered a favorable field for prospecting operations, rendering unnecessary procedure under 12 (c) of the oil and gas regulations as a basis for requiring the entryman to file his consent to a reservation of the oil and gas content of the land to the Government.

It is true that the oil and gas lease granted by the State was in the nature of a prospecting permit and covered many widely scattered tracts. But the State accepted yearly rent and continued the lease for the particular tract here involved. It would seem that under these conditions the land should be considered as having been "reported as being valuable" for oil and gas prior to August 22, 1927, and that it would be incumbent upon the State to prove the nonmineral character of the land, or waive its rights to oil and gas therein in accordance with the provisions of the act of July 17, 1914, *supra*, before it could be regarded as having completed the selection so as to effect the passing of equitable title. The State in its appeal has cited and quoted excerpts from the case of *Wyoming v. United States* (255 U.S. 489). But the situation was different there because the State had done everything necessary and had fully completed its selection before any question as to the character of the selected land arose. In the present case the selected land was reported as being valuable for oil and gas prior to the time the State completed its selection, and equitable title has not passed.

The report of value for oil and gas contemplated in the act of July 17, 1914, is the *prospective* value. See *Foster v. Hess* (50 L.D. 276). The action of the State in granting an oil and gas lease was tantamount to an oil and gas classification, and this classification was confirmed by the report of the Geological Survey dated July 10, 1929, and subsequent developments have warranted the inclusion of the land within the boundaries of the geological structure of a producing oil and gas field.

The State contends that the character of the selected land should be determined as of March 9, 1915, the date when the selection was originally made. There is no merit in the contention, because it would be equivalent to saying that equitable title passes on the acceptance of a selection list in the local land office, regardless of any question of validity of base or other defect. It is clear from the language in the Wyoming case, *supra*, that equitable title does not pass before *completion* of the selection. The selection in this case was not completed March 9, 1915, and in fact this Department takes the view that said selection has not yet been completed, inasmuch as the State must satisfy the Department regarding the mineral or nonmineral character by reason of having granted an oil and gas lease prior to the time of completing the selection in other respects.

The State further contends that waivers of minerals can not lawfully be required from the State of New Mexico, and that if its officers consent to such waivers their acts are illegal and void, citing Section 10 of the Enabling Act of June 20, 1910 (36 Stat. 557, 561).

The Department is not impressed with this argument. Only non-mineral lands could originally be selected. The act of July 17, 1914, has made possible the selection of lands valuable for oil and gas, with reservation of oil and gas content to the United States. If any State is desirous of taking advantage of this further right in selection of lands it may do so. Its title will be restricted and it will have no more to convey than is granted. If the State of New Mexico attempts to select land which is valuable for oil and gas, within the meaning of the act of July 17, 1914, it will either waive its right to the oil and gas content therein or suffer rejection, or cancellation, of its selection. Congress has not found that the State of New Mexico, or any other State, may not make indemnity school land selection with reservation of some mineral to the United States. See the act of April 30, 1912 (37 Stat. 105).

For the reasons hereinbefore stated the decision appealed from is

Affirmed.

ABANDONMENT OF WELLS ON OIL AND GAS PROSPECTING PERMIT LANDS

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,

Washington, D.C., March 2, 1933.

THE DIRECTOR, GEOLOGICAL SURVEY;

THE COMMISSIONER, 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 or his authorized agent to perform the necessary work. (See Operating Regulations, Sec. 1 (a) and (e).) If steps to perform the required work are not taken with reasonable promptness, the supervisor shall report to the Geological Survey stating in detail the conditions that exist, the efforts made by him to have them corrected and the results thereof, the approximate cost of abandoning properly each well involved, as well as information available as to the financial status of the permittee and of the principal on the bond, if other than the permittee, and shall

make specific recommendations as to the action to be required of the permittee.

2. The Director of the Geological Survey will immediately serve notice by registered mail on the permittee and on the principal on the bond, if other than the permittee, at his record address (copy being sent to the supervisor and to the General Land Office), allowing thirty days from receipt of notice within which to initiate proceedings through the office of the oil and gas supervisor looking to the requisite abandonment in accordance with the operating regulations; and will transmit by regular mail to the home office of the bonding surety company a copy of such notice, advising the surety that unless satisfactory steps are taken to comply with the order within the time allowed the Government will protect its interests by appropriate proceedings, and will look to the surety under the bond to perform the necessary work or to defray the cost thereof.

3. Upon expiration of the time allowed the supervisor will make a field investigation and report the then existing facts as disclosed by such investigation to the Geological Survey.

4. If the supervisor shall report that satisfactory steps toward abandonment have not been taken, the Geological Survey will immediately notify the home office of the surety company, reporting all pertinent facts, stating the estimated cost of abandoning each well involved, giving any information available as to the financial status of the principal on the bond, and allowing the surety thirty days to indicate what action it desires to take.

5. If the surety company so requests, the Geological Survey, through the oil and gas supervisor, will prepare specifications for performance of the requisite abandonment at the cost of the surety and issue invitations for bids, in triplicate, to three or more responsible contractors, and the supervisor will forward two copies of all bids received to the Geological Survey with a report as to the reasonableness of the bids, the reliability of the bidders, and his recommendation.

6. The Geological Survey will forward one copy of all such bids received to the surety for consideration. If the surety company accepts one of the bids and authorizes the necessary abandonment work to be done by notice direct to the bidder, upon notification thereof the Geological Survey, through the supervisor, will direct and supervise the performance of the work without expense to the surety.

7. When the work is completed to his satisfaction the supervisor will so notify the contractor and will make a report to the Geological Survey and the Department will notify the surety company that there will be no objection to release of all liability under the bond after the surety company makes direct payment to the contractor of the bid price.

8. If the surety company decides that it has no liability in a stated case, or fails, within the time allowed, to take action or to request the Geological Survey to take action looking to performance of the requisite abandonment as herein provided at its expense, the Geological Survey will submit the case to the General Land Office, where the same will be considered and recommendation made to the Secretary of the Interior for the institution of suit against the surety company to recover the damages sustained by the United States by reason of the failure of its principal to abandon the well or wells, such damages to be considered to be the estimated cost of plugging and abandoning the well or wells as reported by the Geological Survey. In case the General Land Office is of opinion that the surety company is not liable or for other reasons that suit will not lie to recover the damages reported, a report to that effect will be submitted to the Secretary for consideration.

These instructions supplement the instructions of April 23, 1928 (52 L.D. 353); and all provisions of those instructions inconsistent herewith are hereby revoked.

RAY LYMAN WILBUR,
Secretary.

**SUSPENSION OF ANNUAL PAYMENTS OF RENTAL UNDER COAL,
OIL, AND/OR GAS LEASES—ACT OF FEBRUARY 9, 1933 (47 STAT.
798), AMENDING ACT OF FEBRUARY 25, 1920, BY ADDING
THERE TO SECTION 39.**

REGULATIONS

[Circular No. 1294]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 3, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of February 9, 1933 (47 Stat. 798), the Leasing Act of February 25, 1920 (41 Stat. 437), is further amended by adding thereto the following section:

Sec. 39. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production of coal, oil, and/or gas under any lease granted under the terms of this Act, any payment of acreage rental prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto: *Provided*, That nothing in this Act shall be construed as affecting existing leases within the borders of the naval petroleum reserves and naval oil-shade reserves.

The provisions of the act apply to oil and gas and coal leases where, in the interest of conservation, suspensions of operations and production have been or may be directed or assented to by the Secretary of the Interior whether the form of suspension is by order of the Secretary of the Interior, by reason of the restricted drilling clause now inserted in the secondary or (b) lease, or by the granting of such relief upon application by the lessee.

No payment of rental under such leases so suspended is therefore required to be made during the suspension periods, beginning with the first annual rental date after suspension, or after the date of the act when suspension was then in effect, and continuing until the suspension is terminated, by revocation of the order of suspension, direction by the Secretary, or his authorized representative, to operate the lease, or by resumption of operations by the lessee.

While the act does not relieve lessees from payment of rentals accrued prior to its date on leases heretofore suspended, such lessees who are now in default in the payment of past rentals accrued during suspension of operations and production under their leases will be allowed to defer payment of the amounts due until termination of the suspension periods or until otherwise directed by the Secretary.

Relief from payment of rentals under suspended leases will not be affected by the payment by the lessee of compensatory royalty in lieu of drilling offset wells.

In computing the term of any oil and gas lease, the time, if any, subsequent to February 9, 1933, during which operations and production under the lease may be suspended in the interest of conservation, will not be considered as a part of such term.

A suspended preference right to lease the secondary or (b) acreage of the permit will no longer be granted to applicants for lease under Section 14 of the Leasing Law. Those who have accepted such rights in lieu of leases with the restricted drilling provision authorized by the regulations will be given notice and allowed 60 days from receipt thereof to execute and file leases, such leases to contain the restricted drilling provision. Any such lease, if issued, will not require payment of annual rental thereon until drilling and producing under the lease are authorized. In case, after notice, the holder of such preference right to lease fails to complete the lease, no further right to lease the land will be recognized, and the permit will be canceled.

The provisions of the act apply to coal leases where suspension of the requirements of Section (2-i) of the leases is made in the interest of conservation. However, a coal lessee will not be excused from payment of annual rental where the required production under

the lease is modified to a lesser amount than provided in the lease, or modified to require no production where the application for such modification is made subsequent to the expiration of the year for which the relief is requested.

C. C. MOORE,
Commissioner.

I concur:

W. C. MENDENHALL,
Director, Geological Survey.

Approved:

RAY LYMAN WILBUR,
Secretary.

BURNHAM CHEMICAL COMPANY v. UNITED STATES BORAX COMPANY AND WESTERN BORAX COMPANY; UNITED STATES, INTERVENER

Decided March 8, 1933

MINERAL LANDS—TERM "SODIUM BORATE" IN GENERAL LEASING ACT—KERNITE.

The term "sodium borate" in section 23 of the Leasing Act of February 25, 1920 (41 Stat. 437), related to the character of the deposit as found in the ground; therefore, the fact that the products produced from kernite, a sodium borate mineral, such as borax and boric acid, are chiefly valuable for their boron content, does not exclude kernite from the purview of the act.

MINERAL LANDS—SEC. 23, GENERAL LEASING ACT—STATUTORY CONSTRUCTION.

Considering the circumstances that led to the enactment of section 23 of the General Leasing Act (see 41 Stat. 448) as disclosed in the proceedings before the Public Lands Committees of Congress, by the phrase in that section reading "dissolved in and soluble in water and accumulated by concentration" was meant natural evaporation residues dissolved in and accumulated by surface or ground-water drainage in the form of brines and later crystallized.

MINERAL LANDS—OPINION EVIDENCE—CONFLICTING CONCLUSIONS.

Where expert opinion evidence conflicts as to whether the deposits of sodium borates in question were natural evaporation residues dissolved in and accumulated by surface ground-water drainage or were hot springs products of fumarolic type, and such opinions are no more than theory and assumption and no way proved, if the adoption by the Department of the more plausible and probable theory would run counter to the conclusion of eminent scientists on a highly technical question, and subject a mining claimant to the probable loss of all benefits from his explorations and development at large cost made on the faith of an opposing theory, the Department will adopt the latter theory in disposing of the case.

MINERAL LANDS—LODE AND PLACER DEPOSITS—COLEMANITE AND ULEXITE.

Where deposits of colemanite and ulexite have been located as placer upon reliance upon a practice in the Land Department to permit the patenting

of lands containing such minerals solely as placer locations, the placer claimants should not have their rights assailed because the deposits might more appropriately be deemed lode in form and character.

EDWARDS, *Assistant Secretary*:

On October 26, 1927, the United States Borax Company made mineral entries in the Los Angeles land district as follows:

044251 for the Keen placer, covering SE $\frac{1}{4}$, and 044266 for the Big Keen No. 2 placer, covering lots 1 and 2 and NW $\frac{1}{4}$ Sec. 18, T. 11 N., R. 7 W., S. B. M. The Keen placer is alleged to have been located October 3, 1924, and to be valuable on account of mineralized shale yielding boric acid. The Big Keen No. 2 is alleged to have been located May 2, 1925, and to be valuable on account of deposits of ulexite.

On August 1, 1928, the same company made application 045946 for the Little Placer, covering SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., alleged to have been located August 11, 1926, and valuable for deposits of borate of lime.

On March 21, 1928, the Western Borax Company made mineral entry 044801 for the Tincal No. 2 placer, covering SW $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., and on April 24, 1928, made mineral entry 044800 for the Tincal placer covering the SE $\frac{1}{4}$ of the same section, township, and range. The locations of Tincal Nos. 1 and 2 are alleged to have been made July 23, 1926, and the application for patent is based upon discoveries of valuable deposits of "borates of soda or tincal."

On June 1, 1928, the Burnham Chemical Company filed application 045676 under the provisions of the General Leasing act of February 25, 1920, for a sodium prospecting permit covering all the tracts above described and other lands, and followed it up on June 7, 1928, with a protest against the issuance of patents for the Tincal Nos. 1 and 2, and the Keen and Big Keen No. 2, on the ground that the deposits contained in said claims were subject to disposition only under the provisions of the General Leasing act.

On October 25, 1928, the Geological Survey reported that the lands in Sec. 24, T. 11 N., R. 8 W., contained sodium salts in commercial quantities and were subject only to lease. On January 21, 1929, the Burnham Chemical Company filed application 046681 for a sodium lease, covering the S $\frac{1}{2}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of the above-mentioned Sec. 24.

On November 23, 1928, the Commissioner of the General Land Office directed a hearing between the above-named permit applicant and the mineral applicants to determine whether or not the lands within the above-stated mining locations were "valuable for sodium in any of the forms described in the Leasing Act of February 25, 1920, and so known at the date of the respective placer mining locations."

The burden of proof was placed upon the permit applicant to show that the land was valuable for sodium within the meaning of the act, and it was directed that the Government be represented in order that all facts relative to the mineral character of the land be brought out.

Upon the evidence adduced at the hearing the register held, in substance and effect, that borate of sodium had not been discovered, nor could it reasonably be presumed to exist upon the three claims of the United States Borax Company; that the sodium borate discovered upon the two locations of the Western Borax Company was not within the purview of the act of February 25, 1920, and that prior discoveries of colemanite and ulexite thereon were sufficient to validate those claims, and recommended rejection of the applications of the Burnham Chemical Company.

The Commissioner held that the claims of the United States Borax Company were valid upon the same grounds that were assigned by the register, but as to the claims of the Western Borax Company, in substance and effect, his ultimate conclusions were that valuable deposits of calcium borates, namely, colemanite and ulexite, were discovered first on the Tinal claims and the Little Placer, without actual knowledge at that time by the claimants thereof of the existence of the underlying sodium borate deposits, and that the discovery of such calcium borates was sufficient to validate the claims, and therefore consideration of the evidence as to the origin and mode of deposition of the sodium deposits with a view to the determination of whether they were sodium borates within the meaning of the act of February 25, 1920, was unnecessary. The Commissioner accordingly affirmed the register's decision and held the permit application of the Burnham Chemical Company for rejection, from which holding the Burnham Chemical Company has appealed.

Section 1 of the Leasing Act of February 25, 1920 (41 Stat. 437), provides: "That deposits of coal, phosphate, sodium, oil, oil shale, or gas *and lands containing such deposits* owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act * * *", and section 37 of the act provides that such deposits "in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in this Act except as to valid claims existent at date of the passage of this Act and thereafter maintained", etc.

Section 23 of the act authorizes the Secretary to grant prospecting permits "which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium *dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States* * * *".

The words above italicized in section 23 were omitted in the amendment thereof by act of December 11, 1928 (45 Stat. 1019).

The evidence shows that the locators of the Tincal Nos. 1 and 2 locations began exploring the land by drilling on July 25, 1926, and prosecuted such operations to the discovery of boron minerals in commercial quantities. In clay shale beds between 650 and 1046 feet in depth from the surface, lime borates consisting of colemanite and ulexite were first encountered and immediately thereunder in the same drill hole larger and much more valuable deposits of sodium borates were found in the form of a new mineral previously disclosed on the adjacent NE $\frac{1}{4}$ of Sec. 24, called kernite, with which is associated massive borax, showing no crystal outline.

The Western Borax Company is engaged in mining this kernite, for the manufacture of commercial borax and boric acid, and had expended at the time of hearing over \$250,000 in exploring and developing the deposit, and, as above stated, applied for a mineral patent based upon its discovery, but furthermore contending in this case that the antecedent disclosure of the lime borates mentioned, as the drilling progressed, served to validate their claims.

Drilling for borate minerals on the Keen, Big Keen No. 2, and Little Placer claims by the United States Borax Company took place after its officials knew that valuable deposits of sodium borate had been discovered on the NE $\frac{1}{4}$ of Sec. 24, 11 N., R. 8W., and on Sec 19 of T. 11 N., R. 7 W., and was discontinued after the calcium borates were encountered in commercial quantities; patent being requested on account of the same. While there is evidence both for and against the probability of the existence of valuable deposits of kernite and associated minerals under the three last-mentioned claims, it is not certainly known that these claims are valuable for sodium borates by the actual disclosure of such minerals within those claims.

The evidence, which is by no means convincing, that the commercial products made from kernite, namely, borax and borac acid, are valued because of their boron content, and that the sodium element in the borax is not important in the uses to which it is put, and the contention based thereon that kernite therefore is not within the purview of Sec. 23 of the act, will be put aside as untenable. The act specifies among the salts named "sodium borate", and relates to the deposit found in the ground, and it is immaterial what constituents thereof are the most useful after it has been made into a commercial commodity. If that argument were valid it would, of course, follow that no sodium borate from which borax is made would be within the purview of the Leasing Act, either as it originally stood or as amended.

The principal contention, however, upon which the mineral claimants rely, is that the descriptive terms in the original Sec. 23, reading "dissolved in and soluble in water and accumulated by concentration" referred solely to deposits of sodium salts such as those known to exist in the desiccated lake basins in the Western States in the form of brines and dry residues thereof, concentrated by the evaporation of the lake water, and not to the kernite deposits under consideration, which were not laid down with the sedimentary shales in which they are found, but later introduced therein as the result of molecular replacement of the shale by the kernite, due to emanations of boron-bearing vapors and hot waters, under certain conditions of pressure and temperature, from hot springs below, and that the tincal, or natural borax associated with it, is an alteration of the kernite.

It is difficult to escape the conclusion that the words "dissolved in and soluble in water and accumulated by concentration" were intended as a restriction upon the operation of the act in its application to sodium salts mentioned therein, though far from supplying an incisive criterion for determining what sodium borates are within and what without the purview of Sec. 23. Taken in the broader signification, the words "accumulated by concentration" would apply to the mode of deposition of mineral deposits generally and the words so understood would appear to be mere surplusage. It is a general rule of statutory construction that every word of a statute is to be given force and effect, if possible, and where ambiguous and uncertain in meaning, resort may be had to extrinsic aids, such as consideration of the history of the passage of the act. Examination of the reports by the Secretary of the Interior to the Committee on Public Lands of the House of Representatives, and statements made by well-informed witnesses before the Public Lands Committee on the original bills proposing the leasing of oil, gas, sodium, and the like, particularly H.R. 406, 64th Congress, and H.R. 14094, 63d Congress, which were progenitors of the bill that eventually became the Leasing Act, show that as to sodium and potassium salts the committee's attention was directed only to the occurrence of these deposits in dry basins or beds of former lakes, and that their mode of deposition was substantially as described in the language last above quoted from Sec. 23.

The report of Secretary Lane, dated March 24, 1914, to the committee, contains this statement as to potassium and sodium: "These deposits generally occur in dry or nearly dry basins or beds of former lakes in which the minerals from the surrounding country have drained and concentrated for ages."

At the hearings on the House Bill No. 14094, the Director of the Geological Survey was asked by the Chairman of the Committee:

Doctor Smith, will you now give us such data as you have with reference to the area, quality, where found and value of the sodium lands that this bill is presumed to embrace.

Dr. Smith: In a way this bill will, I suppose, take the place of the provisions of the present law for the acquisition of salines but I do not know that I have any special statement to make regarding that feature of the bill; of course we know that in such areas as the Salt Lake Desert or out in Nevada or Black Rock Desert, they simply have to scrape up and purify the salt on the surface in order to obtain the sodium chloride.

Mr. RAKER: Is that common salt that you get in our sodium beds?

Dr. SMITH: Sodium chloride; the common salt; sodium salts would come under that head.

Mr. RAKER: That would take in all the salt beds?

Dr. SMITH: Yes, the salt beds of the Western deserts.

It further appears from the record of the hearings before the Public Lands Committee, as to borax and borate deposits, that the information given the committee was that borax ores at that time were found in colemanite and mined from land in private holding, which the bill would not affect.

Mr. Hoyt S. Gale, a geologist, in the course of his testimony for the contestee, expressed the opinion as to the language of Sec. 23 of the act above quoted as "an attempt to define the two stages of evaporation to form residues in these deposits; first, concentration to the bottom of the brine from which the salts may later have crystallized; perhaps more or less completely dried up."

Geologist Joseph Jensen was substantially of the same opinion. There does not appear any other reasonable explanation for the inclusion of these words in the statute other than above given by Mr. Gale.

As to requirement of solubility in water, it is believed the words "dissolved in and soluble" were used in their ordinary signification, and that so understood kernite is soluble in water according to the weight of the evidence. No warrant is seen for reading into the statute the words "readily soluble in cold water" or for refusing to consider kernite soluble because of a theory that during the process of disappearance of the solid kernite in the water, it undergoes a conversion from one sodium borate, kernite ($\text{Na}_2\text{O} \cdot 2\text{B}_2\text{O}_3 \cdot 4\text{H}_2\text{O}$) to another, tincal or borax ($\text{Na}_2\text{O} \cdot 2\text{B}_2\text{O}_3 \cdot 10\text{H}_2\text{O}$) by taking up six molecules of water.

As to the origin of the deposit, however, the decided weight of expert opinion evidence is that the kernite and its associated minerals are not natural evaporation residues dissolved in and accumulated by surface or ground-water drainage, but are a hot spring product of fumarolic type. Able and prolonged cross-examination

of these experts for the mineral claimants developed, at least, that these opinions as to the origin of the deposit are no more than theory and assumption and in no way proved, and gives rise to doubts whether the known data are sufficiently adequate or entirely reconcilable with the deductions made. But it is also only a competitive theory, namely, that the borax was originally laid down with the clay sediments of the lake and was subsequently melted by heat from some source, and where there was no escape of the water of crystallization the fused borax solidified into the massive borax now found, and where such water did partially escape, kernite resulted from partial dehydration. If it be conceded that the latter theory seems the more probable and plausible, nevertheless, to adopt it as an established fact of the case would be to run counter to the conclusions of eminent scientists on a highly technical question, and subject a claimant under the mining law to the probable loss of all benefits from his exploration and development at large cost, made on the faith of an opposite view of the form and character of the deposit, by favoring a conflicting hypothesis which on more complete study and investigation may be rejected as erroneous. For the reasons stated it is held upon the evidence in this case that the deposits of sodium borate on the tincal claims are not within the provisions of Sec. 23 of the Leasing Act at the time such deposits were found.

As to the claims of the United States Borax Company, it is shown that only valuable deposits of colemanite and ulexite, subject to location under the Mining Law, were actually found in commercial quantity, and under the view above stated as to form and character of the sodium borate deposits, it becomes immaterial whether the company had knowledge or had good reason to believe that the sodium borates found in the field underlay such deposits. It is also unnecessary for the same reason to consider whether or not the fact that the Western Borax Company first encountered deposits of ulexite and colemanite in the drill holes which were continuously sunk and which disclosed the underlying much more valuable deposits of sodium borates, which they proceeded solely to mine and extract, would invest them with any rights under the mining laws based on asserted discoveries of ulexite and colemanite, irrespective of whether the sodium borates encountered were or were not within the purview of Sec. 23 of the Leasing Act.

The evidence in the case is to the effect that the kernite deposit and associated minerals are in the nature of a lode having definite hanging and foot walls. But evidence as to the form and character of colemanite and ulexite deposits has heretofore been presented to the Land Department equally justifying their characterization as

lodes, either in application for patents for such deposits as lodes, or in challenge of the right to acquire them under placer location. It appears, however, to be the uniform practice to permit the patenting of claims for such deposit solely as placer locations. It is therefore believed that mineral claimants who have made their locations in reliance upon this practice should not have their rights assailed because the deposits claimed might more appropriately be deemed lode in form and character.

For the reason above stated the decision appealed from is

Affirmed.

LANGDON H. LARWILL

Decided March 8, 1933

OIL SHALE LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT—METALLIFEROUS MINERALS—WITHDRAWAL.

Executive order No. 5327 of April 15, 1930, under which certain oil-shale lands were temporarily withdrawn for the purpose of investigation, examination, and classification, constituted a withdrawal from every form of claim except for metalliferous minerals, and a permit to prospect lands within the withdrawn area for oil and gas was not allowable as long as the order remained unmodified or unrevoked by another Executive order or by act of Congress.

EDWARDS, Assistant Secretary:

By decision of September 14, 1932, the Commissioner of the General Land Office held for rejection the oil and gas prospecting permit application of Langdon H. Larwill, filed April 6, 1932, for all of Secs. 18, 19, 30, and 31, T. 4 S., R. 97 W., 6th P. M., Colorado, on the ground that all of said township was embraced in an oil-shale withdrawal under Executive Order of April 15, 1930, and that the land applied for was therefore not subject to prospecting permit.

The applicant has appealed, stating, first, on information and belief, that "said alleged Executive Order of April 15, 1930, was never promulgated and never became binding and effective," and, second, that the leasing of lands for oil and gas is not necessarily in conflict with the use of the same lands under leases for oil shale.

The appellant further states:

If the withdrawal in question, as construed by said Circular No. 1220, had ever been promulgated and become effective, then applicant submits that same would have prevented the acceptance of surface homesteads; but the facts are, as the records of the General Land Office will disclose, that surface homesteads have been allowed since the date of the withdrawal order on numerous tracts of oil-shale land within the area in question.

The position of the applicant is, therefore, that for some reason unknown to the applicant, the withdrawal order was either never promulgated or in some other way never became effective.

The appellant offers to prove, if such proof should be deemed material, that the geological horizons where oil and gas deposits may be expected in these lands lie far below the horizons where oil shale exists, that oil and gas, if found, would be withdrawn in a short time and thereafter the mining of oil shale could and would proceed over a longer period; that these lands lie along the summit of a considerable ridge or swell, and that the more valuable deposits of oil shale do not outcrop here but rather outcrop a number of miles away in the sides of canyons, so that mining oil shale on these lands will in all probability be deferred many years.

The cited circular, No. 1220, dated June 9, 1930 (53 I.D. 127), was a promulgation of Executive Order No. 5327 of April 15, 1930. Maps showing the withdrawn areas were signed by the Secretary of the Interior and copies thereof were sent to the local land offices. It does not appear that there is any ground for questioning the regularity or effectiveness of the order of withdrawal.

If surface homestead entries have been allowed for withdrawn oil-shale lands, that has been done pursuant to the act of February 28, 1931 (46 Stat. 1454). In Circular No. 1244 of April 3, 1931 (53 I.D. 346), under said act, it is stated:

The act is construed to permit stock-raising homestead applications to be made for lands containing deposits of oil shale which lands and deposits by Executive Order of April 15, 1930, No. 5327, were temporarily withdrawn from lease or other disposal and reserved for the purpose of investigation, examination, and classification.

Said Executive order has been construed as a withdrawal from every form of claim except for metalliferous minerals. Even for the allowance of a railroad right of way across certain of these withdrawn lands Executive orders modifying the order of April 15, 1930, have been necessary. See Executive orders Nos. 5708, 5723, and 5772.

There has been no allegation that the land does not contain oil shale. Under these circumstances the appellant's argument that the granting of an oil and gas prospecting permit will not interfere with any use that may be made of the oil shale is without effect. The temporary withdrawal is a complete withdrawal, except against claims for metalliferous minerals, until modified or revoked by another Executive order or by act of Congress.

On February 6, 1933, Executive order No. 6016 was issued and it reads as follows:

Upon recommendation of the Secretary of the Interior, Executive Order No. 5327 of April 15, 1930, withdrawing certain lands for purposes of investigation, examination, and classification, is hereby modified to the extent of authorizing him to issue oil and gas permits and leases under the general leasing act of February 25, 1920 (41 Stat. 437-451), for any of the lands withdrawn by said order.

The Commissioner correctly held the application for rejection. Although there has since been a change in the status of the land, the application filed did not have the effect of segregating the land applied for or giving the appellant any right thereto. *Hendricks v. Damon* (44 L.D. 205); *Keating v. Doll* (48 L.D. 199); *H. A. Hopkins* (50 L.D. 213).

The decision appealed from is affirmed and the papers are returned to the General Land Office with instructions that the appellant be advised that he may file a duplicate of his application, or a new application, and that if there shall then be no intervening permit application filed since February 6, 1933, the matter of granting a permit to the appellant will be favorably considered.

KERMIT D. LACY

Decided March 18, 1933

OIL AND GAS LANDS—PROSPECTING PERMIT—ABANDONMENT—WORDS AND PHRASES.

The term "producing oil or gas field," as used in section 13 of the Leasing Act, must be construed to include areas in which there has been production and which will continue to produce oil or gas, and the fact that there has been a cessation of production and abandonment of wells in a given field is not of itself sufficient to warrant a redefinition of the structure or the revocation of the classification of the field in the absence of a proper showing persuasive that the area does not in fact contain valuable deposits of oil or gas.

OIL AND GAS LANDS—PROSPECTING PERMIT—ERROR.

The issuance through oversight of an oil and gas permit for prospecting land within a producing oil field will not compel a subsequent erroneous classification of the field and the granting of another permit for prospecting other lands on the structure.

EDWARDS, *Assistant Secretary*:

By decision of December 13, 1932, the Commissioner of the General Land Office held for rejection as to the NW $\frac{1}{4}$ SE $\frac{1}{4}$ the oil and gas prospecting permit application of Kermit D. Lacy, filed June 3, 1932, for the W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 32, T. 5 N., R. 19 W., S. B. M., California, for the reason that said NW $\frac{1}{4}$ SE $\frac{1}{4}$ was within the limits of the Rose Oil Company's oil field, which was known to be a producing area long prior to the enactment of the General Leasing Act.

An appeal on behalf of the applicant has been filed. He states, through his attorney, that he denies that the land is within any known oil structure; that he asserts that the oil alleged to have been discovered on said land was produced from shallow wells which have for a long time past been totally exhausted; that any future oil

will of necessity be found in deeper formations not now known to be oil-bearing; that he held a previous oil and gas permit for said $W\frac{1}{2}SE\frac{1}{4}$; and that the issuance of said permit was *prima facie* evidence that the land was not within the limits of any known structure.

On November 3, 1932, the Geological Survey made a report as follows:

The records of the Geological Survey show that of the land involved in the application the $NW\frac{1}{4}SE\frac{1}{4}$ Sec. 32, T. 5 N., R. 19 W., is within the limits of the Rose Oil Company's oil field, definition not promulgated, which was known to be a producing area long prior to the enactment of the mineral leasing act, and is therefore not subject to filing under the prospecting provisions of the act.

It is true that on January 26, 1925, this appellant filed an oil and gas prospecting permit for the same land; that the Geological Survey reported on August 12, 1925, that the land involved was not within the known geologic structure of a producing oil or gas field, and that so far as relations to structure were concerned there appeared to be no objection to granting a permit; that a permit was granted September 5, 1925; and that said permit was canceled on June 17, 1929, for failure to comply with the terms thereof.

The fact that through oversight the land was reported as subject to prospecting permit in 1925 and a permit was then issued does not compel an erroneous classification at this time and the granting of another permit. It is shown that as of March 4, 1929, the State of California classified the $N\frac{1}{2}N\frac{1}{2}SE\frac{1}{4}$ said Sec. 32 as proven oil land, according to law, for the purpose of assessment. See "Summary of Operations, California Oil Fields," published by the Department of Natural Resources, Division of Oil and Gas, August, 1929.

In its unreported decision of March 24, 1924, in the case of *John H. Moss v. A. D. Schendel* (A-6287, Buffalo 021031-021033), the Department said:

The applicant Moss has appealed from this decision and alleges that the lands were not, at the time of his application, within a producing field, as all wells in that field which had produced either oil or gas, were not producing, but were exhausted, the wells abandoned and the casing pulled and the wells plugged. * * * *

The records disclose that the Torchlight field was a known producing field long before the passage of the leasing act, and was so defined long prior to the filings by appellant or Schendel. The Department is also aware that large oil companies which have been operating in the field did abandon it in 1923, as alleged, but is not convinced that such abandonment warrants a redefinition of the structure or the revocation of the classification of the area as a producing field at this time. The term "producing oil or gas field" as used in section 13 of the leasing act must be construed to include areas in which there

has been production and which are *capable* of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits. Until further showings are made which are persuasive that the area does not still contain valuable deposits of oil, the field will not be redefined.

In the absence of any showing other than the unverified and uncorroborated statements made in the appeal, the Department is not willing to consider the land involved as subject to prospecting permit for oil and gas.

The decision appealed from is

Affirmed.

**AMENDMENT TO REGULATIONS GOVERNING RECOGNITION OF
PERSONS REPRESENTING CLAIMANTS BEFORE THE DEPART-
MENT OF THE INTERIOR AND ITS BUREAUS**

[Order No. 615]

DEPARTMENT OF THE INTERIOR,
Washington, D.C., March 24, 1933.

Under authority conferred upon the Secretary of the Interior by section 5 of the act of July 4, 1884 (23 Stat. L. 101), the following regulation is hereby promulgated and ordered to be inserted between the 8th and 9th regulations heretofore promulgated under the said act on September 27, 1917¹:

8-a. No person who has been employed or has held any office or place of trust or profit in the Department of the Interior shall be permitted to practice, appear, or act as an attorney or agent in any case, claim, contest or other proceeding before the Department or before any bureau, board, division or other agency thereof, until two years shall have elapsed after the separation of the said person from the said service; and no attorney or agent admitted to practice before the Department shall employ or retain any such person for the purpose of making any personal appearance in any such case, claim, contest or other proceeding, before the expiration of the said two-year period.

HAROLD L. ICKES,
Secretary of the Interior.

¹ See 46 L.D. 206; also 51 L.D. 547, 561.

ELIMINATION OF NONIRRIGABLE AREAS IN INDIAN RECLAMATION PROJECTS—AUTHORITY OF SECRETARY OF THE INTERIOR

Opinion, March 27, 1933.

INDIAN LANDS—RECLAMATION—ACT OF AUGUST 1, 1914—AUTHORITY OF SECRETARY OF THE INTERIOR.

Congress, in the Act of August 1, 1914 (38 Stat. 582), having authorized and directed the Secretary of the Interior to act in determining the per acre charge for irrigation of lands within Indian reclamation projects, impliedly gave him authority to determine the estimated cost of the project and the total area that can be irrigated.

INDIAN LANDS—IRRIGATION PROJECTS—APPORTIONMENT OF COST—SECRETARY OF THE INTERIOR.

The Act of August 1, 1914 (38 Stat. 582), directing the Secretary of the Interior to apportion the cost of irrigation projects constructed for Indians in accordance with the benefits received by each individual Indian, requires him, in effect, to make an apportionment of the cost of such irrigation works upon a per acre basis based upon benefits received.

INDIAN LANDS—RECLAMATION—IRRIGATION CHARGES—WIND RIVER PROJECT, WYOMING.

In order to fix charges upon irrigated lands within Indian reclamation projects the Secretary of the Interior must determine the estimated cost of the project and the total area that can be irrigated, which factors supply the basis for such charges.

INDIAN LANDS—RECLAMATION—SECRETARY OF THE INTERIOR—"IRRIGABLE" DEFINED.

It would be unusual to say that Congress intended, by the Act of February 14, 1920 (41 Stat. 408) to declare as irrigable all land for which water for irrigation purposes can be delivered, and the Secretary of the Interior would not be justified in determining that land was irrigable if it was not arable and susceptible of economic cultivation with the use of irrigation water.

INDIAN LANDS—RECLAMATION—ELIMINATION OF NONIRRIGABLE AREAS.

If, before the irrigable area of a reclamation project is determined and construction charges fixed, experience in actual cultivation and irrigation of known areas demonstrates that a crop can not be economically produced thereon, such areas should be eliminated in the final determination of irrigable area, even though land "to which water for irrigation purposes can be delivered."

DIXON, First Assistant Secretary:

You [Commissioner of Indian Affairs] have informally submitted to me two letters addressed to W. H. Farmer, Acting Supervising Engineer at Billings, Montana, with the idea that the Department should determine which of the two letters should be signed and transmitted.

The main question in dispute involves the authority of the Secretary of the Interior to approve a classification of the project land so as to exclude the nonirrigable area, although it is land "to which water for irrigation purposes can be delivered."

The questions involved immediately affect the Wind River Project, Wyoming, authorized pursuant to the act of March 3, 1905 (33 Stat. 1016), which provided that the Government should reimburse itself from tribal funds in its possession for all expenditures made in the construction of irrigation works. Prior to August 1, 1914, reimbursement for all expenditures on account of both construction and operation and maintenance was made from such fund. The entire tribe and not the individual water user continued to bear the burden of the reimbursement until the passage of the act of that date (38 Stat. 582, in which Congress abandoned the policy of expending tribal funds, and provided:

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.

By this act the Secretary was required to apportion the cost of any irrigation project, in accordance with the benefit received by each individual Indian. This was in effect a direction to require an apportionment of the cost of irrigation works upon a per acre basis based upon benefits received. Prior to the enactment of this legislation only preliminary surveys of irrigable acreage had been made, and on many of the Indian projects these surveys of irrigable acreage have not been completed up to the present time. More than five years elapsed after the act of 1914 before Congress again definitely considered the beginning of payments of reimbursable money expended for construction works. In many cases construction of the irrigation system had not progressed far enough to justify a fairly accurate estimate of the final total cost of construction. It then passed the act of February 14, 1920 (41 Stat. 408), part of which is quoted as follows:

The Secretary is hereby authorized and directed to require the owners of irrigable land under any irrigation system heretofore or hereafter constructed for the benefit of Indians and to which water for irrigation purposes can be delivered to begin partial reimbursement of the construction charges, where reimbursement is required by law, at such times and in such amounts as he may deem best; all payments hereunder to be credited on a per acre basis in

favor of the land in behalf of which such payments shall have been made and to be deducted from the total per acre charge assessable against said land.

The acts of 1914 and 1920, above quoted, were the subject of Solicitor's opinions dated November 17, 1924, and July 8, 1925. A proper interpretation of these opinions appears to me to settle the question relative to the letter to transmit to the Acting Supervising Engineer. The principal question in dispute is the determination of irrigable area of each legal subdivision of the project and the authority of the Secretary of the Interior to determine such area. The Department has by regulation defined irrigable land and also agricultural land in this language:

Irrigable land is agricultural land that can be watered by an irrigation project. Agricultural land is land capable of use for crop production. This land may or may not be irrigable.

In determining irrigable areas it is necessary to take into consideration what may be designated as high and rough land, steep land, rocky land, alkali and water-logged land, and frequently overflowed land. It is stated in one of the letters that—

With respect to irrigable areas that have in the past been irrigated and to which water for irrigation purposes can be delivered, there is authority for the elimination and adjustment of irrigable area and costs under the Leavitt act (47 Stat. 564).

It seems to be the contention that under the act of 1920, *supra*, if water for irrigation purposes can be delivered, the land must be considered as irrigable and must be charged with the return of the cost of expenditures made for the irrigation system. This, however, is not the true test of irrigable area and it is not a limitation upon the authority given the Secretary of the Interior to fix the charges per irrigable acre. To fix charges the Secretary of the Interior must determine two specific facts: (1) The estimated total cost of the project; (2) the total area that can be irrigated. Congress having authorized the Secretary to act in determining the per acre charge, it impliedly gives him authority to determine the two facts above outlined. The determination of the irrigable area depends upon many conditions, and it would be unusual to say that Congress intended, by the act of 1920, to declare as irrigable all land for which water for irrigation purposes can be delivered. Many ditches are constructed on a project which could deliver water to sandy land, gravelly land, and land afflicted with other impediments to cultivation, but the Secretary would not be justified in determining that the land was irrigable if it was not arable and susceptible of economic cultivation with the use of irrigation water.

Whether a given area is irrigable must frequently be determined by scientific and topographic investigation prior to cultivation and

irrigation, but no information can be more reliable than that obtained by cultivation, irrigation and production of crops on the land. If, before the irrigable area of the project is determined and construction charges fixed, experience in actual cultivation and irrigation of known areas demonstrates that a crop can not be economically produced because the land is too high, rough, steep, rocky, alkaline, seeped or water-logged, the areas should be eliminated in the final determination of irrigable area even though it is land "to which water for irrigation purposes can be delivered."

To determine the irrigable area of the Wind River project, Wyoming, there has been appointed a board of expert classifiers, and the report is nearly completed and ready for submission to the Department for approval by the Secretary of the Interior. Pending such approval, you desire authority to put into effect the collection of operation and maintenance charges for the year 1933, based upon the irrigable area surveys made by the board. There is no objection to this, providing your field men are instructed to advise water users that final action has not been taken on the board report, and therefore adjustments may be necessary before the report is finally approved.

On the subject of overpayments heretofore made and deficiencies which might occur on account of changes in the irrigable area of any land holding, it is required that we consider conditions involving the two classes of charges and the two kinds of ownership on the project. Charges consist of (a) construction charge, and (b) operation and maintenance charge, while ownership must be divided into (a) lands owned by Indians, and (b) those owned by whites. Construction charges against Indian-owned lands are deferred while the land is in Indian ownership by reason of the act of July 1, 1932 (47 Stat. 564). This is true whether the land be trust patent or patented. Operation and maintenance charges are to be collected in the future for Indian-owned lands, but past due charges may be affected by the operation of the act of July 1, 1932, *supra*.

Construction charges on white-owned lands have not been announced for the Wind River project by the Secretary and determination of the irrigable area is a necessary preliminary act. Operation and maintenance charges for white-owned land must be collected and credits for overpayments can be allowed only so far as such payments have been made by or on behalf of the present owner of the land. In all cases where the report and recommendations of the committee on classification fixes an assessable irrigable area in excess of the original estimated acreage on which assessments have been written in the past, the new assessable area shall be used for the irrigation season of 1933 and thereafter and assessments

on irrigation charges made on that basis. Adjustment of deficiencies in payment of construction or operation and maintenance charges should await the approval of the board report and the determination of the irrigable area by the Secretary as to each legal subdivision.

It is desired that you make your letter to the field officer conform to the opinions herein expressed.

CREDIT TO HOMESTEAD SETTLERS AND ENTRYMEN FOR MILITARY SERVICE IN INDIAN WARS EXTENDED TO SOLDIERS' WIDOWS

[Circular No. 1296]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., March 31, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

The act of March 3, 1933 (47 Stat. 1424), provides as follows:

"That the provisions and limitations of the Act entitled 'An Act to allow credit to homestead settlers and entrymen for military service in certain Indian wars', approved April 7, 1930, are hereby extended to the widow of any person who would be entitled to make homestead entry or settlement and receive credit in connection therewith for military service under the provisions of such Act, if such widow is unmarried and otherwise qualified to make entry of public lands under the provisions of the homestead laws of the United States and has heretofore made or shall hereafter make such entry: *Provided*, That in the event of the death of any such widow 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 death, and of the minority of the child or children, without further showing or compliance with law."

This act extends the benefits of the act of April 7, 1930 (46 Stat. 144), explained in Circular No. 1218 (53 I.D. 102), to the unmarried widow of a soldier who served in an Indian war mentioned in said act of April 7, 1930, and who died possessed of a homestead right or who may be considered as restored to such right under existing laws. If such widow shows her qualifications and makes her homestead entry, in perfecting title to the land included therein she may deduct the period of her deceased husband's military service from the three years' residence required, subject to compliance with the requirements of the law for at least one year.

The widow must make the same showing to establish evidence of the military service as the husband would have been required to make had he become a homestead applicant for public land. Therefore evidence of military service must be furnished as explained in said Circular No. 1218 and in addition the widow must file an affidavit showing that she is the soldier's unmarried widow and that

at the time of his death he was possessed of the right to make a homestead entry or that the existing laws may be invoked to restore such right. If he ever made a homestead entry data sufficient for this office to identify the same must be furnished.

If such widow makes a homestead entry and dies prior to perfection of the title to the land included therein, leaving only a minor child or children, patent will issue to such minor child or children upon proof of her death and of the minority of the child or children, without further showing of compliance with law, but publication and posting of notice of intention to submit proof must be had and evidence thereof filed in support of the request for the issuance of the patent to the child or children of such deceased homesteader.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

EXCHANGE OF LANDS IN NEW MEXICO UNDER ACT OF JUNE 15, 1926

[Circular No. 1295]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., April 1, 1933.

REGISTERS, UNITED STATES LAND OFFICES,
LAS CRUCES AND SANTA FE, NEW MEXICO.

1. By the act of Congress approved June 15, 1926 (44 Stat. 746), it is provided as follows:

"That section 10 of the Act entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States,' approved June 20, 1910; be, and the same is hereby amended, subject to the consent to the terms hereof by the State of New Mexico, by adding the following: *Provided*, That the Secretary of the Interior be, and he is hereby, authorized in his discretion to accept on behalf of the United States, title to any land within the exterior boundaries of the national forests in the State of New Mexico, title to which is in the State of New Mexico, which the said State of New Mexico is willing to convey to the United States, and which shall be so conveyed by deed duly recorded and executed by the Governor of said State and the State land commissioner, with the approval of the State land board of said State, and as to land granted to the said State of New Mexico for the support of common schools with the approval of the State superintendent

of public instruction of said State, as to institutional grant lands with the approval of the governing body of the institution for whose benefit the lands so reconveyed were granted to said State, if, in the opinion of the Secretary of Agriculture, public interests will be benefited thereby and the lands are chiefly valuable for national forest purposes, and in exchange therefor, the Secretary of the Interior, in his discretion, may give not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said State of New Mexico, as may be determined by the Secretary of Agriculture and be acceptable to the State as a fair compensation, consideration being given to any reservation which either the State or the United States may make of timber, mineral, or easements.

That authority is hereby vested in the President temporarily to withdraw from disposition under the Act of June 25, 1910 (Thirty-sixth Statutes at Large, page 847), as amended by the Act of August 24, 1912 (Thirty-seventh Statutes at Large, page 497), lands proposed for selection by the State under the provisions of this Act.

Sec. 2. Where sections 2, 16, 32, and 36, within national forests, legal title to which sections is retained in the United States under the provisions of section 6 of the said Act of June 20, 1910, and which sections are administered as a part of the said national forests for the benefit of the said State of New Mexico, have not already been tendered as base for indemnity selection under sections 2275 and 2276, United States Revised Statutes, and where such sections of land, in the opinion of the Secretary of Agriculture, are chiefly valuable for forest purposes, upon surrender by the State of New Mexico of the right to make lieu selections and of all claim, right, or interest in or to said sections upon and in the event of elimination from the national forests, the Secretary of the Interior, in consideration of such surrender, may, in his discretion, give to the State of New Mexico not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said State of New Mexico, as may be determined by the Secretary of Agriculture and be acceptable to the State as a fair compensation, consideration being given to any reservation which either the State or the United States may make of timber, mineral, or easements.

That the Secretary of Agriculture may establish regulations and a procedure for appraising the values of the lands owned by the United States and by the State and for carrying out the provisions of this Act.

Sec. 3. That all lands acquired by the State of New Mexico under the provisions, and all the products and proceeds of said lands, shall be subject to all the conditions and trusts to which the lands conveyed or surrendered in lieu thereof are now subject. All lands conveyed to the United States under this Act shall, upon acceptance of title, become parts of the national forests within which they are situated.

Sec. 4. That pursuant to section 10, Article XXI, constitution of the State of New Mexico, the consent of the United States is hereby granted for amendment of the constitution of the State of New Mexico in accordance with the provision of this Act."

Evidence has been furnished of the amendment to the constitution of the State of New Mexico, as provided by this act.

2. All preliminary negotiations relating to an exchange under this act are to be conducted with the local representatives of the Forest Service, and the State must file with the Regional Forester, Albuquerque, New Mexico, an informal application describing the land

to be conveyed as well as that to be selected, which lands must be described by legal subdivisions, or by entire sections, and nothing less than a legal subdivision may be surrendered or selected. The lands selected in any one application should not exceed 6,400 acres. The conveyed lands must be within the exterior boundaries of a national forest, and the selected lands may be within a national forest or may be from the unreserved and unappropriated surveyed public lands within the State.

3. Where the lands proposed for selection by the State as aforesaid, under the provisions of said act of June 15, 1926, are outside of national forests and form a part of the unappropriated, unwithdrawn, unreserved, surveyed public lands, a list of such lands should be promptly forwarded by the State to the Commissioner of the General Land Office, with the request that a withdrawal thereof be made under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), and in aid of said proposed selection by the State under said act of June 15, 1926.

4. The application for exchange should show in detail every reservation of mineral, timber, or easements previously granted or to be made by the State to which the offered lands are subject, and should also show the reservations of timber, minerals or easements which are acceptable to the State and are to be made by the United States.

The act requires that the value of the selected lands shall not exceed that of the offered lands, consideration being given to any reservations of timber, mineral, or easements which may be made by the State or the United States. The values of both offered and selected lands shall be determined by the Secretary of Agriculture. To meet that requirement of law, both the offered and selected lands will be examined and appraised by officers of the Forest Service, in conformity with the principles and procedure governing examinations of lands offered or selected under the provisions of land exchange laws as set forth in the National Forest Manual. If such examinations disclose inequalities of value, the State will be so advised and opportunity afforded for adjustments which will bring the exchange within the provisions of the law.

After agreement as to values has tentatively been arrived at by the State officials and officers of the Forest Service, the Chief of Field Division of the General Land Office at Santa Fe, New Mexico, will be furnished with two copies of each report and appraisal covering lands to be selected from the unreserved public domain, for comment and recommendations. If no objections to the proposed exchange are known to the Chief of Field Division, he will so endorse the reports, returning one copy to the Regional Forester and forwarding the other to the Commissioner of the General Land

Office at Washington, D.C. If the Chief of Field Division has valid objections to the tentative agreement, the Regional Forester will endeavor to consider and adjust them. If the report meets with the approval of the Chief of Field Division, the Regional Forester will forward the copy of the report returned by the Chief of Field Division, together with the application and other related papers, to the Forester at Washington, D.C.

5. If, in the case of selection of unreserved public lands of the United States, a joint examination for appraisal is requested through the national forest officers, arrangements for such examination may be made with the Chief of Field Division of the General Land Office. Where, for any reason, other or further examination is found necessary or desirable by the Department of the Interior, the Chief of Field Division will be so instructed.

6. When it has been shown to the satisfaction of the Secretary of Agriculture, through the district forester and the Forest Service at Washington, D.C., that the exchange sought will be in the public interest and that the value of the selected land does not exceed that of the land offered in exchange, the Secretary of the Interior will be so advised. The letter of recommendation of the Secretary of Agriculture should specifically describe all reservations of mineral, timber, or easements previously granted or to be made by either the State or the United States. The General Land Office will notify the district land officers that applications for such exchange may be allowed, if in conformity with these regulations.

7. All applications for exchange under the provisions of this act must be filed, by the proper officers of the State, in the district land office of the district in which the lands applied for are situated, accompanied by the following affidavits and certificates:

(a) An affidavit as to the nonmineral and nonsaline character of the land applied for, except where the land is subject to a reservation of mineral rights by the United States. The nonmineral affidavit should also show that said land is unappropriated and is not occupied by and does not contain improvements placed thereon by any Indian.

(b) A certificate of the selecting agent that the selection is made under and pursuant to the laws of the State.

(c) An affidavit that the land selected does not exceed in value that of the land offered in exchange.

8. Where the application is for public lands of the United States outside of national forest boundaries, there must be furnished a corroborated affidavit relative to springs and water holes upon the land applied for, in accordance with existing regulations pertaining thereto in the case of all similar State selections.

9. Payment of fees will be required in the sum of \$1.00 for each 160 acres, or fraction thereof, selected by the State.

10. Where title has actually vested in the State as to the lands sought to be conveyed, each application for exchange must be accompanied by a deed (unrecorded), prepared in accordance with the laws of the State of New Mexico governing the conveyance of real property, executed by the Governor of the State and the Commissioner of Public Lands, with the approval of the State land board and the State superintendent of public instruction, as to the lands granted for the support of common schools; and as to institutional grant lands, with the approval of the governing body of the institution for whose benefit the lands so reconveyed were granted to the State. Where the legal title to school sections is retained in the United States under the provisions of section 6 of the enabling act of June 20, 1910, or where title to school sections has not vested in the State because of withdrawal of the lands prior to survey, the State must furnish a certificate showing surrender by the State of the right to make lieu selections under sections 2275 and 2276 R.S., as amended, and of all claim, right or interest in or to said lands. All selection lists must be accompanied by certificates of the proper State officer and of the proper county recorder, showing that the offered lands have not been sold or otherwise encumbered by the State. In case, however, any of such lands have been sold by the State and title again acquired, an abstract of such title will be necessary.

11. In order to simplify the work of keeping the records and of adjudicating exchanges under this act, these two classes of exchanges (where deeds of conveyance are required as to the lands offered in exchange, and where title to school sections is in the United States) should not be made in the same selection list, but should be in separate lists.

12. If the selection appears regular and in conformity with these regulations, you will accept the selection, assign the current serial number thereto, and will prepare notice for publication in accordance with the regulations approved June 23, 1910 (39 L.D. 39), and amendments thereto.

13. When upon examination in this office it is found that all requirements have been complied with and it is considered that the State is entitled to the exchange sought, the deed will be returned to the State for recordation and retransmittal to this office, and where abstract of title may have been required, such abstract will be returned to be brought down to show the title in the United States, free from all liens and incumbrances, including tax liens. Upon the return of the recorded deed and satisfactory abstract of title, the selections will be embraced in a clear list and transmitted to the Secretary with recommendation for approval, in the absence of other

objection, with a view to the certification to the State of the selected lands.

14. Should the application for exchange be finally rejected or the selection canceled, for any reason, the unrecorded deed and the abstract of title will be returned to the State.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary of the Interior.

H. A. WALLACE,
Secretary of Agriculture.

LANDS IN UTAH ADDED TO THE NAVAJO INDIAN RESERVATION

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., April 26, 1933.

REGISTER, SALT LAKE CITY, UTAH:

The act of March 1, 1933 (47 Stat. 1418), provides:

That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: Beginning at a point where the San Juan River intersects the one hundred and tenth degree of west longitude; thence down said river to its confluence with the Colorado River; thence down the Colorado River to a point where said river crosses the boundary line between Utah and Arizona; thence east along said boundary line to the one hundred and tenth degree of west longitude; thence north to the place of beginning; also beginning at a point where the west rim of Montezuma Creek or wash intersects the north boundary line of the Navajo Indian Reservation in Utah; thence northerly along the western rim of said creek or wash to a point where it intersects the section line running east and west between sections 23 and 26, township 39 south, range 24 east, Salt Lake base and meridian in Utah; thence eastward along said section line to the northeast section corner of section 26, township 39 south, range 25 east; thence south one mile along the section line between sections 25 and 26 to the southeast section corner of section 26, township 39 south, range 25 east; thence eastward along the section line between sections 25 and 36, township 39 south, range 25 east, extending through township 39 south, range 26 east, to its intersection with the boundary line between Utah and Colorado; thence south along said boundary line to its intersection with the north boundary line of the Navajo Indian Reservation; thence in a westerly direction along the north boundary line of said reservation to the point of beginning be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: Provided,

That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

SEC. 2. That the State of Utah may relinquish such tracts of school land within the areas added to the Navajo Reservation by section 1 of this Act as it may see fit in favor of the said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

You will make the proper notation on your records and will carefully check any application to make homestead entry or selection for Indian allotment in the vicinity of the withdrawn lands so as to avoid any conflict therewith.

You will also make proper notations on your records of any indemnity school-land selection or selections made in lieu of lands in secs. 2, 16, 32 and 36, granted to the State for school purposes by section 6, act of July 16, 1894 (28 Stat. 107), and within the area added to the Navajo Reservation.

All such indemnity school selections must be made in accordance with the provisions of sections 2275 and 2276, United States Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796), as made applicable to the State of Utah by the Act of May 3, 1902 (32 Stat. 188). Such selections must also be made in accordance with the regulations of June 23, 1910 (39 L.D. 39), and the State must furnish an affidavit as to springs and water holes on all selected lands in accordance with Circular No. 1066, May 25, 1926 (51 L.D. 457), and Circular No. 1231 (53 L.D. 173).

The State must also furnish an affidavit to the effect that the land selected is approximately of the same value as that relinquished. Field examination will be directed by this office in order to determine whether or not the lands relinquished and those selected are considered to be of approximately equal value within the intent of the act. If the report of the Chief of Field Division should be adverse to the State, the State will be given opportunity to make selection of other lands or to make such showing as may be desired, and will be afforded the right of appeal, review, or rehearing recognized in the manner prescribed by the Rules of Practice.

No fees will be charged in connection with any selection made under this act.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

MINING LOCATIONS IN PRESCOTT NATIONAL FOREST, ARIZONA

[Circular No. 1298]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., May 4, 1933.

REGISTER, PHOENIX, ARIZONA:

The act of January 19, 1933, an act to amend the United States mining laws applicable to the city of Prescott municipal watershed in the Prescott National Forest within the State of Arizona, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter mining locations made under the United States mining laws upon lands within the municipal watershed of the city of Prescott, within the Prescott National Forest in the State of Arizona, specifically described as the west half southwest quarter section 13; south half section 14; southeast quarter, and east half southwest quarter section 15; east half, and south half southwest quarter section 22; all of section 23; west half section 24; all of sections 26 and 27; north half north half section 34; and north half north half, section 35, township 13 north, range 2 west, Gila and Salt River base and meridian, an area of three thousand six hundred acres, more or less, shall confer on the locator the right to occupy and use so much of the surface of the land covered by the location as may be reasonably necessary to carry on prospecting and mining, including the taking of mineral deposits and timber required by or in the mining operations, and no permit shall be required or charge made for such use or occupancy; *Provided, however,* That the cutting and removal of timber, except where clearing is necessary in connection with mining operations or to provide space for buildings or structures used in connection with mining operations, shall be conducted in accordance with the rules for timber cutting on adjoining national-forest land, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining and prospecting shall be allowed except under the national-forest rules and regulations, nor shall the locator prevent or obstruct other occupancy of the surface or use of surface resources under authority of national-forest regulations, or permits issued thereunder, if such occupancy or use is not in conflict with mineral development.

SEC. 2. That hereafter all patents issued under the United States mining laws affecting lands within the municipal watershed of the city of Prescott, within the Prescott National Forest, in the State of Arizona, shall convey

title to the mineral deposits within the claim, together with the right to cut and remove so much of the mature timber therefrom as may be needed in extracting and removing the mineral deposits, if the timber is cut under sound principles of forest management as defined by the national-forest rules and regulations, but each patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except under the rules and regulations of the Department of Agriculture.

Sec. 3. That valid mining claims within the municipal watershed of the city of Prescott, within the Prescott National Forest in the State of Arizona, existing on the date of the enactment of this Act, and thereafter maintained in compliance with the law under which they were initiated and the laws of the State of Arizona, may be perfected under this Act, or under the laws under which they were initiated, as the claimant may desire.

The provisions of the act apply only to the lands described therein, comprising approximately 3,600 acres in T. 13 N., R. 2 W., G. & S. R. M. Rights acquired under mining locations made after the date of the act on any of the described lands are limited to the right to occupy and use so much of the surface of the land covered by the location as is reasonably necessary to carry on prospecting and mining, including the taking of mineral deposits and timber required by or in the mining operations; and patents for such locations shall convey title to the mineral deposits and a limited right to cut and remove timber for mining purposes, such patent to reserve to the United States all title in or to the surface of the lands and products thereof.

You will note on the face of all applications for patent for mining claims embracing any of the described lands that the same are subject to the conditions, provisions, limitations and reservations of the act, except applications for claims located prior to the date of the act and as to which the applicants expressly request patent under the provisions of the general mining laws. Patents issued subject to the act will contain appropriate conditions in accord with Sec. 2 thereof.

Under Sec. 3 of the act, valid claims existing at the date of the act and thereafter maintained may be perfected under this act or under the law under which they were initiated, as the claimant may desire. Such claimant may, therefore, continue the development of his claim under the provisions of the act and secure patent for the mineral deposits only, under its provisions, or he may continue to hold under the general mining laws and secure patent which will convey to him the surface as well as the minerals in the claim.

Note on your tract books each subdivision to which the act applies as subject to the act of January 19, 1933 (47 Stat. 771), and give

such publicity to the act as may be done without expense to the Government.

C. C. MOORE,
Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

ROY R. RITNER

Opinion, May 11, 1933

CLAIMS—DAMAGE TO PRIVATE PROPERTY THROUGH NEGLIGENCE—EMPLOYEE OF THE UNITED STATES—ACT OF DECEMBER 28, 1922.

A valid claim for damages under the terms of the Act of December 28, 1922 (42 Stat. 1066), arises where, without negligence on the part of the claimant, his property is injured through the negligent operation of an automobile by an employee of the United States acting within the scope of his employment, and the amount of the claim does not exceed \$1,000.

MARGOLD, *Solicitor:*

My opinion has been requested as to whether the claim of Roy R. Ritner, of Tacoma, Washington, for damages in the amount of \$22.70 to cover repairs to his automobile resulting from a collision on February 12, 1933, with an automobile operated by Frank Greer, District Ranger, in Mount Rainier National Park, is a proper claim for certification to Congress under the act of December 28, 1922 (42 Stat. 1066), which provides a method for the settlement of claims in sums not exceeding \$1,000, caused by the negligence of an officer or employee of the Government, acting within the scope of his employment.

From the papers submitted by the Superintendent of the Park it appears that the accident occurred on a curve on the Nisqually Road; that at the time the weather was cloudy and the roadway was covered with snow. An investigation was made by the Assistant Chief Ranger, who reported as follows:

Ranger Greer was returning from directing traffic at Narada Falls and was driving well towards the center of the road at about 20 miles per hour. There was a ridge of snow piled along his side of the road which had been rolled there by the snow blade plow. Mr. Greer on seeing the approaching car applied his brakes, causing his car to skid sufficiently for his left front fender to strike Ritner's car damaging it to the extent shown on enclosed form.

Ritner was driving well on his side of the road and neither was driving over 20 miles per hour. Had Greer not applied his brakes there would

have been no difficulty, but the accident was not due to any willful negligence or careless driving, and due to snowy road conditions I feel that the accident should be classed as more or less unavoidable. I also feel that Ritner is entitled to reimbursement for damage done to his car by the Government car.

The following statement was submitted by Ranger Greer:

I was returning from Narada where I had been directing traffic. The road was quite icy and slippery and was driving at a moderate rate of speed; not to exceed 20 miles per hour. About one quarter mile above Longmire a car was noticed approaching. At the time I was driving well toward the center of the road due to ridge of snow which had been bladed towards one side by the blade snow plow and had not been cleared away. In order to pass it was necessary for me to swing over to my right and as I was about to do so I applied the brakes on my car which caused it to skid to such an extent that it struck Mr. Ritner's car. If I had not applied my brakes I probably would not have skidded.

There were no personal injuries, the damages claimed consisting of the bending of the left front and rear fenders, the left running board, and the left side of the body of claimant's car. The bill for repairs submitted by the Mueller-Harkins Motor Company of Tacoma, Washington, is in the amount of \$22.70.

The claimant stated that the damage was not covered in whole or in part by insurance.

To bring the claim within the scope of the act in question, it must be shown that the damage complained of was caused by the negligence of an officer or employee of the Government, acting within the scope of his employment.

In this case the park ranger was acting within the scope of his employment. The facts show that the road conditions were bad at the time of the accident, due to snow and ice, and the existence of a ridge of snow which had been pushed up by a road scraper on the side of the road on which the ranger was operating his car. Further, that the claimant was not guilty of contributory negligence and was operating his car at moderate speed on the right side of the road. Admittedly, the ranger's car was thrown into a skid through unnecessary or improper application of his brakes, which caused it to collide with the claimant's car with the resultant damage.

Under the facts disclosed by the reports, I am of the opinion that the claim presented is within the purview of the act of December 28, 1922, *supra*, and is a proper one for certification to Congress as provided for therein.

It is noted that the claim presented (Form No. 28) has not been sworn to, and same should be returned to the claimant for that purpose before further action is taken in the matter.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

USE OF FUNDS FOR ROAD MAINTENANCE IN MT. MCKINLEY NATIONAL PARK, ALASKA.

Opinion, May 12, 1933.

ALASKA—MT. MCKINLEY NATIONAL PARK—ALASKA ROAD COMMISSION—ACT OF JUNE 30, 1932.

The act of June 30, 1932 (47 Stat. 446), contains no express provision under which transfer of any of the funds appropriated for the Alaska Road Commission may be made to the appropriation for national park roads within a national park.

ALASKA—MT. MCKINLEY NATIONAL PARK—AVAILABILITY OF APPROPRIATIONS—ACTS OF JUNE 30, 1932, AND FEBRUARY 17, 1933.

From the terms of the act of February 17, 1933 (47 Stat. 820), making appropriation for the Alaska Road Commission for the fiscal year 1934, it is clear that no portion of the funds thereby made available may be used for maintenance work on a road within a national park in Alaska, since such funds are required to be expended under the provisions of the act of June 30, 1932 (47 Stat. 446), the terms of which are not intended to apply to roads within national parks, nor to relate to the use of appropriations specifically made for the construction and maintenance of roads within national parks.

ALASKA ROAD COMMISSION—ACTS OF JUNE 30, 1932, AND MARCH 20, 1933—TRANSFER OF APPROPRIATIONS WHEN FOR PUBLIC WORKS.

The projects of the Alaska Road Commission and the roads and trails in national parks are included in the general classes enumerated as "public works" in the act of March 20, 1933 (48 Stat. 8), continuing in force section 317 of the Economy Act, approved June 30, 1932 (47 Stat. 382, 411), which section provided, with certain qualifications, that "not to exceed 12 per centum of any appropriation for an executive department * * * may be transferred, with the approval of the Director of the Budget, to any other appropriation * * * under the same department, to be used for public works." Such legislation would seem to supply authorization for transfer to the appropriation for roads and trails in national parks some portion of the sum appropriated for the Department of the Interior for the fiscal year 1934.

MARGOLD, Solicitor:

In accordance with the reference of the Assistant Secretary, I have considered the question submitted by the Acting Director, National Park Service, upon the suggestion of the Governor of Alaska, as to whether, in view of the status of the National Park Service appropriation for roads for the fiscal year 1934, funds of the Alaska Road Commission may be used to perform the most urgent maintenance work on the Mt. McKinley National Park Road.

By act of Congress approved June 30, 1932 (47 Stat. 446), the duties authorized and authority conferred by law upon the Board of Road Commissioners, and upon the Secretary of War were transferred to this Department. The act provides that the Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails

and other works in Alaska, heretofore administered by said Board of Road Commissioners under the direction of the Secretary of War, and authorizes the Secretary, by order or regulation, to distribute the duties and authorities transferred and appropriations pertaining thereto, and to make rules and regulations governing the use of roads, trails, and other works. The powers and duties of the said Board of Road Commissioners are defined in sections 321 to 328 inclusive. Title 48, U.S. Code.

The administrative changes effected by the act of transfer are not applicable to national park roads as administered prior thereto, and do not affect the use of appropriations specifically made for construction and maintenance of national park roads. Although it appears that the road in question was constructed by the said Board of Road Commissioners for the Park Service, the expenditures for such construction were met from the National Park appropriation for roads.

The main question for determination is whether any of the funds made available for the Alaska Road Commission for the fiscal year 1934 may be used for necessary maintenance work on the road within the national park.

The appropriation act for this Department for the fiscal year 1934, approved February 17, 1933 (47 Stat. 820), makes appropriation for the Alaska Road Commission as follows:

For the construction, repair, and maintenance of roads, tramways, ferries, bridges, and trails, Territory of Alaska, to be expended under the provisions of Public Resolution Numbered 218, approved June 30, 1932, \$466,300; for repair and maintenance of Government wharf at Juneau, Alaska, \$3,000; in all, \$469,300, to be immediately available.

Appropriations for the National Park Service include the following:

Emergency reconstruction and fighting forest fires in national parks: For reconstruction, replacement, and repair of roads, trails, bridges, buildings, and other physical improvements and of equipment in national parks or national monuments that are damaged or destroyed by flood, fire, storm, or other unavoidable causes, during the fiscal year 1934, and for fighting or emergency prevention of forest fires in national parks or other areas administered by the National Park Service, or fires that endanger such areas, \$50,000, and in addition thereto the unexpended balance for this purpose for the fiscal year 1933 is continued available during the fiscal year 1934, together with not to exceed \$100,000 to be transferred upon the approval of the Secretary of the Interior from the various appropriations for national parks and national monuments herein contained, any such diversions of appropriations to be reported to Congress in the annual Budget: *Provided*, That the allotment of these funds to the various national parks or areas administered by the National Park Service as may be required for fire-fighting purposes shall be made by the Secretary of the Interior, and then only after the obligation for the expenditure has been incurred.

Construction, and so forth, of roads and trails: For the construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in national parks and monuments under the jurisdiction of the Department of the Interior, including the roads from Glacier Park Station through the Blackfeet Indian Reservation to various points in the boundary line of the Glacier National Park and the international boundary, and areas to be established as national parks under the Act of May 22, 1926 (U.S.C. title 16, sec. 403), and for the replacement of a road at Felsgate Creek on the Navy mine depot in connection with the Colonial National Monument Parkway, Virginia, at a cost of not to exceed \$20,000, to be immediately available and remain available until expended, \$2,435,700, a part of the amount of the contractual authorization of \$2,500,000 contained in the Act making appropriations for the Department of the Interior for the fiscal year 1933.

The appropriation for the Alaska Road Commission contains no item for national park roads, but provides that it shall be expended under the provisions of the act of June 30, 1932, *supra*. There is no express provision anywhere in the act under which transfer of any of these funds for use on national park roads may be effected.

Attention, however, is directed to Title II, Sec. 4(a) of the "Act to maintain the credit of the United States Government", approved March 20, 1933, (48 Stat. 8), continuing in force and amending, among others, section 317 of the Economy Act, approved June 30, 1932 (47 Stat. 382, 411). Said section as originally enacted provided that not to exceed 12 per centum of any appropriation for an executive department, or independent establishment, may be transferred, with the approval of the Director of the Budget, to any other appropriation or appropriations under the same department or establishment, but no appropriation shall be increased more than 15 per centum by such transfers. The amendment provides 4(a) (2) that no part of any appropriation for "public works" nor any part of any allotment or portion available for "public works" under any appropriation shall be transferred, pursuant to the authority of this section, to any appropriation for expenditure for personnel unless such personnel is required upon or in connection with "public works".

The projects of the Alaska Road Commission and roads and trails in national parks are included in the general classes enumerated in the Budget statement as "public works".

It therefore appears that under the provisions of the act of March 20, 1933, *supra*, funds may be transferred from one appropriation to another, within the limitation prescribed therein, with the approval of the Director of the Bureau of the Budget. The Department is without authority at this time to authorize the transfer as requested by the Governor, but in the event it is deemed advisable by the administrative officers, the matter may be presented to the Director for consideration under the provisions of said act.

Transfer of funds under appropriations for the fiscal year 1933, if any are now available, would likewise be subject to the approval of the Director as provided for in section 317 of the Economy Act of 1932, as amended.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PROVISION FOR APPEALS BY SPECIAL AGENTS IN CHARGE FROM DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, AND MOTIONS FOR REHEARING BEFORE THE SECRETARY OF THE INTERIOR—CIRCULAR NO. 460 AMENDED.

INSTRUCTIONS

[Circular No. 1299]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., May 18, 1933.

**SPECIAL AGENTS IN CHARGE, AND
REGISTERS, UNITED STATES LAND OFFICES:**

Paragraph 13 of Circular 460, approved February 26, 1916 (44 L.D. 572), prescribing rules for proceedings in contests initiated by reports from the field, is hereby amended to read as follows:

13. Appeals or briefs relating to Registers' decisions, if filed, must be in accordance with the rules but need not be served upon the Special Agent in Charge or government representative in charge of the hearing. No appeals from decisions by the Registers will be filed by the Special Agents in Charge. However, Special Agents in Charge shall have the right of appeal from any decision by the Commissioner of the General Land Office in favor of the contestee, and shall have the right to file motion for rehearing before the Secretary of the Interior, and to take other like action in the same manner as a private contestant, and shall receive like notices of proceedings and decisions.

D. K. PARROTT,
Acting Assistant Commissioner.

I concur:

LOUIS R. GLAVIS,
Director of Investigations.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

SUSPENDING ANNUAL ASSESSMENT WORK ON MINING CLAIMS—
ACT OF MAY 18, 1933

[Circular No. 1300]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., May 25, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to the act of May 18, 1933 (48 Stat. 72), providing for the suspension of annual assessment work on mining claims held by location in the United States and Alaska, and reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of Section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, including Alaska, during the year beginning at 12 o'clock meridian July 1, 1932, and ending at 12 o'clock meridian July 1, 1933: Provided, That the provisions of this act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1932: Provided further, That every claimant of any such mining claim, in order to obtain the benefits of this act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1933, a notice of his desire to hold said mining claim under this act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1932.

It will be observed that only those claimants entitled to exemption from the payment of a Federal income tax for the taxable year 1932 are benefited by the act, and that such claimants must file on or before 12 o'clock noon July 1, 1933, in the office where the location notice or certificate is recorded, a notice of their desire to hold the claims under the act, stating therein that they were entitled to exemption from payment of a Federal income tax for the year 1932.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**ADVANCES TO RECLAMATION FUND BY THE RECONSTRUCTION
FINANCE CORPORATION**

Opinion, May 31, 1933

RECLAMATION SERVICE—ADDITIONAL FUNDS MADE AVAILABLE FOR PROJECTS—
SCOPE OF AUTHORITY GRANTED RECONSTRUCTION FINANCE CORPORATION
AND SECRETARY OF THE INTERIOR BY ACT OF JANUARY 22, 1932.

MARGOLD, *Solicitor*:

My opinion has been requested on the method of procedure for obtaining and expending the funds made available by section 37 of the act of Congress approved May 12, 1933, (48 Stat. 31), which section is quoted for convenience:

The Reconstruction Finance Corporation, upon request of the Secretary of the Interior, is authorized and empowered to advance from funds made available by section 2 of the Act of January 22, 1932 (47 Stat.L. 5), to the reclamation fund created by the Act of June 17, 1902 (32 Stat.L. 388), such sum or sums as the Secretary of the Interior may deem necessary, not exceeding \$5,000,000, for the completion of projects or divisions of projects now under construction, or projects approved and authorized. Funds so advanced shall be repaid out of any receipts and accretions accruing to the reclamation fund within such time as may be fixed by the Reconstruction Finance Corporation, not exceeding five years from the date of advance, with interest at the rate of 4 per centum per annum. Sums so advanced may be expended in the same way as other moneys in the reclamation fund.

It has been represented to me that the logical method to pursue in the administration of this section of the act is to have the Secretary of the Interior make formal application to the Reconstruction Finance Corporation for the funds to be advanced to the reclamation fund from time to time as required for expenditure for the construction program on the reclamation projects, the use of the funds to be determined by the Secretary of the Interior and submitted to the Reconstruction Finance Corporation each time an advance is made.

It is the opinion of the Assistant Commissioner of the Bureau of Reclamation that the act requires the money advanced to be covered into the reclamation fund and then recommendation made by the Secretary of the Interior to the Bureau of the Budget, which will recommend to the President, and he in turn will recommend to Congress and it will again appropriate by another act the money for specific use on designated projects, and then it could be expended in the same way as other moneys in the reclamation fund.

The act of which section 37 is a part was passed as emergency legislation and Congress was attempting to have certain things done immediately, and to expedite the action to be taken the Reconstruction Finance Corporation is used as a medium to determine when certain money appropriated and made available to the corporation may be repaid after it is advanced.

Section 37 comprises only three sentences. The first sentence provides for advance of funds not to exceed \$5,000,000, the second provides for the time and method of repayment, and the third provides for the "way" the money may be expended.

In construing the language used the true meaning is to be found not merely from the words of the act but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances. The true meaning of any passage is to be found not merely in the words of that passage, but comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from these circumstances which the Congress had in view. What were the cause and occasion of the passage of the act and the purpose intended to be accomplished by it in the light of the circumstances at the time and the necessity of its enactment?

When the legislation was under consideration by Congress it had been advised that the reclamation fund would be depleted about July 1, 1933, due principally to moratoria granted by Congress for repayment of construction charges from irrigation districts on the various reclamation projects. The emergency was to be overcome by borrowing from the Reconstruction Finance Corporation, and in this loan the Secretary was supposed to be the judge of when and for what specific purpose the money should be expended. When Congress authorized the loan it believed that the enactment of section 37 was the appropriation of the money, which was to be expended in the same way as other moneys in the reclamation fund. The words "same way" in the last sentence of section 37 have reference to the manner or method of expenditure and the necessity for the repayment by the landowners as provided in the reclamation act. *Davis v. City of Houston* (264 S.W. 625). The emergent nature of the legislation and the prevailing condition at once refute the theory that Congress expected the Secretary of the Interior to go through all the governmental machinery to secure another act of Congress making specific appropriation of funds advanced as set out in section 16 of the act of August 13, 1914 (38 Stat. 689-690). That section has reference to the annual appropriation "in the regular Book of Estimates" and not to this emergency act.

In section 36 of the act of May 12, 1933, *supra*, the Reconstruction Finance Corporation is authorized to loan \$50,000,000 to irrigation, drainage and levee districts to reduce and refinance their outstanding indebtedness, but no one would contend that the money must be reappropriated for each project after the conditions for the loan were found to be satisfactory.

The act provides that the moneys advanced shall be turned into the reclamation fund because it is the only convenient governmental method for receiving and disbursing the funds advanced, and such declaration in the act can not be construed as meaning that the Reconstruction Finance Corporation is authorized and empowered to advance to the reclamation fund *for subsequent appropriation by Congress* not to exceed \$5,000,000. The italicized words must be added to the act to permit an interpretation that the funds must again be appropriated by Congress before they are available for expenditure. This would be an absurd interpretation, as it assumes that Congress must make two appropriations before the money can be expended.

The last sentence from the paragraph provides that "Sums so advanced *may* be expended in the same way as other moneys in the reclamation fund." This does not require that the sums advanced *shall* be expended in the same way as other moneys in the reclamation funds, but only states that sums so advanced *may* be expended in the same way, thus demonstrating that Congress intended to leave to the Secretary of the Interior the decision of how the sums advanced may be expended.

It is my opinion that the logical method to pursue in administering section 37 requires the Secretary of the Interior to apply to the Reconstruction Finance Corporation for the funds to be advanced to the reclamation fund and that the use of the funds shall be determined by the Secretary of the Interior and submitted to the Reconstruction Finance Corporation as a basis for advances from time to time, the sums advanced to be expended as the Secretary of the Interior determines, to be repaid by the landowners or the irrigation districts in the same manner that other moneys are repaid when expended from the reclamation fund.

Approved:

T. A. WALTERS,

First Assistant Secretary.

TAXABILITY OF ELECTRIC POWER GENERATED ON MENOMINEE INDIAN RESERVATION

Opinion, June 5, 1933.

INDIANS—STATUS—INTERNAL REVENUE TAXATION.

The courts and the Commissioner of Internal Revenue have set up an implied inhibition against the collection of the Internal Revenue tax from Indian wards.

INDIANS—APPLICATION OF GENERAL STATUTES—WHEN STATUTES APPLY.

General acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them; and wherever they and their interests have been the subject affected by legislation, they have been named and their interests specifically dealt with.

INDIANS—LANDS TRIBAL AND UNALLOTTED—TAX IMMUNITY—INTERNAL REVENUE ACT OF JUNE 6, 1932.

Electrical energy generated on an Indian reservation by a power plant constructed out of tribal funds and operated as an adjunct to or in connection with an Indian commercial activity is not taxable under section 616 of the act of June 6, 1932 (47 Stat. 266), the lands being tribal and unallotted, and the Indians wards of the Government.

INDIANS—TRIBAL PROPERTY OF MENOMINEES—INTERNAL REVENUE TAXATION—LEGISLATIVE INTENT.

To the extent of participation in income from property which still remains within the ownership of an Indian tribe as a whole, restricted Indians should not be taxed under the Federal revenue acts, since to such extent it appears not the intention of Congress.

INTERNAL REVENUE TAXATION—ELECTRICAL POWER GENERATED ON INDIAN RESERVATION—NON-INDIANS SUBJECT TO TAX.

Electrical energy, generated by a power plant constructed out of tribal funds and operated in connection with Indian mills on an Indian reservation, when furnished to non-Indians, is taxable under the Internal Revenue Act of June 6, 1932.

DECISIONS AND OPINIONS CITED AND APPLIED.

Blackbird v. Commissioner of Internal Revenue (38 Fed. 2d, 976); 34 Op. Atty. Gen. 439; Op. Comp. Gen. of February 27, 1933, cited and applied.

MARGOLD, Solicitor:

With reference to the request of the Commissioner of Indian Affairs, addressed to you under date of April 29, 1933, for opinion (requested by Ralph Fredenberg, Aloysius M. Dodge, and James Caldwell, delegates of the Menominee Tribe of Indians, under date of April 11, 1933) on the question whether electrical energy generated at Neopit, Wisconsin, on the Menominee Indian Reservation, by a power plant constructed out of tribal funds and operated as an adjunct to or in connection with the Menominee Indian Mills, is taxable under the Internal Revenue Act of June 6, 1932 (47 Stat. 266), my opinion follows:

The pertinent part of the statute reads:

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor. (Sec. 616, Act of June 6, 1932, *supra*.)

The question divides itself into two parts:

1. Are the Indians to whom the electrical energy is furnished by the plant exempt from the tax?

2. Are non-Indians to whom such energy is furnished exempt from the tax?

(1) Prior to 1848 numerous treaties had been effected with the Menominee Tribe of Indians. On October 18, 1848 (9 Stat. 952), a treaty was made with the Menominees in which it is stated in Article 3:

In consideration of the foregoing cession the United States agree to give and do hereby give to said Indians for a home to be held as Indians' lands are held, all that country or tract of land ceded to the United States by the Chippewa Indians of the Mississippi and Lake Superior, * * *

The lands on this reservation have not been allotted under any act of Congress, the property is tribal, and title to the lands remains as stated in the treaty. The Indians on the reservation who use electricity from the tribal power plant are wards of the Government.

In decision of October 28, 1932, the Deputy Commissioner of Internal Revenue had under consideration the payment of a stamp tax on a deed for conveyance of restricted Indian lands from one Indian to another Indian. By the transaction the restriction was not removed. Section 725 of the Revenue Act of 1932 provided by subsection 8 that on deeds conveying realty there shall be assessed a tax of 50 cents where the consideration exceeds \$100 and does not exceed \$500, and increasing the tax for increased consideration named in the deed. The Commissioner states:

The Blackbird case should be taken to stand for the proposition that to the extent of restricted allotted lands, and of any participation in income from property which still remains within the ownership of the tribe as a whole, restricted Indians should not be taxed under the Federal revenue acts on the ground that to such extent it is not the intention of Congress to tax restricted Indians.

The decision of the Commissioner holds that the taxing stamp should not be affixed to a deed of conveyance of restricted lands from one restricted Indian to another restricted Indian. The decision of the Commissioner on the question of tax on the transfer of lands from one Indian to another appears to me to be almost identical with the case under consideration, where the sale is that of electrical energy produced by a plant owned and operated for the benefit of the Menominee Tribe and the electricity is sold to a member of the tribe.

In the case of *Blackbird v. Commissioner of Internal Revenue* (38 Fed. 2d, 976), the court was considering the applicability of the income tax under the Revenue Act of 1918 (40 Stat. 1057), and the Revenue Act of 1921 (42 Stat. 227), in connection with the income of

Mary Blackbird, a restricted full-blood member of the Osage Tribe of Indians. The principal part of Mary Blackbird's gross income for the two years for which it was claimed she owed income tax, was her share of bonuses and royalties on tribal mineral leases. The court says:

She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057) and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with. *Elic v. Williams*, 112 U.S. 94, 100, 5 S.Ct. 41, 44, 28 L.Ed. 643: "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." In *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941, the court, after noting the general rule that exemptions from taxation are to be strictly construed, said at page 675 of 224 U.S., 32 S.Ct. 565, 569:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

"Cases are cited. This is the view taken of the matter by the Attorney General in several opinions. 34 Ops. Attys. Gen. 439; * * *."

In the wording of both the electric tax and the documentary tax the law seems to be inclusive, but the courts and the Commissioner of Internal Revenue have set up an implied inhibition against the collection of the Internal Revenue tax from Indian wards.

Upon the foregoing considerations it is my opinion that Indian wards are exempt from payment of the tax in question.

(2) In an opinion by the Comptroller General dated February 27, 1933, relative to the sale of electrical energy (to Government employees) developed by the Menominee Indian Mills, Neopit, Wisconsin, and the computation of Federal tax thereon, he asserts:

As stated in the decision of the Commissioner of Internal Revenue, dated February 7, 1933, where electrical energy is supplied by the Government to its employees for private use and paid for by them on a consumption basis, directly or by pay roll deductions from their salaries, the purchase of such energy is subject to the tax imposed by section 616 of the revenue act.

The Comptroller General further provides in his opinion a method of stating and settling for the taxes collected. From this it appears

that the whites living on the reservation and using electricity developed by the Menominee Indian Mills plant are required to pay the tax of 3 per cent. This is not inimical to the interest of the Menominee Tribe of Indians, since the tax is paid by the consumer and is not an attempt to tax the property of the wards of the Government, and should not deprive the tribe of its usual revenue from the plant.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**STATUS OF ISLANDS IN THE ARKANSAS RIVER AND OTHER
STREAMS IN OKLAHOMA WITHDRAWN FROM SETTLEMENT
AND ENTRY BECAUSE WITHIN A PETROLEUM RESERVE.**

Decided June 9, 1933.

ISLANDS—OKLAHOMA—TITLE AS BETWEEN STATE AND THE UNITED STATES.

The title of the United States to islands in the Arkansas River and other Oklahoma streams is not dependent upon whether such streams are, in law, held to be navigable, since upon admission of a State into the Federal Union, islands formed prior to such admission remain the property of the United States and subject to disposal as public lands.

**ISLANDS—DISPOSAL OF ISLAND OMITTED FROM UNITED STATES SURVEY—
OKLAHOMA.**

The United States has authority to survey and dispose of an island lying between the meander line and the thread of a stream, navigable or non-navigable, omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land left unsurveyed.

PETROLEUM WITHDRAWAL—STATUS OF LANDS WHILE WITHDRAWAL CONTINUES.

A withdrawal of public lands from disposal, made by the President under the authority of the act of June 25, 1910 (36 Stat. 847), continues in effect until revoked by the President or by act of Congress.

**LAND WITHDRAWAL FOR PETROLEUM RESERVE—EFFECT OF SUBSEQUENT PASSAGE
OF ACTS OF JULY 17, 1914 (38 STAT. 509), AND FEBRUARY 25, 1920 (41 STAT.
437).**

Where, following establishment by the President of a petroleum reserve embracing certain islands, and the consequent withdrawal of the land from disposition, legislation is passed providing for the disposition of the surface of lands in petroleum reserves, and other legislation is passed providing for the disposition of oil and gas deposits, no further bar remains to the disposal of such lands under the public-land laws, provided appropriate reservation is made of the oil and gas deposits.

CHAPMAN, *Assistant Secretary*:

By your [Commissioner of the General Land Office] letter of May 10, 1933, you request instructions relative to the status and disposition of islands belonging to the United States located in the Arkansas River and other streams in the State of Oklahoma affected by Executive order dated April 17, 1914, which reads as follows:

ORDER OF WITHDRAWAL

Petroleum Reserve No. 1, Oklahoma

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled an act to authorize the President of the United States to make withdrawals of public lands in certain cases, as amended by act of Congress approved August 24, 1912 (37 Stat. 497), it is hereby ordered that the following described lands be, and the same are hereby, withdrawn from settlement, location, sale, entry, or disposal and reserved for classification and in aid of pending legislation affecting the use and disposition of such land.

Oklahoma

All islands, survey or unsurveyed, belonging to the United States and situated in the bed of the Arkansas River or other navigable streams within the boundaries of the State of Oklahoma.

You refer to departmental letter of April 16, 1914, recommending the withdrawal for reasons therein stated, and to H. R. 13086, introduced February 17, 1914, in the 63d Congress, Second Session, proposing to authorize the Secretary of the Interior to sell to the State for \$1.25 per acre all unsurveyed islands or remnants of land in the Arkansas River. It is also stated in your letter that there are several islands in the Salt Fork of the Arkansas River which were surveyed recently and the notice of the filing of the plats was approved by you October 24, 1932.

Instructions are requested as to the following:

1. Whether all islands, surveyed or unsurveyed, belonging to the United States and situated in the bed of the Arkansas River or other navigable streams within the boundaries of Oklahoma, are now withdrawn from settlement and entry. These instructions are requested as said withdrawal in part was made in connection with the above mentioned H. R. 13086 and as it is the rule that such a withdrawal continues in effect until revoked by the President or by act of Congress. (*Shaw v. Work*, 9 Fed. 2d, 1014; certiorari denied by the Supreme Court of the United States, 270 U.S. 642). The said order of withdrawal has not been revoked. In this connection attention is called to the fact that lands in a petroleum reserve and not otherwise withdrawn may now be entered under the act of July 17, 1914 (38 Stat. 509), with a reservation to the United States of the oil and gas deposits.

2. Whether, under the circumstances, the revocation of the withdrawal order should be recommended, so as to permit the entry of the islands affected thereby, with a reservation to the United States of the oil and gas deposits, if such islands are not otherwise reserved or withdrawn.

From your quotations from the letter of April 16, 1914, it appears that the Secretary recommended the withdrawal because of the existence of unsurveyed islands belonging to the United States in the Arkansas River and other streams believed to be underlaid by valuable deposits of oil or gas, and the bill then pending to dispose of the lands to the State for a nominal consideration and other pending legislation regarding the disposition of oil and gas deposits in public lands generally.

It also appears that, prior to the withdrawal, the Supreme Court of the State of Oklahoma, following a decision of the Supreme Court of the State of Kansas, held that the Arkansas River is a navigable stream in law. The view was expressed that if this decision be sound the title to the unsurveyed islands in said river is vested in the United States, and the withdrawal order, it will be noted from the above, was therefore drawn to include all islands belonging to the United States "situated in the bed of the Arkansas River or other navigable streams."

The assumption that the title of the United States to islands in said river and other streams is dependent upon whether rivers are navigable in law or not was not in accord with the previous holdings of the Department and the courts. The subject of the ownership of islands was considered at length in the case of *Emma S. Peterson* (39 L.D. 566), in connection with an application for the survey of an island in Idaho situated in Snake River, a navigable stream. With respect to islands in navigable streams the Department held that upon the admission of a State into the Union it acquires absolute property and dominion and sovereignty over all soils under the navigable water within its borders, but islands therein formed prior to the admission of the State remain the property of the United States, subject to disposal as other public lands. It was also pointed out, however, that the United States has authority to survey and dispose of any island lying between the meander line and the thread of a stream whether navigable or nonnavigable, which had been omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land left unsurveyed.

The subject of title to lands in the beds of rivers has been the source of much litigation, and the question as to whether or not the river involved in the particular case is navigable or nonnavigable has been carefully considered by the Federal courts where large interests of the United States have been involved. *State of Oklahoma v. State of Texas*: (258 U.S. 574), involving the Red River; *Brewer Elliott Oil and Gas Co. et al. v. United States et al.* (260

U.S. 77), involving the Arkansas River in Oklahoma; *United States v. State of Utah* (283 U.S. 64), involving the Green, Colorado, and San Juan Rivers.

These decisions were handed down after the date of the withdrawal order in question and it is noted that in the cases involving the Red and Arkansas Rivers the greater portions of said rivers were found to be nonnavigable.

However, in so far as the withdrawal here under consideration is concerned, all islands belonging to the United States situated in the Arkansas River were withdrawn, evidently on the assumption that the river is navigable, and it clearly was the intention to include all islands belonging to the United States situated in other streams which would be regarded as navigable according to the standard established by the decisions of the State courts. Otherwise the order would be practically ineffective.

The instructions you request, however, concern primarily the question as to whether the order is still effective. The authorities cited by you and numerous others support the view expressed in your letter that as the withdrawal has not been revoked by the President or act of Congress it necessarily remains in effect.

The withdrawal was made for two main purposes, the first being for classification of the lands, and the second in aid of pending legislation affecting the use and disposition of such lands. With respect to H.R. 13086 proposing the sale of the islands to the State, you advise that the legislation was not enacted, and that since that time no similar legislation was passed. With respect to the disposition of oil and gas deposits in public lands generally, the matter has been fully covered by legislation. The act of July 17, 1914 (38 Stat. 509), provides for the disposition of the surface of lands in petroleum reserves and the general leasing act of February 25, 1920 (41 Stat. 437), provides for the disposition of other non-metalliferous minerals and deposits of oil and gas belonging to the United States. It thus appears that in so far as the proposed sale of the islands to the State in 1914 is concerned, the proposed legislation has been abandoned. The disposition of both the surface and the oil and gas deposits in the lands embraced in petroleum reserves has been fully provided for in subsequent legislation, and there appears to be no further bar to the disposition of the islands referred to in your letter, with appropriate reservation of the oil and gas deposits, and such disposal would be consistent with the express purposes of the withdrawal.

The first question submitted by you is therefore answered in the affirmative, and inasmuch as no revocation of the withdrawal under the circumstances is necessary, your second question as to whether

the revocation of the withdrawal order should be recommended in order to permit of the disposition of the said islands, is answered in the negative.

COAL TRESPASS REGULATIONS

[Circular No. 1309]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., June 10, 1933.

SPECIAL AGENTS IN CHARGE, AND

REGISTERS, UNITED STATES LAND OFFICES:

The following regulations will hereafter govern the matter of trespass in coal cases, where the applicant has not been granted a coal permit, lease, or license, and no equities are involved by reason of occupation or improvement of the land prior to the passage of the Leasing Act:

(1). *Trespass*. All coal mined either under a pending application for permit, lease, or license, or without such pending application, is a trespass and the coal so mined must be settled for on a trespass basis. However, where a permittee applies for a lease, the mining of coal by him under his permit, prior to the issuance of the lease, does not constitute a trespass.

(2). *Successful Bidder*. The successful bidder at public sale for a coal leasing unit does not acquire any right to mine coal until he has complied with all the formalities required by the regulations, including the furnishing of a bond, and a lease has been issued to him. Coal mined by such applicant prior to the date of the issuance of a lease is in trespass and must be paid for on a trespass basis.

(3). *Measure of Damage*. The law of the State in which the trespass is committed governs, if there is such law. *Sam. W. Mason et al. vs. United States* (260 U.S. 545). In the absence of a State law the measure of damage will be determined as follows:

(a) For innocent trespass, payment must be made for the value of the coal in place before severance. *United States vs. Homestake Mining Company* (117 Fed. 481). In no event should less than 25 cents per ton be demanded in settlement.

(b) For wilful trespass, payment must be made for the full value of the coal at the time of conversion, without deduction for the labor bestowed or expense incurred in removing and preparing the coal for market. *United States vs. Ute Coal and Coke Company* (158 Fed. 20).

(4). *Action Required*. Where coal is being mined in trespass as herein stated, the Special Agent in Charge will take steps to put an immediate stop to such mining and to collect damages for the coal mined.

(5). *Surface Owner*. The owner of land patented with a reservation of the coal deposits, either under the act of March 3, 1909 (35 Stat. 844), or under the act of June 22, 1910 (36 Stat. 563), has the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits.

(6) *Former Instructions.* The instructions contained in Circulars Nos. 955, 1135, and 1239, are revoked, in so far as they are inconsistent herewith.

FRED W. JOHNSON,
Commissioner.

Approved, August 17, 1933.

T. A. WALTERS,
First Assistant Secretary.

AGRICULTURAL ENTRY OF LANDS WITHDRAWN, CLASSIFIED,
OR REPORTED AS VALUABLE FOR SODIUM AND/OR SULPHUR—
ACT OF MARCH 4, 1933.

REGULATIONS.

[Circular No. 1303]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., June 13, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved March 4, 1933 (47 Stat. 1570), reads as follows:

That lands withdrawn, classified, or reported as valuable for sodium and/or sulphur and subject to prospecting, leasing, or development under the General Leasing Act of February 25, 1920, or Acts amendatory thereof or supplementary thereto shall be subject to appropriation, location, selection, entry, or purchase if otherwise available in the form and manner and subject to the reservations, provisions, limitations, and conditions of the Act of Congress approved July 17, 1914 (38 Stat. L. 509; U.S.C., title 30, sec. 123): *Provided, however,* That lands lying within the geologic structure of a field, or withdrawn, classified, or reported as valuable for any of the minerals named herein and/or in any of said Acts, or upon which leases or prospecting permits have been applied for or granted, for the production of any of such minerals, shall not be subject to such appropriation, location, selection, entry, or purchase unless it shall be determined by the Secretary of the Interior that such disposal will not unreasonably interfere with operations under said leasing Acts.

Under said act, lands withdrawn, classified, or reported as valuable for sodium and/or sulphur are subject to entry, filing, or selection, if otherwise available, and subject to the reservations, provisions, limitations and conditions of the act of July 17, 1914 (38 Stat. 509), sulphur lands being limited to the States of Louisiana and New Mexico pursuant to the act of July 16, 1932 (47 Stat. 701).

Under the proviso to said act applications filed under nonmineral public-land laws for lands which are within a designated structure of a producing oil and gas field, or included in an oil and gas or other mineral lease, will be rejected by you subject to appeal. Like appli-

cations filed for lands embraced in applications for permits or leases, or in permits granted, or for lands withdrawn, classified, or reported as valuable for any mineral subject to lease, will be suspended by you and forwarded to this office for consideration with a view to a determination by the Secretary of the Interior whether the disposal of the lands under the nonmineral application will unreasonably interfere with operations under the leasing acts, as required by the proviso to said act of March 4, 1933.

All applications so suspended will be forwarded with your semi-monthly returns, with a report on each as to the status of the land involved, and with a reference made to the act of March 4, 1933.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CHRISTMANN v. YONKERS

Decided June 17, 1933

RELINQUISHMENT OF PORTION OF A LEGAL SUBDIVISION IN HOMESTEAD ENTRY— MINING REGULATIONS.

Relinquishment of a homestead entry as to part of a forty-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of the General Mining Regulations.

AGRICULTURAL APPLICATION FOR FRACTIONAL PART OF LEGAL SUBDIVISION—RE- MAINDER OF LAND WITHIN MINING LOCATION—SHOWING REQUIRED.

An agricultural application for a fractional part of a legal subdivision of land classified as agricultural will not be allowed where the remaining part is covered by a surveyed mining claim for which no application for patent has been filed, unless the agricultural applicant submits a satisfactory affidavit, corroborated by two witnesses, showing that the land within the mining location is in fact mineral in character, or following an adjudication that the mining claim was valid from the evidence adduced in a contest proceeding between the agricultural and mineral claimant, as prescribed in sections 101, 105-108, of the General Mining Regulations.

CONTEST AFFIDAVIT—RELINQUISHMENT BY CONTESTEE—RIGHTS OF CONTESTANT— PRESUMPTION.

Where, following contest duly allowed, an entryman with notice of such contest does not meet and respond to its allegations, but relinquishes to the United States; such action must be taken as a confession of the truth of the charges, and the contestant is under no burden to prove such facts as would entitle his opponent to a segregation survey; but as between the Government and the mineral claimant there is no presumption that the mining claim is valid.

CHAPMAN, *Assistant Secretary*:

Pursuant to an application, Phoenix 066562, filed September 22, 1929, Gustave C. Yonkers was allowed, under the stock-raising homestead act, to make entry of the E $\frac{1}{2}$ NE $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 11, T. 24 S., R. 28 E., G. & S. R. M. On December 27, 1932, Walter F. Christmann filed contest affidavit asserting a superior right to the W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, said Sec. 11, by virtue of the location on September 19, 1929, of the Frida O. mining claim embracing said W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ on account of valuable deposits of gypsum contained therein; that Yonkers made his application with actual knowledge of the prior existence of such claim, having assisted in the location thereof; that the affidavit supporting the homestead application was false and untrue insofar as it stated "that no part of said land is claimed, occupied or being worked under the mining laws."

The contest was allowed and due notice thereof was served on Yonkers requiring him to answer. The notice contained the usual monition to the effect that the allegations of contest would be taken as confessed and the entry canceled without further right to be heard unless the contestee specifically met and responded in an answer under oath to the allegations of contest.

On January 31, 1933, contestee filed answer, under oath, stating as follows:

That at the time I made application for homestead entry No. 066562 as to that part of said entry, namely, the W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 24 S., Range 28 E., G. & S. R. B. & Meridian, very little gypsum was exposed and there is very little gypsum exposed now and said land is more valuable for agriculture and for the raising of forage crops and stock purposes than for mining or for gypsum, as the gypsum is a fertilizer and will have a tendency to insure the crop. *But having no money to defend the matter*, I hereby relinquish to the United States all my right, title and interest in and to that part of my homestead entry, as a homestead, that part being the land in conflict, the W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 24 S., of Range 28 E., G. & S. R. B. & Meridian.

The relinquishment was accepted by the register and noted on the records of his office.

By decision of March 1, 1933, the Commissioner of the General Land Office stated that:

This office is opposed to the closing out of a contest such as this on the mere allegations of the contestant. You (the register) should in such cases require the contestant to introduce evidence in support of his assertions.

He therefore refused to accept the relinquishment, returned the contest record and directed that the hearing proceed, and required the contestant to substantiate his charges regardless of whether or not there was default on the part of the contestee.

The contestant appealed from this decision requiring him to further proceed, and from the rejection of the relinquishment.

The Commissioner's refusal to accept, under the circumstances presented, a relinquishment of a fractional part of a subdivision was clearly right. The case here presented is similar in essentials to the case of *Lenertz v. Parsons* (41 L.D. 132). In that case Lenertz contested the enlarged homestead of Parsons, alleging a prior valid location of a placer claim covering a specifically described aliquot portion of a subdivision of the entry. As here, Parsons, while the contest matter was pending, relinquished the part claimed by Lenertz and other tracts, which was accepted in the form presented, and a subsequent timber and stone application was filed to include the fractional subdivision claimed by Lenertz. The Department held (syllabus) that:

Relinquishment of a homestead entry as to a part of a forty-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of paragraph (c) of section 37 of the general mining regulations of March 29, 1909.

The provisions of the mentioned regulation bar the allowance of an agricultural claim for a portion of a subdivision where the remaining portion is covered by a surveyed mining claim for which no application for patent has been filed, unless the *agricultural* applicant submits a satisfactory affidavit, corroborated by two witnesses, showing the land within the mining location is in fact mineral in character. The applicability of this regulation and the case of *Lenertz v. Parsons, supra*, to the present case is not affected by the fact the entry here in question is a stock-raising entry, for while the character of the land is not important in determining the entryman's rights, it is important in determining whether the land is subject to mining location and such as should be segregated as *prima facie* appropriated under the mining laws.

An alternative basis for segregation in such a case would be an adjudication that the mining claim was valid from the evidence adduced in a contest proceeding between the agricultural and mineral claimant, as prescribed in sections 101, 105 to 108 of the mining regulations. Neither of these methods being pursued, there is no warrant for the segregation of a portion of a legal subdivision by the filing of a relinquishment therefor.

The answer of the contestee did not meet and respond to the allegations, and his relinquishment must be taken as a confession of the truth of the charges. In other words, he has admitted that there was a prior subsisting mining location, to his personal knowledge, covering the $W\frac{1}{2}SE\frac{1}{4}NE\frac{1}{4}$ at the date of the inception of his stock-raising entry. Had this been disclosed in his application, in the absence of the showing required by paragraph (c) of section 37 of the mining regulations, he would not be entitled to make

entry of any part of SE $\frac{1}{4}$ NE $\frac{1}{4}$. See *Alford Roos v. Altman et al.*, decided September 14, 1932 (54 I.D. 47). The entry of contestee should, therefore, be canceled as to the whole of the SE $\frac{1}{4}$ NE $\frac{1}{4}$, should he fail in due opportunity given to file the requisite showings prescribed under paragraph (c) aforementioned.

Under the rules of procedure the contestant is entitled, as between himself and the contestee, to have his allegations taken as true and his contest sustained. He is under no burden to prove such facts as would entitle his opponent to a segregation survey, and he could gain nothing thereby. This requirement of the Commissioner will, therefore, be vacated. As between the Government and the mineral claimant this decision creates no presumption that the mining claim is valid.

As herein modified, the Commissioner's decision is

Affirmed.

McMINN v. McKENZIE

Decided June 26, 1933

CONTEST—SERVICE OF NOTICE—SUFFICIENCY.

In the absence of other objection, a motion to dismiss the contest of a homestead entry is properly denied if, prior to the time the contest has become subject to a judgment of abatement, personal service upon the contestee has been secured and evidence thereof supplied.

CHAPMAN, Assistant Secretary:

William H. McKenzie has appealed from the decision of the Commissioner of the General Land Office dated December 22, 1932, denying his motion to dismiss the contest of Weston R. McMinn against his homestead entries Nos. 065046 and 065605, Phoenix, Arizona, series.

The entries were made on July 9 and August 8, 1929, respectively, under the stock-raising homestead law. The contest was filed on July 1, 1932, alleging that entryman had not established residence on the land; had never occupied the same; had never placed any improvements thereon, and that he had abandoned his claim.

Notice issued for personal service on July 1, 1932. On July 27, 1932, the contestant filed in the local land office his affidavit to the effect that he had made diligent search but was unable to find the entryman for personal service, and he requested an order to serve the notice by publication. The request was granted and notice for publication was issued on July 27, 1932. It was first published on August 5, 1932, and weekly thereafter for the required time, the last publication being on August 26, 1932. On September 7, 1932, the contestant filed in the local land office his affidavit to the effect

that he had on August 15, 1932, by registered mail, served on the contestee notice of the contest, together with a copy of the affidavit of contest, and in verification thereof the registry return card signed by the contestee was attached. The contestee did not file answer to the contest, but appeared specially, by his attorney, and moved the dismissal of the contest, and, by letter of September 26, 1932, the register notified the contestant that this contest was dismissed because he had not filed evidence of publication and did not file evidence of personal service within 30 days from the date of the issuance of the notice, as required by the Rules of Practice.

The Commissioner, in the decision appealed from, reversed the action of the register, and remanded the case for hearing, allowing the contestee 30 days within which to file answer. Instead of filing answer as permitted, the contestee has appealed. He relies upon Rule 8 of the Rules of Practice (51 L.D. 547), which reads as follows:

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

It is clear that this contest did not abate on the ground that personal service was not made within the 30-day period from July 1, 1932. Before the expiration of that period attempt to obtain personal service had failed and an order had been obtained for notice by publication. The contest was still in good standing, and the publication proceeded in regular order. If proof of the publication had been filed in the local land office within 20 days from August 26, 1932, the date of the last publication, there would have been no question whatever in regard to the technical compliance with the rules. But as personal service had been in the meantime secured, the contestant, instead of completing his proof of constructive service by publication, filed instead the better proof of personal and actual service. This was done before the contest could have abated. Under such circumstances, Rule 12 of the Rules of Practice is peculiarly applicable and serves to cure any supposed defect in the proceedings. It provides:

Rule 12. No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but in such case the time to answer may be extended in the discretion of the register.

It will be observed that the Rules of Practice provide two methods for serving notice of a contest. The first is the actual or personal service, and satisfactory effort must be made to obtain personal service before resorting to constructive service by publication. The latter is only substituted service, which is resorted to from practical necessity, and can not at any stage of the proceedings be regarded as preferable to actual notice. No reason is seen why the more satisfactory actual notice may not be recognized if given and proof thereof be submitted before the process of serving notice by the secondary method has been completed and before the contest has become subject to a judgment of abatement. But, of course, the provisions of Rule 12 are not applicable where the contest otherwise has abated.

The decision appealed from is found to be correct and the same is accordingly

Affirmed.

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PER DIEM AND TRAVEL EXPENSES OF DETAILED EMPLOYEES AND SALARY WHILE ON DETAIL—APPROPRIATION CHARGEABLE

Opinion, June 28, 1933

APPROPRIATIONS—PER DIEM AND TRAVEL EXPENSES OF EMPLOYEES DETAILED TO OTHER FEDERAL ESTABLISHMENTS—TO WHAT APPROPRIATION CHARGEABLE.

Per diem and travel expenses of employees of the Department of the Interior or of the Federal Emergency Public Works Administration may properly be charged against the appropriation of the Federal establishment for which such expenses are incurred, where such employees have been detailed for special services with such other establishment.

APPROPRIATIONS—SALARIES OF EMPLOYEES APPOINTED TO ONE FEDERAL ESTABLISHMENT AND LOANED TO ANOTHER—TEST FOR DETERMINING WHICH ESTABLISHMENT CHARGEABLE FOR SALARY.

Where the loan of the services of an employee of the Federal Emergency Public Works Administration to the Department of the Interior entails a burden upon the former which necessitates the engagement of additional personnel or the postponement of work which would otherwise be performed by the employee so detailed, the appropriation of the Department of the Interior may properly be charged with the detailed employee's salary or a *pro rata* portion thereof.

DECISIONS OF COMPTROLLER AND COMPTROLLER GENERAL CITED AND APPLIED.

See 23 Comp. Dec. 242 (1916) ; 3 Comp. Gen. 974 (1924) ; 6 Id. 217 (1926) ; 10 Id. 193 (1930).

MARGOLD, Solicitor:

My opinion has been requested by the Director of Investigations of this Department, Louis R. Glavis, as to the propriety of:

1. Charging per diem and travel expenses of employees of the Interior Department or of the Federal Emergency Public Works Administration against

the appropriation of the other department when such employees have been detailed for special services with such other department.

2. Charging the appropriation of either department with the salaries of employees appointed by the other department who have been detailed for special services.

It has long been the custom of the General Accounting Office to approve interdepartmental charges where such charges represent additional costs by way of materials, supplies and travel expenses incurred in furnishing special services to another department. Thus in 3 Comp. Gen. 974, 976 (1924), the following statement appears:

The performance of work by one department for another department, etc., without reimbursing the whole additional cost of such work as accurately as it may reasonably be ascertained, would contravene the requirements of law in that it would augment one appropriation at the expense of another. 23 Comp. Dec., 242.

Compare 10 Comp. Gen. 193 (1930).

The position of the General Accounting Office with respect to interdepartmental salary charges seems less clearly defined. In an early decision of the Comptroller of the Treasury (23 Comp. Dec. 242, Oct. 16, 1916), it was held that while the salary of a national bank examiner serving under the Treasury Department and assigned to assist the Department of Justice in a criminal prosecution is payable in the first instance from the appropriation for the Treasury Department, by which he was regularly employed, nevertheless such appropriation should be credited with the amount of such salary from the appropriation of the Department of Justice, which received the benefit of his services. The Comptroller pointed out that national bank examiners are charged primarily with the duty of examining banks and disclosing any unlawful conditions which may be found to exist, and that should an examination result in a legal proceeding so as to render it necessary for the examiner to aid a United States attorney in the preparation of a case for trial, it would be proper for the examiner in his official capacity to give the attorney the benefit of his knowledge of the facts of the case. But the Comptroller insisted that where "a national bank examiner * * * is loaned to the Department of Justice to assist a United States attorney as an expert because of his general expert knowledge * * * the resultant expense is a just and proper charge" against the appropriation of the Department of Justice. In discussing the reason of the rule the Comptroller admitted that "unless some one else is employed to do his work during his absence, no direct immediate loss of money would ensue, but the loss of his services must necessarily involve the loss of the value of those services, and there is no other measure of value than the salary paid to him during the loan period."

He added :

We can not assume either that he would have remained idle if he had not been loaned or that the activities of his regular services will be curtailed because of his temporary absence. We must conclude that the performance of his regular duties is postponed until his return, and must therefore be thereafter performed in time, for which he will be regularly paid by his department. His service will be thus prolonged, and the loss of the value of his services during the loan period will ultimately fall upon his department.

The Comptroller concluded by holding :

That when the expert services of a national bank examiner are loaned by the Treasury Department to the Department of Justice upon due authority from the latter department, the examiner's salary and expenses are payable in the first instance by the Treasury Department from the fund provided for that purpose and under laws and regulations governing other like payments. Having so paid the said salary and expenses, the Treasury Department has a just and lawful claim against the Department of Justice for reimbursement of this fund to the extent to which it has been thus drawn upon.

On a somewhat similar state of facts, however, the Comptroller General has decided [6 Comp. Gen. 217 (1926)] that where the services of an employee of the Geological Survey are loaned to assist a United States district attorney in the investigation of a case and to testify as an expert witness relative thereto, the Geological Survey may not charge the appropriation of the Department of Justice for the salary of the employee lent to the Department of Justice. After reaffirming the general principle that where one establishment of the Government lends the services of an employee to another, the salary of such employee remains primarily chargeable against the establishment lending the services, the Comptroller insisted that there was "nothing in the circumstances connected with the instant case to warrant excepting it from the general rule." He distinguished the case from those presented in 23 Comp. Dec. 242, *supra*, and 3 Comp. Gen. 974, *supra*, "in that in the instant case it does not appear that any additional burden will be incurred by the salary appropriation of the Geological Survey because of the loaning of Mr. Schrader's services. On the contrary, it would seem that a reimbursement would operate to augment the salary appropriation of the Geological Survey. It is assumed that Mr. Schrader's services can be spared or they would not have been loaned."

The effect of this decision seems to be to set forth a guiding principle different from that asserted by the Comptroller in the decision above referred to (23 Comp. Dec. 242, *supra*). In the earlier decision the Comptroller indulged in a presumption that the Department lending the services would be put to extra expense, while in this case the Comptroller General cast the burden of proving a loss upon the lending Department.

This interpretation of the view of the Comptroller General is supported by a recent case where the Comptroller General sustained the claim when the lending Department successfully carried the burden imposed. The Comptroller General said (at 10 Comp. Gen. 193, 196 (1930)) :

*That reimbursement * * * is authorized only upon a showing that the loaning of the services to or the doing of work for another department or establishment increased the burden of or caused additional expenditures under the appropriation first chargeable. These principles are fundamental and are for application in the absence of specific statutory provision otherwise. Therefore the question for determination * * * is as to the sufficiency of the showing as to increased burden or additional expenditures.* [Italics supplied.]

The issue in this case was the propriety of the War Department charging the Navy Department for the cost of materials and salaries incurred in performing services in connection with the construction of a United States Naval Radio Compass Station. The Comptroller pointed out:

In the present case, while the War Department may not engage additional employees to perform the work for the Navy, and may not thereafter have engaged additional employees because of the work performed for the Navy, the work for which these river and harbor appropriations are made is of such a continuing nature—additional appropriations for the same being made as previous appropriations therefor become exhausted—that the diverting of material and labor, which otherwise would be used on said work, to a Navy project, necessarily imposes an additional burden on the river and harbor appropriations by creating a need for subsequent appropriations sooner or in greater amount than if the work for the Navy had not been done. Under such circumstances, there would appear to be no legal objection to reimbursing such appropriations for the increased burden imposed upon them on the basis of the actual cost of the labor as well as for the cost of the material used on the job.

In the situation upon which an opinion is here requested, no specific statutory provisions are involved, with the exception of the act providing for the appropriations for the Interior Department for the fiscal year 1934 (Public No. 361, 72d Congress) [47 Stat. 820] and the National Industrial Recovery Act (Public No. 67, 73d Congress, 1st session) [48 Stat. 195].

It is my opinion that in so far as per diem and travel expenses are concerned, they may be charged against the appropriation of the Department to which an employee of another Department is detailed. It is also my opinion that if the loan of a particular employee of the Federal Emergency Public Works Administration to the Department of the Interior constitutes a burden upon the Public Works Administration so as to necessitate the engagement of additional personnel or the postponement of work which would

otherwise be performed by the employee detailed, then the appropriation of the Department of the Interior may be charged with a *pro rata* portion of the detailed employee's salary.

CHICAGO TITLE AND TRUST COMPANY

Opinion, July 8, 1933

INDIANS OF FIVE CIVILIZED TRIBES—TRUSTEESHIPS—DISQUALIFICATION TO ACT AS TRUSTEE—SEC. 2, ACT OF JANUARY 27, 1933.

Under that provision of section 2 of the Act of January 27, 1933 (47 Stat. 777), relating to Indians of the Five Civilized Tribes in Oklahoma, which declares that "no trust company * * * shall be trustee in any trust created under the Act which has * * * promised to pay to any person other than an officer or employee on the regular pay roll thereof any * * * remuneration for any service or influence in * * * attempting to secure for it the trusteeship in any trust," a company is disqualified to act as trustee in cases where it has entered into contractual relations with one not on its regular pay roll, such person to receive a compensation for obtaining for the company the consents of said Indians to its trusteeship in the creation of trusts under said Act.

INDIAN TRUSTEESHIPS—SERVICES IN CONNECTION THEREWITH—CHARACTER AND TIME OF EMPLOYMENT.

The criterion for determining whether a company has placed itself within the class inhibited from acting as Indian trustee under the provisions of the Act of January 27, 1933, is the circumstance, whether or not the person dealing in its behalf with the Indians in endeavoring to obtain consents to the creation of trusts was at the time of the transactions an officer or employee on the company's regular pay roll, the statute and regulations clearly expressing an intention to limit promises of compensation to persons *already on the regular pay roll of the company for purposes other than the procural of trusts under the Act*, and prohibiting any and all sorts of promises of remuneration so long as they are made to persons who are not already officers or employees on the regular pay roll.

INDIAN TRUSTEESHIPS—ACT OF JANUARY 27, 1933, AND DEPARTMENT REGULATIONS—PERMANENCE OF DISQUALIFICATION TO ACT.

Held, That a trust company permanently disqualifies itself from acting as trustee in Indian trusts under the provisions of the Act of January 27, 1933, where, after filing the certificate prescribed by paragraph 2 of the Department's regulations of June 2, 1933, "to the effect that it has not paid or promised to pay any person other than an officer or employee on its regular pay roll * * * any remuneration for any service or influence in * * * attempting to secure for it the trusteeship in that or in other trusts to which these regulations apply," it is established that said company had entered into contractual relations with one not at the time an officer, employee, or on the pay roll of the company, under the terms of which he was to engage in efforts to procure Indian trusteeships for the company under said Act of January 27, 1933.

MARGOLD, *Solicitor*:

Personally, and also through the Commissioner of Indian Affairs, you [the Secretary of the Interior] have requested my opinion as to:

1. Whether the Chicago Title and Trust Company has disqualified itself from acting as trustee in the three trusts submitted under cover of a letter dated June 24, 1933, for your approval under the Act of January 27, 1933 (Public No. 322) [47 Stat. 777].

2. Whether the Chicago Title and Trust Company has permanently disqualified itself from acting as trustee under any trust whatsoever created under the provisions of the said Act.

The precise ground of disqualification here in question depends upon the proviso in Section 2 of the Act declaring:

That no trust company or bank shall be trustee in any trust created under this Act which has paid or promised to pay to any person other than an officer or employee on the regular pay roll thereof any charge, fee, commission, or remuneration for any service or influence in securing or attempting to secure for it the trusteeship in any trust

and upon the requirement, paragraph (2) of the regulations approved by you on June 2, 1933, that:

The agreement must also be accompanied by a written certificate duly executed by the trustee to the effect that it has not paid or promised to pay any person other than an officer or employee on its regular pay-roll any fee, charge, commission or remuneration for any service or influence in securing or attempting to secure for it the trusteeship in that or in other trusts to which these regulations apply.

The trusts in question admittedly were procured through a Mr. Herbert G. House, of Muskogee, Oklahoma, who has been retained or employed by the Chicago Title and Trust Company solely for the purpose of obtaining, on its behalf, the consent of Indians of the Five Civilized Tribes to the creation of trusts under the Act of January 27, 1933. The precise terms of Mr. House's employment are somewhat in dispute, due to contradictory statements made with reference thereto by the representatives of the company who have appeared before the Department. The facts concerning the making of these contradictory statements are set forth in my memorandum to you dated June 27, 1933, a copy of which is attached hereto. Each trust is accompanied by a certificate, signed by Chester R. Davis, as vice-president of the company, which states:

* * * That it has not paid or promised to pay any person other than an officer or employee on its regular payroll any fee, charge, commission, or remuneration for any service or influence in the above proposed trust, or in other trusts to which said regulations apply.

The letter of June 24, 1933, also signed by Chester R. Davis as vice-president of the company, however, submits these proposed trusts to you with the following statement:

With further reference to the provisions of said paragraph 2 of said regulations, we wish to inform you, as we have heretofore orally advised the former Commissioner of Indian Affairs, that these trusts came to us through Herbert G. House of Muskogee, Oklahoma. Mr. House is on the regular payroll of this company at a salary of \$10,000 per year, provided, however, that such salary shall not exceed one percent of the face value of the trusts created through his efforts.

The representatives that have appeared in this Department on behalf of the Chicago Title and Trust Company have admitted that the statement in the certificates accompanying the trusts represents merely the company's interpretation of the effect of the terms of the agreement between it and Mr. House stated in the letter of June 24. This interpretation has been varied, without apparent regard for consistency, in the oral hearings before the Department. At various times, the company's representatives have admitted before you, before the Commissioner of Indian Affairs, before the First Assistant Solicitor, and before me, that Mr. House is to receive no salary at all unless he succeeds in the creation of one or more trusts under the Act, in which the Chicago Title and Trust Company will be the trustee, and that the salary he is actually entitled to receive, subject to a maximum limitation of \$10,000 per annum, is one per cent of the total face value of the trusts created through his efforts. At other times, however, it has been asserted that Mr. House is entitled to receive a minimum salary of \$10,000 per annum and a maximum of one per cent of the face amount of trusts procured by him for the company.

Of these two interpretations, the former obviously is the one in accord, and the latter the one in conflict, with the terms stated in the letter of June 24. The propriety of the former also is borne out by the admissions of the company's representatives that no salary has yet been paid to Mr. House, although he has been actively engaged in efforts to procure these trusts for many months. The company's representatives also stated to the First Assistant Solicitor and to me on June 27, 1933, that Mr. House was not on the Company's payroll at all, but would be added thereto on July 1, 1933. Later the same day, they denied making this statement and asserted they really had said that Mr. House was put on the pay roll on June 1, but would not draw his first salary check until July 1.

While I am not persuaded as to the truth of any of these statements other than those which strictly conform to the letter of June 24, it really is not necessary to seek the truth among them. Under the clear language of the act and the regulations, and on the basis of the undisputed facts, the company has disqualified itself from acting as trustee, no matter which of the contradictory statements is to be taken as true.

It is unequivocally admitted that Mr. House was not "an officer or employee on the regular pay roll" of the Chicago Title and Trust Company at the time he was promised remuneration for his "service or influence in securing or attempting to secure for it the trusteeship in any trust" under the Act. Indeed, it is also unequivocally admitted that the *only* remuneration promised him was remuneration for that very service or influence, and for nothing else. On these admitted facts, the contradictions as to whether the promised remuneration was a regular salary entitling him to a proper place on the "regular pay roll" or whether it really was a fee or commission for procuring the trusts, become entirely immaterial. The statute and the regulations explicitly prohibit prospective trustees from promising to pay any remuneration whatsoever to any person for any service or influence in securing or attempting to secure for it a trusteeship under the Act, unless the promise is made to a person who is "an officer or employee on the regular pay roll thereof."

The statute and the regulations thus clearly express an intention to limit such promises of compensation to persons who are already on the regular pay roll of the company *for purposes other than the procurement of trusts* under the Act, and hence clearly prescribe the promise made by the company to Mr. House even if the promise itself were one to pay him a regular salary in no wise dependent upon the face amount of the trusts procured through his efforts. The promise still would have been to a "person other than an officer or employee on the regular pay roll" of the company, and hence would have been precisely the sort of promise expressly prohibited by Section 2 of the Act.

The criterion prescribed in the Act thus has reference *not to the kind of remuneration* promised by a bank or trust company, *but to the kind of person to whom the promise is made*. It prohibits any and all sorts of promises of remuneration, so long as they are made to persons who are not already officers or employees on the regular pay roll.

The adoption of this criterion by the Congress of the United States was by no means a fortuitous one; and a determined insistence upon its stringent application is by no means a technical one. It is the plain duty of this Department to assure the Indians of the protection against the importunities of those who have learned by experience to victimize and overreach them, and whose reputation and skill in this very respect may have been a dominant factor in causing their employment in violation of the Act. And the file in this very case contains a significant if unnecessary reminder of our duty, in the form of the following resolution unanimously adopted by the House Committee on Indian Affairs on May 31, 1933:

WHEREAS, Legislation creating Indian trusts has been pending in Congress for some years past, and

Whereas, Such legislation was generally opposed by the Indians and their representatives before this Committee, and

Whereas, The Congress of the United States in the last session passed what was known as the Indian Trust Bill, providing for the recognition of Indian trusts for the rich Indians of the Five Civilized Tribes in the State of Oklahoma, and

Whereas, During the passage of said Indian Trust Bill certain representations were made to the Chairman and Members of this Committee who had consistently opposed the legislation on behalf of the Indians, and

Whereas, The Chairman and others so opposed had reluctantly accepted and agreed to the passage of the Indian Trust Bill upon the express conditions that the Indians were fully protected by the requirements of surety bonds and other provisions in the legislation and that the Secretary of the Interior through the Commissioner of Indian Affairs could in his discretion refuse to recognize or approve the creation of any such Indian trust were the circumstances irregular or such as to indicate fraud or deception against the Indian testator, and

Whereas, It now appears upon complaints made by the Indians and their representatives that the spirit, if not the letter, of the law in such Indian Trust Bill is being violated and that certain trust companies outside the State of Oklahoma are sending emissaries into the state to solicit and secure the creation of such Indian trusts; that such emissaries are of bad reputation and have been known in the past to have had corrupt dealings with the Indians:

NOW, THEREFORE, Be It Resolved:

That it is the judgment of this Committee that the Secretary of the Interior and the Commissioner of Indian Affairs be notified that the Indian Trust Law is being violated in spirit, or letter, or both, and that it is the desire and will of this Committee to support the Secretary of the Interior and the Commissioner of Indian Affairs in a rigid enforcement of the Indian Trust Law that the Oklahoma Indians may not be despoiled of their wealth and inheritances.

There are indications in the files of this Department pointing to the possibility that Mr. House is one of the "emissaries" to whom the foregoing resolution might aptly apply. These indications may, however, be misleading, and I have been able to make no thoroughgoing attempt to verify them. Such verification is in my judgment unnecessary because Mr. House's personal characteristics and history, however exemplary, would not exempt him from the class plainly proscribed by the Act and the regulations. This class applies to "any person other than an officer or employee on the regular pay roll" of a "trust company or bank", to whom the company or bank has promised to pay "any charge, fee, commission, or remuneration for any service or influence in securing or attempting to secure for it the trusteeship in any trust." This class therefore applies to Mr. House, who admittedly was not "an officer or employee on the regular pay roll" of the Chicago Title and Trust Company when it made its variously represented promise to pay for his services with references to the trusts in question.

For the foregoing reasons, it is my considered opinion that the company has disqualified itself from acting as trustee at least in the three trusts now pending before you for approval, and hence that each of these trusts should be rejected.

It also is my opinion that the company has permanently disqualified itself from acting as trustee in any trust whatsoever created under the Act of January 27, 1933. Section 2 contains no words to limit the disability to the particular trust with reference to which its requirements have been violated. On the contrary, it expressly attaches the disability to the trust company or bank guilty of the violation and extends its effect "to any trust created under this Act." Paragraph (2) of the regulations, prescribed pursuant to Section 7 of the Act, even more clearly expresses this view, for it requires a prospective trustee, applying for approval of a trust, to certify that it has not made a prohibited promise of compensation "in that or in other trusts to which these regulations apply."

It is not the province of this Department to inquire into or to determine whether the operation of the statute and the regulations will work an undeserved hardship on the Chicago Title and Trust Company. Congress has clearly prescribed the road that must be followed, and we are not at liberty to deviate from its delineations in order to relieve the company from a possible hardship. Congress alone can grant relief, if relief is warranted.

STOCK-RAISING HOMESTEAD ENTRIES IN GEOLOGICAL STRUCTURES OF PRODUCING OIL OR GAS FIELDS SUBJECT TO ALLOWANCE

INSTRUCTIONS

[Circular No. 1304]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., July 11, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

Section 1 of the stock-raising homestead act of December 29, 1916 (39 Stat. 862), as amended by the act of February 28, 1931 (46 Stat. 1454), was amended by the act of June 9, 1933 (48 Stat. 119), to read as follows:

From and after December 29, 1916, it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public lands in reasonably compact

form: *Provided, however*, That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands": *Provided further*, That for the purposes of this section lands withdrawn or reserved solely as valuable for oil or gas shall not be deemed to be appropriated or reserved: *Provided further*, That the provisions of this section shall not apply to naval petroleum reserves and naval oil-shale reserves: *And provided further*, That should said lands be within the limits of the geological structure of a producing oil or gas field entry can only be allowed, in the discretion of the Secretary of the Interior, in the absence of objection, after due notice, by the lessee or permittee, and any patent therefor shall contain a reservation to the United States of all minerals in said lands and the right to prospect for, mine and remove the same.

This act removes the restriction of the act of February 28, 1931, against allowance of stock-raising homestead entries for lands within the limits of the geologic structures of producing oil and gas fields, such entries for lands within such structures to be allowed in the discretion of the Secretary of the Interior, in the absence of objection after due notice, by any lessee or permittee of the lands sought to be entered.

The lands applied for must be designated under the stock-raising homestead law or subject to such designation and if not so designated the application to make entry must be accompanied with a petition, in duplicate, for such designation of the land involved. The act does not permit such entries for lands in naval petroleum reserves and naval oil-shale reserves.

Accordingly, any application to make stock-raising homestead entry of lands within the limits of such a structure, if otherwise regular and allowable, will be received by you, noted on your records and suspended until it shall be determined by the Secretary of the Interior whether or not entry may be allowed. You will notify the applicant of the suspension.

If any of the lands applied for are embraced in an application for permit or permit or lease granted, the instructions of July 21, 1925, Circular No. 1021 (51 L.D. 167), must be followed, and in due time you will transmit to this office the application and all papers filed in connection therewith and report as to status of the lands involved.

Where objections are filed by mineral permittees or lessees, the instructions of September 17, 1925, Circular No. 1031 (51 L.D. 202), will govern. If the application is otherwise allowable, it will be submitted to the Secretary of the Interior with appropriate recommendations by this office, and when final decision is made as to the allowance or rejection of the application, you will be given instructions as to the action to be taken thereon.

In so far as they are inconsistent with these instructions the following circulars are hereby amended to agree herewith:

Circular of October 6, 1920 (47 L.D. 474).

Circular No. 523 (51 L.D. 1).

Circular No. 541 (48 L.D. 389).

Circular No. 1021 (51 L.D. 167).

Circular No. 1244 (53 I.D. 346).

Circular No. 1303 (54 I.D. 227).

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

OIL SHALE PLACER CLAIM: FAILURE TO RECORD NOTICE OF DESIRE TO HOLD UNDER ACT OF MAY 18, 1933—EFFECT

Opinion, July 11, 1933

MINING CLAIM—OIL SHALE LANDS—ACT OF MAY 18, 1933—WHEN CLAIM FORFEITED.

Failure to record a notice of desire to hold an oil shale placer mining claim in accordance with the provisions of the Act of May 18, 1933 (48 Stat. 72), does not, *ipso facto*, work a forfeiture, but it is necessary, in order to terminate the claim, following failure to comply with the legal requirements, that there be on behalf of the United States at least some form of challenge of the valid existence of the claim.

FAHY, *Acting Solicitor:*

By letter of July 3, 1933, the Assistant to Director of Investigations has requested my opinion on the view expressed in an excerpt from a letter received in that bureau from Archie D. Ryan, Special Agent in Charge, Salt Lake City, Utah, reading as follows:

I don't believe that the claimants will actually file notices on more than ten per cent, as an absolute outside figure, of remaining oil shale claims. The ones on which they do file intention to hold could then be examined and checked up early in the field season of 1934. It would appear to me that under this act providing for the suspension of annual assessment work, that the balance of the claims would be null and void without any further action by this Department by posting or otherwise.

Evidently the question raised is, does a failure to record a notice of desire to hold an oil shale placer mining claim in accordance with the provisions of the act of May 18, 1933 (48 Stat. 72), *ipso facto* render the claim null and void.

After the enacting clause the act mentioned reads as follows:

That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has

been issued therefor, not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, including Alaska, during the year beginning at 12 o'clock meridian July 1, 1932, and ending at 12 o'clock meridian July 1, 1933: *Provided*, That the provisions of this Act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1932: *Provided further*, That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1933, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1932.

Following the views of the courts as to the effect of similar earlier suspension acts, the Department has held that to hold an oil shale claim, under the act of November 13, 1919 (41 Stat. 354), it was necessary either to do the required assessment work or cause the prescribed notice to be recorded in lieu thereof; that the filing of such a notice is equivalent in all respects to, and is attended with, the same consequences that result from the actual performance of the assessment work, and conversely, the failure to file the notice is attended with the same consequences that result from the failure to do the work. *Standard Shales Products Company* (52 L.D. 522, 524). But the rule has been long settled as to mining claims generally that the claim is not terminated nor the owners' rights divested by the mere failure to do the annual assessment work (Lindley on Mines, Sections 624, 645, and cases there cited), and since the decision in *Wilbur v. Krushnic* (280 U.S. 306), it is settled that this rule applies to oil shale claims, and that owners of oil shale claims may preserve their estate in the claims notwithstanding a lapse in the performance of assessment work, unless, by a later resumption of work, as stated therein, at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. Governed by the courts' construction of the applicable mineral land laws in *Wilbur v. Krushnic*, the Department, on reconsideration of *Standard Shales Products Company*, *supra*, recognized the validity of oil shale claims, where claimants thereof failed to do the assessment work or file requisite notices under the suspension act of November 13, 1919, but had later resumed work prior to any challenge by the United States to the validity of the claim (53 I.D. 42).

It will be observed that the act of May 18, 1933, does not contain any forfeiture provision for failure to comply with its terms, and in the absence of such a provision it would seem clearly to follow that owners of oil shale claims who fail to do either the assessment

work or record the notice as therein provided do not forfeit their rights by their neglect, but may continue to maintain their claims by resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.

It is therefore my opinion that the view expressed in the above-quoted excerpt is erroneous, and the answer to the question as above formulated is in the negative.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

HOMESTEAD APPLICATIONS FOR LANDS IN PATENTED PRIVATE LAND CLAIMS

[Circular No. 1305]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., July 11, 1933.

REGISTERS, LOS ANGELES AND SACRAMENTO, CALIFORNIA:

Where a homestead application is presented at your office containing a description by fictitious subdivisions not shown on the official township plat, and the land is segregated as in a confirmed private land claim, and has been patented as such by the United States, you will stamp the application with the following notation in the upper right-hand corner of the application:

U.S. Land Office, -----

Application refused and returned because land has been patented by United States as a confirmed private land claim, and because of fictitious description of the land.

-----Register.

No serial number will be assigned, and no receipt will be issued. The application and money tendered therewith will be returned to the applicant, if present, or to the post-office address given in his application. You will inclose a copy of these instructions with the application.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

HUMBLE OIL AND REFINING COMPANY ET AL.

Protests against Department orders of August 6, 1932, and March 3, 1933,
in re oil and gas leases on public lands.

Orders sustained.

Decided July 12, 1933

OIL AND GAS ON PUBLIC LANDS—ROYALTIES—METHOD OF COMPUTATION—HOW VOLUME OF PRODUCTION DETERMINED—TERMS “PRODUCTION,” “OIL PRODUCED,” AND “ACTUAL PRODUCTION” INTERPRETED—FLAT DEDUCTION FOR WASTE MATTER, SHRINKAGE, B. S. AND W., CONSIDERED.

ICKES, *Secretary*:

Both the leasing act of 1920 and the leases issued thereunder provide that oil royalties due the Government shall be based upon “production” and “oil (or gas) produced.” Paragraph 3 (b) of the “Operating Regulations to Govern the Production of Oil and Gas on Public Lands” requires that royalty should be computed upon “actual production.” (52 L. D. 1, 9.) On August 6, 1932, the Geological Survey recommended that the volume of “production” be “determined by tank measurement as based on 100 percent capacity tables” calculated as follows:

(1) The percentage of impurities (water, sand, and other foreign substances not constituting a natural component part of the oil) shall be determined to the satisfaction of the supervisor, and the observed volume of oil shall be corrected to exclude the entire volume of such foreign substances.

(2) The observed volume of oil shall be corrected to the actual volume at 60° F. in accordance with Table 2 of Circular 154 of the U. S. Bureau of Standards (May 29, 1924), and the supplement thereto issued October 27, 1931.

The foregoing interpretation of the terms “production”; “oil produced” and “actual production” was approved by the Acting Secretary under date of August 6, 1932, and appropriate orders were issued to the oil and gas supervisors on September 10, 1932. The Secretary suspended these orders on September 28, 1932, to afford all interested parties an opportunity to present oral arguments and file written briefs. Following a formal hearing before the Secretary on February 1, 1933, the contested orders were affirmed on March 3, 1933, to take effect as of May 1, 1933. In response to requests from protestants desiring to present additional arguments, the effective date of the orders was again suspended on April 20, 1933, and a further hearing set for May 3, 1933.

Subsequent to this most recent hearing, the Geological Survey was asked to submit a final memorandum in support of its recommendation. On June 6, 1933, all interested parties were furnished with copies of this memorandum and invited to reply by June 19, 1933. These replies have been received and carefully noted together

with all the evidence and arguments previously developed. After a painstaking and extended review of the entire record of the dispute, it has been decided to approve and reaffirm the original recommendation of August 6, 1932.

The orders here affirmed alter the determination of royalties only in those fields where a flat deduction for foreign matter has been made or the effect of temperature upon fluid volume disregarded. As to most of the production from Government lands volumetric calculation of royalties due conforms to the recommended standards.

Protestants contend that the practice of allowing flat deductions for base sediment and water—commonly referred to as “B. S. and W.”—is so universally established as a trade custom as to be beyond the power of the Department to change. But the evidence submitted by the protestants seems to refute this contention. They have shown how flat allowances for B. S. and W. have been revised and reduced at different times and in different places. They point out that in Pennsylvania tanks were once strapped on a 95 percent base and later changed to 97 percent. They prove that tank tables in different mid-continent fields are computed on 97, 98 or 99 percent of the actual volume measured. They admit that in California volume has always been calculated upon a 100 percent base less actual B. S. and W. And it is a matter of public record that in at least one of the fields indirectly involved in the instant dispute, a flat deduction for B. S. and W. was recently cut from 3 to 2 percent.

Steady improvement in production methods has steadily decreased the amount of B. S. and W. present in oil. And new devices have been perfected to measure more accurately the actual B. S. and W. content. Purchasers and carriers of crude maintain that these developments have been responsible for the changes in the flat deductions imposed. But protestants can not, on this account, be permitted to point with pride to the way the *rate* of deduction has changed with the march of progress and then seek to forestall further change by raising vested rights in some *specific rate* of short volume measurement.

Clearly enough the allowance for B. S. and W. is not now uniform and in the past has been reduced to conform more closely to actual B. S. and W. So that if it can be definitely shown that present flat deduction rates are excessive, the “custom of the trade” leads in the direction of a change, not away from it.

If protestants regard a “flat” rate as in itself possessing some virtue, it may be answered that the interpretation of the orders here affirmed provides:

The provision of the interpretation relative to deductions for impurities does not contemplate that each and every “oil run” must necessarily be sampled

and tested to determine the base sediment or other impurities present in the oil. It provides that the supervisor may use his judgment as to the time and method of test together with the application of the result. In other words if it is impractical to sample every oil run, tests must be made for each lease, over a reasonable period of time, to determine the average percentage of impurities present in the oil. This percentage of impurities, checked occasionally, may then continue to be deducted so long as conditions relating to production on the particular lease remain the same and checks indicate the continued propriety of the deduction. Quarterly or semi-annual tests may be adequate on many leases, though the probable increase of emulsion at low temperatures should be considered. If in your opinion, after test, it is reasonable to allow a flat deduction of .5 of one percent for impurities for any lease or throughout any field, and such action is acceptable to the operators you are empowered to authorize such a deduction. [Instructions to Oil and Gas Supervisors, approved by the Secretary of the Interior under date of September 10, 1932.]

The temperature corrections required in the orders of August 6, 1932, appear equally reasonable. Oil contracts or expands approximately 1 percent for each 20° change in temperature. Whenever oil has been deemed too hot, the industry has been quick to demand a downward adjustment in volume based upon an assumed "normal" temperature of 60°. The challenged orders adopt the same "normal" standard.

It is urged that such flat deductions as now prevail constitute a reasonable allowance for actual B. S. and W. Pipe line figures are said to show that the average losses in volume of oil in transit approximate or exceed the total amount of flat deductions imposed. But even if these figures be accepted at their face value, they are misleading. The testimony of numerous witnesses for the protestants points inferentially to the grave inequity of such flat deductions as a measure of actual B. S. and W. It is freely admitted that the amount of shrinkage in transit in any particular instance will vary with the length of the journey, the efficiency of handling en route, the leakage in the line, and the character of the crude. Thus a flat deduction, even though it "washes out on the average" may well benefit certain leases or pools at the expense of others more favorably situated. It therefore appears just and appropriate, in so far as Government royalties are concerned, to substitute a more scientific method of measuring B. S. and W.

Moreover, protestants attempt to classify as B. S. and W. shrinkage which is not properly attributable to the necessary removal of foreign substances from the crude. Numerous tests have shown that the actual amount of foreign matter present in merchantable crude from most mid-continent fields does not exceed $\frac{1}{2}$ percent. In point of fact if it does exceed $\frac{1}{2}$ percent, or 1 percent, either an additional deduction over and above the flat deduction is made or the pipe line refuses to run the oil until it is cleaned. Thus even if all the foreign matter in a particular run settles out during the

course of its journey, a further large balance of shrinkage remains to be accounted for.

Protestants claims that this may be accounted for by the precipitation of paraffin and the evaporation of gases. But neither solidified paraffin nor evaporated gases are "impurities" in the sense that they are chemically different from the other constituents of crude oil. It is a chemical fact that these are hydro-carbons naturally present to a greater or less extent in crude oil. Both paraffin and these lighter fractions have a definite, though somewhat limited, commercial value. Yet even if they have no value, it does not follow that protestants can, by a process of assimilation, include within the meaning of B. S. and W. any or all substances which have no value. Such a broad definition of B. S. and W. would accord them the privilege of forever charging the Government with a part of their transportation or refining expenses under the guise of deducting for sediment and water.

Neither by the leasing act of 1920 nor by the leases under which protestants "produce" are they authorized to measure the *amount* of royalty oil due the Government by the *value* of that oil. Rather it is expressly provided that the amount of oil produced shall serve both as a measure of deliveries in kind and as a base upon which cash royalties shall be computed. Not only is the actual volume of oil produced clearly contemplated, but an allowance for prospective transportation or refinery losses is specifically negated in the case of oil taken in kind by the requirement of delivery "on the premises where produced." [Standard Lease Form, Section 2 (c).]

Even under the definition of B. S. and W. adopted by the protestants, their own pipe line figures show the present flat deductions to be excessive. Transportation results in losses of admittedly valuable constituents of crude through evaporation and leakage. And since pipe line losses and the total volume of flat deductions are said to balance, these flat deductions must inevitably include and cover up transportation losses in no sense connected with the escape or precipitation of so-called valueless "impurities" in the crude.

With respect to royalties owed the Government, protestants are neither producing, selling, nor buying "refined" or partially "refined" oil. They are dealing in *crude* oil. In the absence of some peculiar necessity, it seems unreasonable to interpret the words "production" and "produce" to mean production or produce less pipe line leakage and other "transportation" or "refining" losses.

Protestants insist that such necessity is to be found in the large expense to which they will be put in compiling new tank tables, in taking and testing samples of every crude run, and in building a vast amount of new tankage in which to store freshly produced crude until such time as the free gases have had an opportunity to escape.

The evidence indicates that the total cost of applying the contested orders to fields leased from the Government will be negligible, especially as most of the Government royalties are already settled upon the basis required in these orders.

Furthermore, it has never been proposed that each and every run of oil should be subjected to laboratory tests—discretion is allowed the oil and gas supervisors to compile average percentages for particular pools and particular leases. These percentages, while not absolutely accurate, will be relatively far more accurate than the generalized flat deductions heretofore applied.

Such estimates of future expense as have been prepared are predicated upon the adoption of the proposed basis of computation through the mid-continent fields. But the practices adopted for private producers are not of direct concern to the Government. And even if protestants are correct in assuming the adoption of a similar standard in the mid-continent fields, their estimates of cost seem exaggerated. As already pointed out, oil is almost universally tested for B. S. and W. before acceptance by the pipe lines. And a very large proportion of the crude produced in the mid-continent fields stands in lease tanks for a sufficiently long period to allow free gases to escape and make unnecessary the construction of much additional tankage.

The importance to the Government of a 100 percent basis of measurement is well indicated by the application of this basis to sliding scale leases where any method of short volume measurement deprives the Government of royalties based upon the upper brackets of production.

The orders of August 6, 1932, and March 3, 1933, are hereby affirmed, effective May 1, 1933.

Orders sustained.

EAGLE PEAK COPPER MINING COMPANY

Decided July 17, 1933.

MINING CLAIM—MILL SITE—"LOCATION".

A mill site appurtenant to a lode is a "location" under the mining laws of the United States.

MINING CLAIM—MILL SITE—MANNER OF LOCATION.

The statute is silent as to the manner of locating mill sites, but it is not unreasonable to suppose that a location thereof should be made substantially as in the case of a mineral claim; and this is recognized as the usual practice in the Department and in the courts.

MINING CLAIM—MILL SITE—NOTICE OF LOCATION—REQUIREMENTS.

Neither the execution nor posting of a notice of location of a mill site is necessary to the inception of a right thereto under the mineral-land laws of the United States, it being sufficient that the land embraced within

the mill site is used in good faith in connection with *bona fide* mining and milling purposes, coupled with a *bona fide* attempt to survey it and mark its boundaries.

MINING CLAIM—MILL SITES IN MOUNT RAINIER NATIONAL PARK—ACT OF MAY 27, 1908—EXCEPTING PROVISIO.

Mill sites come within the prohibitions of the Act of May 27, 1908 (35 Stat. 317, 365), forbidding further location of claims under the mineral-land laws of the United States in Mount Rainier National Park, but excepting from this inhibition rights theretofore acquired in good faith under said mineral-land laws.

MINING CLAIM—MILL SITE IN MOUNT RAINIER NATIONAL PARK—ACT OF MAY 27, 1908—PROVISIO.

Where a mining company, in good faith, made use of land within the Mount Rainier National Park for a mill site in connection with *bona fide* mining operations and was prevented from surveying and marking its boundaries by agents of the United States, prior to the passage of the Act of May 27, 1908, it acquired a right, under the proviso to said Act and the mineral-land laws of the United States, to the land as a mill site claim, the Act of May 27, 1908, while forbidding future location of mining claims within the park area, excepting from this inhibition rights theretofore acquired in good faith under the mineral-land laws of the United States.

CHAPMAN, Assistant Secretary:

The Eagle Peak Copper Mining Company has appealed from a decision of the Commissioner of the General Land Office dated November 15, 1932, which held null and void the Eagle Peak Mining Company mill site, situate in the Mount Rainier National Park.

The record shows that at the request of the National Park Service, investigations and reports by mineral examiners of the General Land Office have been made upon this mill site and the lodes to which it is appurtenant, from time to time, which at length resulted in the institution of adverse proceedings charging:

That the alleged mill site of the company in Mt. Rainier National Park, in the neighborhood of its Aldula and Paradise No. 1 lode claims, was not, at the date of the passage of the act of May 27, 1908 (35 Stat. 317, 365), an existing right acquired in good faith under the mineral-land laws of the United States.

Upon consideration of the evidence adduced at a hearing upon the charge, the Commissioner reversed the register and held that the mill site claim was not based upon a right under the mineral-land laws existing May 27, 1908.

The act creating the park, approved March 2, 1899 (30 Stat. 995), provides in section 5 thereof:

That the mineral-land laws of the United States are hereby extended to the lands lying within said reserve and said park.

The act of May 27, 1908, referred to in the charge, however, provides that:

Hereafter the location of mining claims under the mineral-land laws of the United States is prohibited within the area of the Mount Rainier National

Park, in the State of Washington: *Provided, however*, that this provision shall not affect existing rights heretofore acquired in good faith under the mineral-land laws of the United States to any mining location or locations in said Mount Rainier National Park.

In appellant's brief, the validity of the charge is attacked. It is argued that a mill site is not a mining location, under the mineral land laws. The appellant is claiming this mill site as appurtenant to a lode. It has been held by the Department that such a mill site is a location under the mining laws of the United States—*James W. Nicol* (44 L.D. 197); *Coeur d'Alene Crescent Mining Company* (53 I.D. 531, 534, 535)—and no doubt is entertained that mill sites are within the prohibitions of the act of May 27, 1908.

The sole question, then, is whether or not rights had been initiated and were existing under the mineral-land laws of the United States to the possession of the mill site on May 27, 1908.

Obviously the phrase "existing rights" means something less than a vested right, such as would follow from a perfected mining location, since such a right would require no exception to insure its preservation. Opinion of Assistant Attorney General Van Devanter of July 20, 1897, (25 L.D. 48, 51); *Stockley v. United States* (260 U.S. 532, 544).

There is no dispute as to the material facts. The evidence shows that the Aldula lode claim was located July 10, 1903, by Mary A. Long, and the Paradise lode claim was located August 10, 1906, by Ackber Long and R. H. Wheelock. These claims adjoin and lie on the precipitous slope on the southeast side of the Nisqually River. It is shown that adequate discoveries of valuable mineral were made and the boundaries marked on the ground, before the act of May 27, 1908; that they were made in good faith for *bona fide* mining purposes and that the claimants have steadily pursued their mining operations and have mined and shipped small tonnages of ore, principally copper, running as high as 30% per ton, some silver and gold; that they used and occupied a small tract along the river bottom and opposite the lodes on the other side of the river as a place to live and do blacksmithing while conducting their mining operations since 1903, and found in 1904, after they opened up ore considered valuable, that it would be needed as a mill site. Forbidden by the Park Service ranger to cut any brush, make a location or erect permanent structures for mining purposes, they erected tents and temporary structures to house themselves and do their blacksmithing. In 1909 or 1910, a change in local park management resulted in a change of attitude toward them, and thereafter they erected permanent and valuable facilities on the land to carry on their mining operations. On May 20, 1908, the locators organized the Eagle Peak Copper Mining Company, and immediately conveyed their interests in the

lodes to the company, and on November 15, 1910, notice of location by the company of a mill site covering the land they had been using on the river bottom was executed and posted, and recorded December 23, 1910. Since 1909, and without opposition or protest by the local park officials, they have installed on the mill site, comprising less than five acres, an oil flotation mill for reducing ores, aerial tramways from the tunnels on the lodes across the river to the mill site, a pipe line to supply water for the mill and domestic use, a tool house, ore bunker, bunk house to house the workers. Wheelock, president of the company, estimated the cost of these improvements at \$15,000.

Other evidence also shows a power house, flume, air compressor lines, tunnels and buildings on the lode claims are valued four or five times greater than those on the mill site. The evidence of the mineral examiner of the Government agrees with that of claimants that there is no other suitable site for the mill site, that its use is indispensable in the development of the lodes, and the latter would be worthless without it; that the land is nonmineral, noncontiguous to the lodes and not valuable for any purpose other than for mining and milling. There is no suggestion that the mill site interferes with the facilities or the administration of the park.

Although the burden to show invalidity was on the Government, there is no definite evidence in the record showing whether the boundaries of the mill site were marked on the ground prior to the act of May 27, 1908. As it will not prejudice claimants, the Department will take notice that in a companion proceeding against a mill site claimed by the Paradise Mining and Milling Company, contest No. 4139, one Sherman Evans testified in substance that in 1907 Wheelock and he surveyed both the mill site here in question and the one in question in that case, but that Park Ranger Cunningham forbade them to cut any trees, make any location marks, or do anything towards surveying or locating.

In view of the above-quoted provisions of the act of 1899, such action by the ranger was in excess of authority, and the mining claimants could have disregarded it and perfected their location, but it is clear from Wheelock's testimony that he was uncertain or was under a misapprehension as to such authority, and did not wish to clash with the park officials. It is also clear that long prior to 1908, the necessity for a mill site was apparent, and the intention formed to locate it, which intention was evinced by actual possession of the ground for mining and milling purposes, and an attempt to survey it. The erection of dwelling houses for occupancy of workmen is a mining and milling use. *Satisfaction Extension Mill Site* (14 L.D. 173; *The Eclipse Mill Site* (22 L.D. 496).

Section 2337 of the Revised Statutes, applicable to the location of mill sites, reads in part:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode.

The statute is silent as to the manner of locating mill sites, but it is not unreasonable to suppose that a location thereof should be made substantially as that of a mineral claim—*Rico Townsite* (1 L.D. 556)—and this is recognized as the usual practice in the Department—*Hargrove v. Robertson* (15 L.D. 499)—and in the courts—*Hartman v. Smith* (14 Pac. 648). It may be also added that there are no statutory provisions relating to the subject in the laws of the State of Washington.

Whether the marking of the ground is an essential prerequisite to the making of a perfected location of a mill site, it is not necessary here to decide. The exact question has not been decided in the Department, but in *Charles Lennig* (5 L.D. 190), it was said: "They (the terms of the first clause above quoted) make the use or occupation of it for mining and milling purposes the only prerequisite to a patent." In *Kershner v. Trinidad Mill. & Min. Co.* (201 Pac. 1058), the Supreme Court of New Mexico said of section 2337:

That statute is a grant of a right to take possession of the nonmineral lands of the United States for such purposes and to maintain same against all intruders. It follows when appellant intruded and took possession of appellee's mill and made his pretended location, he was a naked trespasser upon the possession of the appellee of the mill and the land upon which the mill stood, and the land surrounding the said mill for such sufficient space as was necessary for the convenient use and occupation of the mill, *whether appellee had any location of the mill site at all or not*. The only object of the location in such a case is to give notice to others of the claim to five acres and thus prevent encroachment upon the lateral boundaries of the land needed for the operation of the plant. *The mill, itself, is notice of the claim to the land upon which it stands and that immediately surrounding it. Its erection and maintenance operates as a location of the land. The owner of such a mill so situated has connected himself with the government and is in a position to resist any subsequent appropriator claiming under the mining law.* [Italics supplied.]

The Commissioner evidently took the view that the execution or possibly the posting of a notice of location of the mill site marked the inception of a right to a mill site. These acts, if essential under the State law of Washington applicable to mill sites, are not required under mineral laws of the United States. It is believed that by the use of the land in good faith for mining and milling purposes,

coupled with an attempt to survey it and mark the boundaries, and which marking it seems would have been done but for the interference of agents of the Government, the claimants of the Aldula lode acquired a right under the mineral laws of the United States within the meaning of the act of May 27, 1908, and are entitled to protection. Any other conclusion would result, under the circumstances presented, in a judgment of confiscation of valuable mining property and valuable improvements erected without opposition if not acquiescence of the agents of the Government in charge, upon a legal technicality not made mandatory by any law of the United States. The Commissioner's decision is accordingly

Reversed.

CLIFFORD H. BRISCOE

Decided July 17, 1933

RECLAMATION HOMESTEAD—IRRIGATION DISTRICT BIDDING IN HOMESTEAD AT TAX SALE—NO FIXED TIME LIMITATION CONTROLLING RETENTION BY DISTRICT.

While the law does not contemplate that an irrigation district shall permanently hold a Reclamation homestead bid in by it at tax sale and receive patent thereto, there is no Federal law which requires such a district to divest itself, within a fixed period to be determined by the Secretary of the Interior, of its interest in said lands; but its retention should be limited to a reasonable time, to be governed by the circumstances of each case.

CHAPMAN, Assistant Secretary:

On March 24, 1933, the Goshen Irrigation District appealed from the decision of the Commissioner of the General Land Office in the case affecting the homestead entry of Clifford H. Briscoe, who, on November 1, 1927, made homestead entry 046053, Cheyenne series, for Farm Unit "A", or the E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 33, NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 34, T. 22 N., R. 60 W., 6th P.M., Wyoming, subject to the Reclamation Act of June 17, 1902 (32 Stat. 388).

In said decision the Commissioner directed the register of the Cheyenne land office to notify the district that it was allowed 90 days from receipt of notice within which to assign said entry to a qualified assignee or to appeal.

The record discloses that the above-described lands were included within the boundaries of the Goshen Irrigation district, an irrigation district organized and existing under the laws of Wyoming, which entered into a contract with the United States on November 24, 1926, agreeing, among other things, to repay to the United States the proportionate part of the construction cost of the North Platte project allocated to the lands within the district. The contract was made pursuant to the said act of June 17, 1902, and acts amendatory thereof or supplementary thereto. By paragraph 12 of the contract,

"all liens in favor of the United States provided by the Reclamation Act above referred to * * * shall * * * be released * * * and the District's obligation herein provided for shall be accepted in lieu thereof."

The land in Briscoe's entry was designated pursuant to the act of August 11, 1916 (39 Stat. 506). The land was taxed by the district and upon default by Briscoe after due time the tax deed was executed, February 9, 1931, by Frank Davis, Treasurer of Goshen County, Wyoming, purporting to convey the above-described lands to the Goshen Irrigation District. The deed recites in part that the lands were subject to taxation for the year 1928; that the taxes so assessed remained due and unpaid; that the Treasurer and Collector of Goshen County sold said lands on July 19, 1929, to the Goshen Irrigation District, and that the statutory period of redemption having expired and no redemption having been made, the deed was executed by the Treasurer of Goshen County in favor of the Goshen Irrigation District.

Section 2 of the act of August 11, 1916, *supra*, provides in part as follows:

* * * 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 (36 Stat. 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 * * *.

The Department has held that it was not contemplated that the district should be given patents pursuant to such sales. It was intended that the district should bid in the lands, take tax certificates and later the tax deeds and hold them without limit of acreage until it could sell and assign them to persons qualified to acquire them. See 53 I.D. 658.

Under said act of August 11, 1916, and the above mentioned contract between said irrigation district and the United States, the irrigation district is allowed to tax for irrigation district purposes lands of the class and character mentioned in said act of 1916 and referred to in said contract, and the district is authorized in proper cases to enforce payment of said taxes by a sale of the lands. The act of August 11, 1916, recognizes, if the laws of the State so provide, that the lands may be bid in by the district for the nonpayment of the irrigation district taxes levied against the lands, but the exercise of such a right by the district only authorizes it to hold the land until it can dispose of it to a purchaser qualified to take the entry by

assignment. However, the district may assign its tax title thus acquired by it, and the assignee, upon proof of such assignment, and if otherwise qualified, may be recognized as an assignee under the act of June 23, 1910 (36 Stat. 592), and thereafter receive final certificate and patent upon the submission of satisfactory final reclamation proof.

The act of June 23, 1910 (36 Stat. 592), referred to in section 2 of the act of August 11, 1916, *supra*, permits assignments of homestead entries made subject to the act of June 17, 1902 (32 Stat. 388), after the filing in the local land office of satisfactory final homestead proof as to residence, cultivation and improvements required by the ordinary provisions of the homestead law. After a person has been recognized as an assignee under the act of June 23, 1910, *supra*, he may receive final certificate and patent subject to the provisions of the act of August 9, 1912 (37 Stat. 265), as amended by the act of August 13, 1914 (38 Stat. 686), for the unpaid charges, upon submission and approval of final reclamation proofs to the effect that he has reclaimed at least one-half of the irrigable area of the lands embraced in the entry and has made payment of all fees and commissions and water right charges due up to the date of the submission of such reclamation proof.

In view of the express provision of section 2 of the act of August 11, 1916, *supra*, conferring upon purchasers at tax sale under that act the same status as assignees under the act of June 23, 1910, no final homestead proof as to residence, cultivation and improvements need be submitted in support of the entry, in the absence of redemption by or assignment to the homestead entryman.

It appears from the tax certificate that the statutory period allowed by law within which to redeem the lands herein described, sold for taxes, has expired and no redemption made.

Up to the time the tax deed was issued to the district, the entryman had a right vouchsafed to him by the laws of Wyoming to redeem from the tax sale, but after that time expires, a sale for taxes, under the laws of Wyoming, from which no redemption is made and pursuant to which a treasurer's deed eventually issues, completely bars and cuts off all interest of all owners and all persons claiming an interest in said lands by lien, mortgage or otherwise, and vests a new title, proceeding from the State, in the grantee named in the treasurer's deed. See section 115-2337, Wyoming Revised Statutes, 1931, and *McCaughey Investment Company v. Mallin* (25 Wyoming, 373, 170 Pac. 763). In following out the State law and the Federal acts applicable to the conditions created in this case by the acts of the parties interested, it appears that the Goshen Irrigation District obtains by the tax deed a qualified interest in the

land. The qualifications are (a) the limited kind of grantee to whom it can convey, and (b) inability to obtain patent.

The contract of November 24, 1926, above referred to, provides in paragraph 14 as follows:

Payment of construction charges on account of lands acquired by the District on account of payment delinquency shall be suspended until such lands are sold or leased by the District: *Provided*, however, that the period of suspension shall not exceed three years from the date the lands are so acquired or for such longer period than three years as the Secretary may deem advisable.

The law and the above quoted portion of the contract indicates that the district should not be compelled, within 90 days, to assign the entry to a qualified assignee. The district has such a substantial equity in the land that it can not be divested of its interest by 90 days' notice from the United States.

Neither the act of August 9, 1912 (37 Stat. 265), as amended by the act of August 13, 1914 (38 Stat. 686), nor the act of August 11, 1916, *supra*, contemplates that the irrigation district shall hold land acquired by it at tax sale for an indefinite period (53 L.D. 658). In dealing with the Goshen Irrigation District, the United States, by the quoted provision of the contract of November 24, 1926, consents to the district holding the land free from construction charge taxes for the term of three years from the date of the tax deed, or for such longer period as the Secretary of the Interior may deem advisable. It is desirable for the United States to refrain from interference with the taxing operations of the irrigation district and permit it to exercise its fullest legal powers to collect taxes levied for its benefit, because a large share of the money raised by taxation is paid to the United States by the district in repayment of money expended by the United States in construction of irrigation works. There is no Federal law that compels the district to divest itself within a limited time, fixed by the Secretary of the Interior, of its interest in lands acquired by certificate at tax sale or by issuance of deed to it by the county treasurer.

Section 6 of the act of August 11, 1916, *supra*, imports an opposite intention. The district stands in a different position, while holding the equitable title to the land, from any other assignee under the tax sale. It is only a temporary owner seeking to dispose of the land to a person qualified to take title by the terms of the Federal law. It is an unwilling agent of the people of the district trying to collect a tax. Briscoe has been completely divested of the rights which he, at one time, held as an entryman. The district holds his former equity by reason of the treasurer's deed, which states in the granting clause:

Now, therefore, I, Frank Davis, treasurer of the County aforesaid, for and in consideration of the said sum to the Treasurer paid, as aforesaid, and by

virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said Goshen Irrigation District, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said Goshen Irrigation District heirs and assigns forever, subject however, to all the rights of redemption provided by law.

In the case of Glenn H. Kimmel and the Goshen Irrigation District (53 I.D. 658, 661), it is stated:

Upon careful consideration of all of the pertinent provisions of law, the Department is of the opinion that it was not contemplated that the district should be given patents pursuant to such sales, but that * * * the district could bid in such lands without limit of acreage and assign them to persons qualified to acquire them in harmony with the provisions of law above referred to." [Acts of Aug. 11, 1916, and May 15, 1922.]

The holding by the district should be limited to a reasonable time, which must be governed by the circumstances of each case. A sale and conveyance should be effected by the district, within a reasonable time, to a person qualified to receive patent, and the district should be advised that the records will be indorsed to show that it holds a tax deed to the Briscoe entry subject to conditions imposed by the Federal law and will be allowed a reasonable time within which to dispose of its equity to one qualified to take title by patent upon compliance with the provisions of the Federal law.

The decision of the Commissioner of the General Land Office is modified accordingly.

Modified.

INVESTMENT OF SURPLUS FUNDS OF OSAGE INDIANS IN OKLAHOMA

Opinion, July 22, 1933

STATUTES—INTERPRETATION—LEGISLATIVE INTENT.

The principle is well established that laws are to be given a sensible construction, and that a literal application of a statute which would entail unjust and absurd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative intent.

INDIANS—STATUTORY CONSTRUCTION—LEGISLATIVE INTENT.

Where language in a statute whose purpose is to liberalize a prior law concerning Indians, if followed literally, would have the contrary effect, and would in other respects be inimical to the best interests of said Indians, such language will not be given administrative effect, since this would be inconsistent with the intent of Congress.

INDIANS—INVESTMENT OF SURPLUS OSAGE FUNDS—ACT OF FEBRUARY 27, 1925—STATUTORY CONSTRUCTION.

An Act of Congress (Act February 27, 1925, 43 Stat. 1008) intended to permit greater latitude in the investment of the surplus funds of Osage

Indians contained language which, if given literal application, would preclude the Secretary of the Interior from investing the funds of such Indians, if resident in Oklahoma, in bonds of the United States Government, and in other respects would work hardship to such Indians generally, whether resident in Oklahoma or not. *Held*, That the presence of this language in the statute should not preclude the Secretary from investing these funds in bonds of the United States Government, should he deem such action in the interest of the Indians.

COURT DECISION CITED AND APPLIED.

Case of *United States v. Katz* (271 U.S. 354, 357) cited and applied.

FAHY, *Acting Solicitor*:

At the suggestion of the Commissioner of Indian Affairs you have requested my opinion as to whether the investment of the surplus funds of those members of the Osage Tribe of Indians who are residents of the State of Oklahoma in United States Government bonds is authorized under that provision in section 1 of the act of February 27, 1925 (43 Stat. 1008), reading:

The Secretary of the Interior shall invest the remainder, after paying the taxes of such members, in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per centum of the appraised value of such real estate, *and where the member is a resident of Oklahoma such investment shall be in loans on Oklahoma real estate*, stock in Oklahoma building and loan associations, livestock, or deposit the same in banks in Oklahoma, or expend the same for the benefit of such member, such expenditures, investments, and deposits to be made under such restrictions, rules, and regulations as he may prescribe: *Provided, That the Secretary of the Interior shall not make any investment for an adult member without first securing the approval of such member of such investment.* (Italics supplied.)

In presenting this matter it is stated:

It will be observed that as to the members of this tribe who are resident in Oklahoma the classes of securities in which such "remainder", commonly referred to as surplus funds or accumulated funds, "shall" be invested, does not include United States Government bonds. An earlier statute dealing with the same subject matter,—Act of March 3, 1921 (41 Stat. 1249), Sec. 4,—contained no such inhibition, but did permit the investment of such surplus moneys belonging to resident members of this tribe in Oklahoma in United States Government bonds, along with the other state or local securities therein enumerated.

The later enactment, however, of 1925, in so far as resident members are concerned, having in express terms confined investment of these funds to certain designated securities, it has heretofore been held, administratively at least, that we are, therefore, inhibited from investing such surplus funds belonging to such resident members in United States Government bonds. This has proved to be a serious disadvantage to these Indians, due largely to the instability under present conditions of the class of securities offered by investment locally in a community in which they reside and the further fact that the interest paid or earned while leaving such funds on deposit in local banks has not been very large; around 3 or 3½ per cent.

The question presented turns primarily upon the effect of the qualifying words "and where the member is a resident of Oklahoma

such investment shall be in loans on Oklahoma real estate * * *." The general language of the statute immediately preceding these words is that the "Secretary of the Interior shall invest the remainder * * * in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per cent of the appraised value of such real estate". This language standing alone obviously embraces both resident and nonresident members. The administrative view referred to, however, construes the qualifying words as confining the application of the general language to members who are nonresidents of Oklahoma, and as establishing a separate and limited class of investments for the resident members, namely, loans on Oklahoma real estate, stock in Oklahoma building and loan associations and livestock. It is to be observed that under such construction, investments for nonresidents may be made in Oklahoma State bonds, but the funds of residents of that State could not be invested in such securities; the funds of nonresidents could be invested in real estate in Oklahoma or elsewhere, but the funds of residents could not be invested in real estate anywhere, not even in their own State; the funds of residents might be invested in livestock, but the funds of nonresidents could not be used for that purpose however much they might desire to engage in the livestock business; and the funds of nonresident members might be invested in United States Government bonds, but this unquestionably safe and sound form of investment would be denied to the resident member. A construction leading to such obviously unjust and absurd consequences can hardly be regarded as representing the purpose and intent of Congress, and should be rejected under the well-settled rule that all laws are to be given a sensible construction and that a literal application of a statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative purpose. *United States v. Katz* (271 U.S. 354, 357).

The provision in the prior act of March 3, 1921 (41 Stat. 1249), of which the provision under discussion is amendatory, limited investments to United States bonds and Oklahoma State, county or school bonds, and made no provision for expenditures for the benefit of the members no matter how great the need. The obvious purpose of the amendatory provision was to liberalize the prior law so as to permit greater latitude in investments and vest in the Secretary broad general authority in the matter of expenditures of the funds of these Indians. The more sensible view, in line with this general purpose and one reasonably supported by the language of the statute, is that the words "and where the member is a resident of Oklahoma such investment shall be in loans on Oklahoma real estate", were intended to and should be confined to the particular class of invest-

ment there mentioned, viz. loans on real estate. The restriction or limitation so placed upon resident members follows immediately that part of the general language authorizing the investment in first mortgage real estate loans, and the use in the qualifying clause of the singular term "such investment" rather plainly indicates that the limitation was to be confined to that particular class of investment. In other words, the qualifying clause appears to have been inserted in the parenthetical manner so as to require that all investments of the funds of members resident of Oklahoma in first mortgage real estate loans be limited to loans on real estate located in that State, leaving as part of the general language of the statute, applying alike to all members of the tribe, both resident and nonresident, the provisions preceding and following that clause. Under this view, which is undoubtedly the correct one, ample authority exists for the investment of the funds in question, whether belonging to resident or nonresident members, in United States Government bonds.

Approved:

HAROLD L. ICKES,

Secretary.

**FURNISHING DATA AS TO MILITARY SERVICE IN CONNECTION
WITH FINAL PROOFS**

INSTRUCTIONS:

[Circular No. 1307.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D.C., July 28, 1933.

REGISTERS AND SPECIAL AGENTS IN CHARGE:

Circular No. 340, dated August 1, 1914, as amended by circular dated February 29, 1928, directs the furnishing to Special Agents in Charge of copies of all protested proofs on homestead and desert land entries and copies of the final proof testimony of the claimant in connection with stock-raising homestead entries.

Hereafter in furnishing such copies, when credit is claimed for military service in lieu of residence, the register will also furnish all data relating to such service. This data should include the name of the organization, the dates of enlistment and discharge and whether regularly discharged; if discharged for disability, whether it was incurred in line of duty, and, if regularly discharged, whether the claimant is drawing compensation for service-connected disability.

In cases where this information is furnished by the claimant at time of making homestead application, the register should make full notation of the details on his records, so that at time of final proof it will not be necessary again to call on the entryman for the evidence or to request a copy of the record from this office.

If the data are not in the record when the final proof is submitted, they should be required of the entryman in order to determine whether the proof is acceptable and for the use of the special agent.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PIONEER IRRIGATION DISTRICT, IDAHO

Opinion, August 2, 1933

**RECLAMATION—IRRIGATION DISTRICT—INDEBTEDNESS TO THE UNITED STATES—
MANNER OF PAYMENT—AUTHORITY OF ADMINISTRATIVE OFFICIAL.**

The Federal statutes relative to the payment of debts and demands due the United States do not require the acceptance of money only in the settlement of such debts and demands, and accordingly the proper administrative official representing the United States may, where it would be to the interest of the United States, accept a "call" warrant for indebtedness of an irrigation district under its contract with the United States Reclamation Service for operation and maintenance of storage works, such warrant to be held by the United States until paid.

FAHY, *Acting Solicitor:*

On February 27, 1913, the United States entered into a contract with the Pioneer Irrigation District, a quasi municipal corporation organized under the laws of the State of Idaho, whereby the district agreed to pay annually certain sums of money for drainage construction to be done by the United States pursuant to the act of June 17, 1902, and for storage capacity in Arrowrock Reservoir, which is one of the storage reservoirs of the Boise project, Idaho. In addition to paying for the drainage work and the storage capacity, the district also agreed, among other things, as follows:

And the District will use the taxing power of the District, and all the powers and resources of the District to collect said sums of money and pay the same to the Government when due, and will also pay each year its proportionate share of the cost of operation and maintenance of said reservoir and delivery of water therefrom, as announced by the Secretary of the Interior.

The contract was amended on June 15, 1915, but the provisions regarding payment of operation and maintenance were not changed.

Up to the year 1933 the district had paid the United States the operation and maintenance charge annually by warrant issued by the district, there being funds in the district treasury to pay the warrant upon presentation. On April 4, 1933, the district issued its warrant, payable to the order of the Bureau of Reclamation, for the sum of \$333.90, for its indebtedness under its contracts with the United States for payment of operation and maintenance of the storage works. Upon presentation of the warrant it was recorded by the treasurer and could not be paid for want of funds. The warrant tendered by the district was returned with the request that payment of the account be made by New York draft or money order. The district again transmitted the warrant to the Bureau of Reclamation, advising that the State law compels the irrigation district to pay its obligations by issuing warrants.

Decision is requested whether or not warrants tendered by irrigation districts in payment of obligations due the United States but not paid when presented for want of funds, may be accepted and held for call by the treasurer of the irrigation district.

Section 198 of Title 31, United States Code, provides:

All taxes and all other debts and demands than duties on imports, accruing or becoming due to the United States, may be paid in gold and silver coin, Treasury notes, United States notes, or notes of national banks.

Section 42-317 of the Idaho Code, 1932, provides:

* * * that for the purpose of defraying the expenses in the care, operation, repair and improvement of such portion of the irrigation works of the district as are completed and in use, including salaries of officers and employees, the board of directors of an irrigation district may at any time issue warrants of such district in payment of claims of indebtedness against the district, not to exceed the district's anticipated revenue.

The warrants herein authorized shall be in form and substance the same as county warrants or as near the same as may be practicable and shall be signed by the chairman and attested by the secretary of said board. All such warrants shall be presented by the holder thereof to the treasurer of the district for payment who shall indorse thereon the day of presentation for payment with the additional indorsement thereon, in case of nonpayment, that they are not paid for want of funds, and such warrants shall draw interest at seven per cent per annum from the date of their presentation to the treasurer for payment as aforesaid until such warrants are paid. No warrants shall be issued in payment of any indebtedness of such district for less than face or par value.

The contract provision for payment of operation and maintenance by the district is without qualification, and it must be presumed that it expected to pay the equivalent of the coin of the realm. Issuance and delivery of a district warrant when there are no funds in the

treasury of the district could not consistently be declared a payment of a contract indebtedness. In 48 Corpus Juris, Sec. 55, page 620, it is stated:

When it is so provided by statute or agreement, or when the creditor so consents, payment may be made by delivery of municipal warrants, orders, or like securities; but in the absence of such provision or consent they do not constitute a valid payment or tender, and even where, by statute, such warrants are made receivable in payment, the creditor may refuse to receive them in satisfaction of an obligation expressly payable in some other medium, or when they are tendered upon unjustifiable conditions.

Helena v. Turner (36 Ark. 577); *Ollemar v. Irvington Bd. of Education*, (N.J.Sup.) 135 At. 696.

The provisions of the Federal statutes above quoted, relative to the payment of debts and demands due the United States, do not require the acceptance of money only in payment of debts. The acceptance of a warrant depends principally upon the business necessity as viewed by the administrative officer of the United States. In the instant case the United States could refuse to accept the warrant and bring suit upon the contract. This would result in judgment which may be collected from the district by acceptance of a warrant when there is money in the district treasury to pay such warrant, and if the levies made by the district after the entry of judgment are not sufficient to permit payment of the judgment, mandamus will lie against the officers of the district to compel them to increase the levy in an amount sufficient to pay the judgment. The carrying out of the proceeding through the legal machinery provided involves time and expense.

The administrative officer can accept the warrant now tendered by the Pioneer Irrigation District and by holding it an advantage is gained, because the State law requires the district treasurer to pay the warrants in the order of their issuance. If the warrant issued to the United States and others previously issued do "not exceed the district's anticipated revenue", it should be presumed that the warrant would be paid some time during the taxing year. The acceptance of the warrant without protest creates a novation and the debt under the contract would be exchanged for the debt of the district as represented by its warrant. If payment is not made, suit must be against the district on the debt represented by the warrant and can not be against the district under the contract provision.

The acceptance of the warrant places the United States in a position of preference as to later warrants issued by the district, and this is a distinct advantage as long as the district is not on a cash basis.

It is my opinion that the administrative officer may accept a "call" warrant in payment of indebtedness under a contract, to be

held by the United States until paid in due course, as provided by the State statutes. He can refuse to accept the warrant and abide by the provisions of the contract, instituting suit for recovery of money due if he deems such action desirable and for the best interests of the United States.

Approved:

T. A. WALTERS,

First Assistant Secretary.

ADMISSION OF INSANE ALIEN TO ST. ELIZABETHS HOSPITAL

Opinion, August 2, 1933

ST. ELIZABETHS HOSPITAL—ADMISSION OF INSANE ALIEN AS PATIENT.

There is no provision of law permitting the admission to St. Elizabeths Hospital of an insane alien in the charge of the United States Immigration Service pending deportation.

ST. ELIZABETHS HOSPITAL—ADMISSION OF INSANE ALIEN THROUGH TRANSFER.

The feasibility of admission of an insane alien to St. Elizabeths Hospital by his transfer from the Immigration Service to the Public Health Service and by that service to St. Elizabeths Hospital is one for determination by the services involved.

FAHY, Acting Solicitor:

My opinion has been requested by the Chief Clerk of the Department of the Interior, at the initiation of St. Elizabeths Hospital, upon the following propositions:

(1) May an insane alien now being cared for at the expense of the Immigration authorities be transferred to St. Elizabeths Hospital directly.

(2) May such a patient be transferred from a private institution to the hospitals of the Public Health Service and by the Public Health Service to St. Elizabeths Hospital.

Title 24, U. S. Code (Sections 191 *et seq.*), sets forth the various classes of patients entitled to be admitted to St. Elizabeths Hospital. Generally, the privileges of the hospital have been limited by statute to insane members of the armed forces of the United States (see Section 191) and insane residents of the District of Columbia. (See Sections 201 *et seq.*; see also 7 Ops. Atty. Gen. 450—1855). Certain exceptions have been made by supplementary legislation permitting the admission of:

(1) Insane prisoners of war and interned persons (Section 192).

(2) Insane American citizens resident in the Canal Zone (Section 196).

(3) Persons charged with offenses against the United States in the actual custody of its officers or convicted of any offense in the United States court and imprisonment in any State prison or penitentiary who, during their term of confinement or imprisonment, have become insane (Section 212).

(4) Insane patients of the Public Health Service who may be transferred to St. Elizabeths Hospital upon order of the Secretary of the Treasury, actual per capita cost of maintenance of such patients to be paid by the Public Health Service (Section 193).

There is no provision in the law entitling an insane alien to be transferred to St. Elizabeths Hospital in the manner proposed.

Whether this patient could be cared for by the Public Health Service depends upon the various statutory enactments governing that Service. The only provision concerning the patients to be treated by the Public Health Service is Section 6 of Title 42, U.S. Code, providing that the care of sick and disabled seamen is entrusted to that Service. It is possible that the President could direct that the supervision and custody of this patient be transferred to the Public Health Service by virtue of his general authority to prescribe rules for the conduct of that Service. (See Section 2, Title 42, U.S. Code.)

In the ultimate analysis, however, the consummation of the indirect transfer proposed will depend upon the attitude of the Public Health Service, and action to determine whether the transfer would be permitted should properly be initiated by the officials of the Department of Labor. It might be noted that there are at present certain elements, arising out of the functions of the Public Health Service in connection with immigration matters, which might conduce to that Service taking a favorable position. Thus, the determination of the sanity or insanity of immigrants is wholly within the province of the officials of the Public Health Service. (See Section 152, Title 8, U.S. Code.)

The alien involved in the present situation is a citizen of Russia, and due to the fact that diplomatic relations do not exist between Russia and this country, his deportation at this time is not practicable. Under these circumstances the Immigration Service is required to provide for his care and maintenance under the express provisions of Section 154 of Title 8, U.S. Code. If the transfer of the patient to St. Elizabeths Hospital can be arranged in the indirect manner suggested, it is believed that the cost of his maintenance in that institution can be met by a transfer of funds from the appropriation of the Immigration Service. (See Section 686 of Title 31 and Section 193 of Title 24, U.S. Code.)

It is my opinion therefore (1) that St. Elizabeths Hospital may not directly admit an insane alien held pending deportation, and (2) that the feasibility of an indirect transfer of the patient by the Immigration Service to the Public Health Service and by that Service to St. Elizabeths Hospital should properly be determined by the officials of the services involved.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**CIRCULAR NO. 354, RELATIVE TO SECOND HOMESTEAD AND
DESERT LAND ENTRIES, AND CIRCULAR NO. 474, RELATIVE
TO DESERT LAND ENTRIES, AMENDED.**

REGULATIONS

[Circular No. 1308]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., August 5, 1933.

REGISTERS, UNITED STATES LAND OFFICES, AND SPECIAL AGENTS IN
CHARGE:

Circular 354 of September 26, 1914 (43 L. D. 408), and Circular 474 of May 20, 1924 (revised December 18, 1928), containing regulations under the act of September 5, 1914 (38 Stat. 712), entitled "An Act providing for Second Homestead and Desert Land Entries," are hereby amended to provide for a report by the proper Special Agent in Charge on the applicant's qualification to make a second entry.

In connection with an application for a second homestead or desert land entry, the Register will act upon the same as usual. Such applications, however, must not be allowed by the Registers, but must be forwarded by them, with appropriate recommendations, to the Special Agent in Charge of the district. Report and recommendation as to the applicant's qualification to make the second homestead or desert land entry must be made by the Special Agent in Charge to the Commissioner of the General Land Office, such report to be made in the case of desert land applications at the same time the Special Agent reports under paragraph 13 of said Circular 474. If the Commissioner should find that the applicant is qualified to make a second homestead or desert land entry and that the application is otherwise an allowable one, the application will be returned to the Register for appropriate action.

Hereafter, you will report on Form 4-030 with respect to all second homestead and desert land applications and in the event that such an application is withdrawn prior to receipt, by the Register, of notice of action on the application by the Commissioner, the Register will make prompt report to the General Land Office, likewise to the Special Agent in Charge, concerning such withdrawal.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**TRACINGS AND DUPLICATES SHOWING PUBLIC HIGHWAY
RIGHTS OF WAY: REGULATIONS UNDER SECTION 17, ACT OF
NOVEMBER 9, 1921 (42 STAT. 212)**

[Circular No. 1310]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., August 19, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

Reference is had to tracings and duplicates filed under section 17 of the act of November 9, 1921 (42 Stat. 212), showing public highway rights of way desired by the various State Highway Departments. Heretofore the tracings have been filed direct with this office by the Department of Agriculture acting in behalf of the State Highway Departments, although it is the practice of some of the Highway Departments to have the local land offices certify the tracings as to the correctness of the designation thereon of public lands before sending the tracings to the Bureau of Public Roads, Department of Agriculture.

Hereafter these tracings, which are considered applications for public highway rights of way, will be treated in the same manner as right of way applications filed under other acts and will be assigned serial numbers, posted on your tract books, and forwarded to this office in the usual manner. The tracings and duplicates should both be stamped with the serial number, but the duplicates should be returned to the State Highway Departments, which will forward them to the Bureau of Public Roads for submission to the Secretary of Agriculture. Under the act it is necessary for the Secretary of Agriculture to determine that the lands are necessary for the rights of way.

No applications will be received by you under the said section 17 for rights of way lying entirely within a national forest or an Indian reservation.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

RELIEF TO SUCCESSFUL BIDDERS UPON GOVERNMENT CONTRACTS

Opinion, August 22, 1933

GOVERNMENT CONTRACT—RELIEF TO SUCCESSFUL BIDDER—ADMINISTRATIVE OFFICERS—AUTHORITY TO GRANT RELIEF.

There is no authority of law under which an administrative officer of the United States may grant relief from the terms of the undertaking of a successful bidder upon a contract to furnish supplies to the United States, by increasing the price for which the supplies are sold, after the sale to the Government has been completed.

GOVERNMENT CONTRACT—RELIEF TO SUCCESSFUL BIDDER—NATIONAL INDUSTRIAL RECOVERY ACT—LEGISLATIVE RELIEF.

An adjustment of prices on completed contracts has not been provided for in the National Industrial Recovery Act, or by other legislation, and only by legislation could administrative officers be clothed with powers to increase the price for which goods are sold to the Government, after the sale has been completed.

GOVERNMENT CONTRACT—WHEN BID BECOMES A CONTRACT—OBLIGATION OF CONTRACTOR—TIME OF ACCEPTANCE MATERIAL.

If acceptance of a bid is made by officers of the Government, on its behalf, within the period stated in the bid, a binding contract is completed and the bidder will be required to furnish the supplies at the price stated in his bid; but if a condition arises whereby the time period stated in the bid has expired, the acceptance of the bid thereafter does not make a binding contract unless the bidder subsequently executes a formal contract.

FAHY, Acting Solicitor.

You have submitted to me for opinion questions propounded by the purchasing agent of the Department. He states there are two questions involved, as follows:

1. Is there any likelihood that under the conditions set forth below relief may be given successful bidders through Executive order or otherwise? If such relief might be anticipated, we could continue to award the contracts and avoid the matter of further delay, which is important.

2. In the event it is decided that no relief can be granted, should we follow the policy of rejecting the bids and re-advertising for the supplies?

It appears that several months ago the purchasing agent began advertising for bids on the many items of food, clothing, furniture, drugs, etc., for the field units of the Indian service, in connection with which joint contracts are made annually. Advertisements were issued, but before their acceptance advice was received from the Indian Office to make no contracts for purchases until the question of adjustment of funds for 1934 was settled. The settlement has now been made and funds are available, but it appears that time options on many of the bids have expired. On numerous other bids the manufacturers and dealers failed to state an option, which, according to the literature used in the advertisement, allowed the Government 60 days in which to accept the proposal. In the meantime the movement started through which higher price levels have resulted. Many of the bids referred to were made before that movement had gained any decided impetus. The successful bidders are thus without any protection and have indicated their desire to be released from their obligation.

On July 17, 1933, the Comptroller General rendered an opinion, A-49605, relative to these advertisements and acceptance of bids, in the case of the Elliott Manufacturing Company, in which the bidder gave the United States 60 days in which to accept its offer. The Comptroller General states:

Answering your question specifically, you are advised that bidders may not be permitted to withdraw their bids during the period between date of opening and date stated in the period for acceptance even though there may have been an increase in the price of supplies offered in the bid due to operation of certain statutes of the United States or otherwise.

The proposal made by the bidder on the standard Government form of bid is without independent consideration and there are some court decisions that an offer without an independent consideration is, until acceptance, without want of mutuality (55 C.J. 89). This somewhat disputed question can however be passed, as it does not specifically involve the questions now presented for disposition.

In answer to the first question, it is my opinion that neither the President nor any administrative officer is authorized by law to increase the price for which goods are sold to the Government, after the sale has been completed. The adjustment of prices on completed contracts has not been provided for in the National Industrial Recovery Act. During the World War broad powers were given by Congress in connection with purchase of war supplies, but when the war closed Congress passed what was known as the Dent

Act (40 Stat. 1272), giving authority to the Secretary of War to adjust, pay or discharge any agreement, expressed or implied, upon a fair and equitable basis, that had been entered into in good faith during the emergency and prior to November 12, 1918. It is believed that the authority given the Secretary of the Interior under the Recovery Act is not greater, regarding the adjustment of contracts, than that given the President under the war-time legislation.

Congress assumed, by its passage of the Dent Act, that the administrative officers did not have authority under emergency legislation to change the terms of existing contracts or to settle damages where the contracts were arbitrarily canceled.

Turning our attention to the second question, which involved the acceptance or rejection of bids, reference is made to the case of *Waterman v. Banks* (144 U.S. 394-402), wherein the court said:

Whether, when such an offer is made for a mere nominal consideration, the person offering can withdraw it within the time specified, it is not necessary to consider, as it was not withdrawn, and, like all such offers, it would be binding if accepted within the time and before it was withdrawn.

Again:

There can be no question but that when an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration may be withdrawn at any time before acceptance; and an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time.

In the case of *Thomson v. James*, reported in 18 *Dunlop* 1, Lord Curriehill says:

An offer hath the like implied condition of the other party's acceptance (and in that it differs from an absolute promise), so that if the acceptance be not adhibited presently, or within the time expressed in the offer in which the other party hath liberty to accept, there ariseth no obligation, * * *

And further:

The implied power of retraction, thus reserved by the law itself to an offerer, may indeed be competently renounced by him; and this is sometimes done by his stating in his offer that he will be bound by it only for a certain definite period of time.

In the present cases it appears from the statement of facts that a definite time is given by the bidder in which acceptance can be made. If the acceptance is made within the period stated in the bid there is a binding contract completed and the bidder will be required to furnish the supplies at the price stated in his bid. If a condition arises whereby the 60 days stated in the bid has expired, the acceptance of the bid after that date does not make a binding contract unless the bidder subsequently executes a formal contract. It appears that in some cases upon submission of the formal contract the

bidder has executed the agreement and returned it with a letter, giving notice of price increases. Such a contract should be returned without acceptance, because the letter might change the terms of the formal contract. Due to the unusual delay, wholly attributable to the United States, it would seem to be more equitable to reject all bids that have not been accepted and readvertise for the supplies required.

By the wording of all advertisements the United States is authorized to reject any or all bids without asserting any reason for the action taken. Any new advertisement should contain the substance of the Executive order of August 10, 1933, relative to Government contracts.

Approved:

T. A. WALTERS

First Assistant Secretary.

EXTENSIONS OF TIME FOR HOMESTEAD AND DESERT LAND PROOFS, ACT OF JUNE 16, 1933

[Circular No. 1311]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 22, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

The act of June 16, 1933 (48 Stat. 274), amended the act of May 13, 1932 (47 Stat. 153), to read as follows:

That the Secretary of the Interior is hereby authorized to extend for not exceeding two years the period during which annual or final proof may be offered by any person who has a pending homestead or desert-land entry upon public lands of the United States on which at the date of this Act or on any date on or prior to December 31, 1934, under existing law, annual or final proof is required, showing residence, cultivation, improvements, expenditures, or payment of purchase money as the case may be: *Provided*, That any such entryman shall be required to show that it is a hardship upon himself to meet the requirements incidental to annual or final proof upon the date required by existing law due to adverse weather or economic conditions; *And provided further*, That this Act shall apply only to cases where adequate relief is not available under existing law.

Sec. 2. The Secretary of the Interior is authorized to make such rules and regulations as are necessary to carry out the purposes of this Act.

1. The said act authorizes the Secretary of the Interior, on sufficient showing, to extend for not exceeding two years from the date of the act annual or final proofs then overdue. In the case of annual or final proofs becoming due subsequent to the date of the act

¹ Supersedes Circulars 1269 and 1288.

and on or before December 31, 1934, an extension may be granted for not exceeding two years from the time the proofs become due.

2. Relief may not be granted under this act if adequate relief is available under other laws, and it will not be granted in cases where entrymen have not complied with the law sufficiently to enable them to make acceptable proof within the period of such extension as may be granted.

3. An extension under the act will be limited to such period as the entryman shows is reasonably necessary to enable him to make proof and payment, not exceeding two years.

4. The fact that relief has been granted under the act of May 13, 1932, as originally enacted will not prevent the granting of further relief under that act, as amended, where the former relief is not adequate.

5. The act is construed not to authorize an extension of time for proofs and payments on homestead or desert-land entries in former Indian Reservations, where, under existing law, the payments when made are required to be deposited in the Treasury to the credit of the Indian tribes for whose benefit the lands are to be disposed of.

6. Application for an extension of time must be filed, in affidavit form, duly corroborated, showing:

(a) The entryman's name and present address.

(b) The serial number of the entry and the land office at which it was made or a description of the land embraced in the entry by legal subdivision, section, township and range numbers.

(c) Why proof was not made or cannot be made as required by law. If the entryman has not been or will not be able to make proof of payment as required by law because of adverse weather or economic conditions, the facts relative thereto should be set forth in full.

(d) The extent to which the entryman has complied with the law in the matter of residence, cultivation, improvements, expenditures, reclamation, payments, etc. The actual dates from which and to which the entryman has resided on the land should be given, where residence has been maintained, and the character and value of the improvements made on the land, and when they were placed on the land, should be shown.

(e) The earliest date on which the entryman believes he will be able to make proof or payment.

7. If such application is allowed, it will operate as a stay during the period for which the extension is granted against contest based upon the charge that the entryman has failed to comply with the law in the matter of residence, cultivation or improvements, prior to the filing of the application for extension, in the absence of fraud in procuring the same.

8. You will transmit all applications under the act to this office by special letter and advise each of the applicants that when action has been taken by this office on his application he will be advised thereof through your office.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

UNITED STATES v. ROBERT L. FERRIN

Decided August 23, 1933

PRACTICE—HEARINGS—ATTENDANCE OF WITNESSES—SUBPOENA—ACT OF JANUARY 31, 1903—REQUIREMENT TO TESTIFY.

By the Act of January 31, 1903 (32 Stat. 790), provision is made, by subpoena, to compel the attendance of persons desired as witnesses at hearings involving public-land matters; but apart from this, where a party to the proceedings is present at such a hearing, he cannot properly refuse to testify if called upon, since he is under the jurisdiction of the tribunal in charge thereof even though he may not have been subpoenaed under the provisions of said Act of January 31, 1903, and therefore not liable to its penalty for refusal to appear and testify.

PRACTICE—TESTIMONY AT HEARING—DEFENDANT, NOT SUBPOENAED, CALLED AS WITNESS BY ADVERSE PARTY—CONSIDERATION OF TESTIMONY.

A defendant in a hearing before a local land office, after being called by the Government as a witness in its behalf and submitting some testimony, declined to further testify in that relation and left the witness stand. *Held*, That the testimony so given and the action in refusing to answer further questions and leaving the witness stand are properly a part of the record and therefore to be considered as evidence in the determination of the case, notwithstanding that the witness was not subpoenaed.

PRACTICE—PARTIES—REMANDING CASE FOR REHEARING—CONSIDERATION OF RECORD A PREREQUISITE.

In a case involving a contest of parties, or where adverse proceedings on the part of the Government are opposed by the entryman, and testimony has been adduced at a hearing called, it is not proper to remand the case for rehearing without first passing upon the defendant's testimony and refusal to answer questions.

SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—RECONSIDERATION WITHOUT APPEAL BEING TAKEN.

The Secretary of the Interior, in the proper exercise of his supervisory authority, may vacate a decision of the General Land Office and direct a reconsideration of the case by said office, even though no appeal may have been taken from its decision therein.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

The cases of *Goodpaster v. Voris* (8 Iowa, 334, 74 Am. Dec. 313), *Bell v. Strain* (49 L. D. 318), and *Harvey M. LaFollette* (26 L. D. 453), cited and applied.

CHAPMAN, *Assistant Secretary*:

The Commissioner of the General Land Office has submitted to the Department for consideration the above-entitled case, in which the facts are briefly as follows:

Robert L. Ferrin made a stock-raising homestead entry for approximately 640 acres of land in the Evanston, Wyoming, land district, on May 31, 1924. He submitted final proof on October 25, 1929, which the Commissioner states does not show compliance with law either in the matter of residence or stock-raising improvements.

On December 16, 1929, the Commissioner ordered adverse proceedings against the entry, charging that the entryman had failed to reside upon the land and to place permanent improvements thereon as required by law.

A hearing was held as the result of the charges, at which the defendant appeared in person and by counsel and the Government was represented by the district law officer. The defendant was called as a witness for the Government although he had not been subpoenaed to appear as a witness. It appears that his attorney allowed him to answer some questions and then instructed him not to answer any further questions. The hearing ended, although only an examiner of the General Land Office and the defendant had given any testimony. The hearing commenced on May 11, 1931. On June 11, 1931, the defendant's attorney filed a motion to dismiss the proceedings. The district law officer filed a motion for judgment by default. On August 12, 1931, the register of the local land office rendered an opinion allowing the Government's motion for default. He said:

Refusal to answer is grounds for judgment by default in the present case without review or consideration of the charges of nonresidence and insufficient improvements. From the evidence it is clear the defendant has not placed the required improvements on the land, did not reside thereon in compliance with the law, and refused to testify at the hearing. In view of these facts, recommendation is made that the entry be canceled and the land revert to the Government.

The defendant appealed. By decision of February 19, 1932, the Commissioner remanded the case for rehearing. He said:

The act of January 31, 1903 (32 Stat. 790), provides the means by which the Government may compel witnesses to testify, and provides penalties for wilfully neglecting or refusing obedience to a subpoena issued by the Register. In the opinion of this office a witness can not be compelled to testify and be

held responsible in the manner provided by said statute for his failure to testify unless he is regularly summoned in accordance with the provisions thereof. This conclusion is in harmony with instructions given to the Register at Sterling, Colorado, in letter of this office dated February 15, 1911 (Sterling 0358).

* * * * *

For the reasons hereinabove set forth, this office is of the opinion that the motion of the counsel for the Government for judgment by default should have been denied, and it is unwilling to decide this case on the record now before it, if the defendant wishes to introduce evidence in support of his contention that he complied with the law. Accordingly the case is remanded for rehearing, and the record of the former trial is returned.

You will confer with the Chief of Field Division and set a date for a hearing, giving due notice thereof to all parties in interest.

Should no further testimony be introduced, you will render decision in the case on the testimony now in the record, apart from the testimony given by the defendant. If further testimony is introduced, you will consider the entire record, apart from the testimony heretofore given by the defendant, and render decision thereon.

It appears that there have been several continuances, but that rehearing has finally been set for September 11, 1933.

On July 21, 1933, the Special Agent in Charge at Helena, Montana, who had been the district law officer at the hearing, wrote a letter to the Director of Investigations, giving a full history of the case, citing authorities to show that the Commissioner's decision was erroneous, and suggesting that the Commissioner be requested either to reconsider his decision or to certify the same to the Department. The Director of Investigations transmitted the letter to the Commissioner and requested "that the decision be reviewed in the light of the recommendations made."

On August 7, 1933, the Commissioner advised the Director of Investigations that the decision had been reexamined, and that "in the opinion of this office no showing has been made which would warrant this office in modifying its decision." At the same time the Commissioner transmitted the record to the Department for consideration, as hereinbefore stated.

The Commissioner clearly erred in ruling that the defendant could refuse to testify because he had not been summoned as a witness in the manner provided in the act of January 31, 1903, *supra*. The defendant could not be punished under the cited act for refusing to testify, but it was not correct to exclude his testimony and disregard his action in refusing to answer further questions and leaving the witness stand.

The Commissioner cited instructions of his own office dated February 15, 1911, but he failed to cite or follow the ruling of the Department in the case of *Bell v. Strain* (49 L.D. 318). In that case it was held upon authorities cited that where a party to proceedings

is present at a hearing thereon he is under the jurisdiction of the tribunal in charge thereof and can not properly refuse to testify, if called upon, even though he had not been subpoenaed as a witness.

In the case of *Goodpaster v. Voris* (8 Iowa, 334, 74 Am. Dec. 313), the court said:

The object of the summons (subpoena) is only to give notice and to call the witness in, and if he is already in court, he requires no further notice. A witness who is not a party can not make this objection, and neither can the party. In legal theory he is already in court, and always prepared to testify the truth.

Section 89-1705 of the Wyoming Revised Statutes, 1931, provides:

Any person who is a party of record in any civil action or proceeding * * * may be examined upon the trial of any such action or proceeding as if under cross-examination, at the instance of adverse party * * * and for that purpose may be compelled * * * to testify.

It was not proper to remand the case for rehearing without passing upon the defendant's testimony and refusal to answer further questions. At the time the decision was rendered there was no provision for appeal to the Department on behalf of the Government, and for that reason the matter was not then brought before or to the attention of the Department.

In the case of *Harvey M. La Follette et al.* (26 L.D. 453) it was held:

The Secretary of the Interior, in the proper exercise of his supervisory authority, may vacate a decision of the General Land Office and direct a reconsideration of the case by said office, even though no appeal may have been taken from its decision therein.

The decision of February 19, 1932, is vacated, and it follows that the order of rehearing is thereby vacated. The Commissioner is instructed to call for the transcript of testimony which was taken at the hearing held in May, 1931, and to reconsider the full record, including the testimony and action of the defendant. The case may thereafter, if appealed, come before the Department.

JOHN W. BEAM: BOULDER POWER PLANT CONTRACT

Opinion, August 23, 1933

RECLAMATION—BOULDER DAM—POWER PLANT—CONTRACT FOR MATERIAL—VARIANCE FROM TERMS OF ACCEPTED BID.

There is no authority of law to require the successful bidder on a contract for the supply of material to the Federal Government to assume, in the performance of the engagement he has entered into, additional and more onerous conditions which would entail increased expense not contemplated when the advertisement was issued and the bid accepted.

RECLAMATION—BOULDER POWER PLANT—CONTRACT—ADDED CONDITIONS THROUGH CODES—EFFECT—NATIONAL INDUSTRIAL RECOVERY ACT.

The Executive order of August 10, 1933, in pursuance of the National Industrial Recovery Act, required that bidders, in the execution of contracts, shall comply with all provisions of the applicable approved code * * * for the trade or industry * * * concerned, or, in the absence of such a code, with the provisions of the blanket code, covering all industries, promulgated under authority of section 4 (A) of the National Industrial Recovery Act. *Held*, that where specifications were issued prior to the Executive order, and the accepted bidder is unwilling to execute a contract under the added conditions named in the codes, all bids should be rejected and readvertisement made, with a definite statement in the advertisement relative to the provisions of the Executive order named.

RECLAMATION—BOULDER POWER PLANT—BIDS AND CONTRACTS—ACCEPTANCE—AUTHORITY OF FEDERAL ADMINISTRATIVE OFFICERS.

In view of the requirements of the Executive orders issued to give effect to the National Industrial Recovery Act, Federal administrative officers are without authority to accept bids or to execute formal contracts on behalf of the United States unless provision is made therein for compliance with said orders.

RECLAMATION—BOULDER POWER PLANT—CONTRACTS WITH THE UNITED STATES—AUTHORITY TO REJECT BIDS.

The authority to reject bids is reserved to the United States; objections by other bidders could not properly be made because the provisions of the Executive order when included in the contract would increase the burden imposed upon the low bidder.

DECISION CITED AND APPLIED.

Decision of the Comptroller General of December 13, 1927 (7 Comp. Gen. 333), cited and applied.

FAHY, *Acting Solicitor*:

"You [the Secretary of the Interior] have requested my opinion in connection with bids which were opened at the Denver office of the Bureau of Reclamation on August 14, 1933, under specifications No. 598-D, for seat frames and bronze liners for bulkhead gates for draft tubes at Boulder Power Plant.

The low bid delivered cost was submitted by John W. Beam, of Denver, Colorado, in the total amount of \$20,057.50. In making the award under the bid, consideration must be given to the Executive order of August 10, 1933, which affects all supply contracts let by the United States. The specifications were issued prior to the date of the Executive order. To give effect to the Executive order it is proposed that the award be made to the low bidder upon condition and with the understanding that he will execute a contract which contains the effective provisions of the Executive order mentioned. If the low bidder is unwilling to execute a contract under the conditions named, should all bids be rejected and readvertisement un-

dertaken with a definite statement in the advertisement relative to the provisions of the Executive order named?

The Executive order provides as follows:

(a) The contractor shall comply with all provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's reemployment agreement, (the blanket code covering all industries), promulgated under authority of Section 4 (A) of the foregoing act, or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement.

And

(b) If the contractor fails to comply with the foregoing provision, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

To require the lowest bidder to accept a contract under the conditions imposed by the Executive order would be to impose on him more onerous conditions, which would result in increased expense not contemplated when the advertisement was issued nor when the bid was made. For the Government to insist that the low bidder sign a contract including the provisions of the Executive order would not be derogatory to the interests of the higher bidders when a similar provision would be insisted on for them. In 7 Comp. Gen. 383 there is pointed out the course which should be pursued if the low bidder does not agree to make a contract with the added conditions above quoted. The Comptroller General had under consideration bids for a painting job in New York City. The bids were opened December 9, but it was discovered that there were insufficient funds in the allotments until after January 1 of the following year. The low bidder was asked, "Will you agree to stand by your proposal until after January 1, 1926"; to which he replied that he would not. On January 2, the bid of the second low bidder was accepted and he did the work.

The Comptroller General said:

The question of whether delay from December 9, 1925, the date of opening of the bids, to January 1, 1926, was an unreasonable period, is primarily one of fact, and the action of the Treasury Department in communicating with the lowest bidder relative to holding his bid open to January 1, 1926, appears to concede that such delay was unreasonable. Therefore, there should have been readvertisement for the work and the lowest bid obtained in response thereto accepted. There was no authority for the acceptance of the Tully bid opened on December 9, 1925, either as having been submitted in response to the advertisement and the lowest bid left after the withdrawal of the low bidder, or without advertising.

This would indicate that if the low bidder does not agree to accept a contract with the provisions of the Executive order included, all bids should be rejected and readvertisement had in which the provisions of the Executive order would be included.

The Administrative officer is without authority to accept the bids or to execute a formal contract unless there be provision for compliance with the Executive order.

The authority to reject bids is reserved to the United States. Objections by other bidders could not properly be made because the provisions of the Executive order when included in the contract would increase the burden imposed upon the low bidder.

Approved:

HAROLD L. ICKES,
Secretary.

WATER SYSTEM AT CARLSBAD CAVERNS NATIONAL PARK

Opinion, August 31, 1933

**NATIONAL PARKS—PURCHASE OR CONDEMNATION OF LAND FOR PUBLIC PURPOSES—
AUTHORITY—ACT OF AUGUST 1, 1888—SECRETARY OF THE INTERIOR.**

By the terms of the Act of August 1, 1888 (25 Stat. 357), the sanction of Congress is necessary to a purchase of land or its condemnation on the part of the United States, and that body has not authorized the Secretary of the Interior to thus acquire property in connection with the water system of the Carlsbad Caverns National Park.

**NATIONAL PARKS—PURCHASE OR CONDEMNATION OF LAND FOR PUBLIC PURPOSES—
NATIONAL INDUSTRIAL RECOVERY ACT—POWERS OF ADMINISTRATOR OF
PUBLIC WORKS.**

Under the provisions of Section 203 of the National Industrial Recovery Act, the Administrator of Public Works, or such other agency as the President may designate or create, is vested with authority to acquire by purchase or the exercise of eminent domain real or personal property in connection with the construction of any project coming within the purview of the Federal Emergency Public Works Administration. *Held*, that in the exercise of this authority, the Administrator of Public Works is authorized to acquire private property and a right of way in connection with the water system of the Carlsbad Caverns National Park, in the absence of some other agency designated by the President under the National Industrial Recovery Act.

**NATIONAL PARKS—CONTRACTS OR PURCHASES ON BEHALF OF THE UNITED STATES—
AUTHORIZATION—LIMITATION.**

The Act of June 12, 1906 (34 Stat. 255), provides that no contract or purchase on behalf of the United States shall be made "unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year * * *."

COURT DECISION CITED AND APPLIED.

The case of *Hanson Company v. United States* (261 U.S. 581, 587), cited and applied.

FAHY, *Acting Solicitor*:

An allotment of \$1,250,000 was made by the direction of the Federal Emergency Administrator of Public Works to the Department of the Interior, National Park Service, for physical improvements within the national parks and monuments. Included therein was an item of \$65,000 for the water system at Carlsbad Caverns National Park. In order to complete the water system at the park it is necessary to acquire some private property and right of way which will cost not to exceed \$8,000.

The question arises as to whether the acquisition of the property should be arranged through the Administrator of Public Works or through the Secretary of the Interior. The questions submitted to me for opinion are:

1. Whether the property to be acquired should be taken under the direction of the Administrator or under the Secretary of the Interior;
2. If the property should be acquired under the direction of the Secretary, would the transfer of the funds necessary for that purpose by the Administrator to the Department, together with existing law, sufficiently empower the Secretary of the Interior to acquire the property; or
3. If it be decided that the Secretary should acquire the property, should an executive order be issued designating the Secretary for that purpose?

A statement of some of the steps necessary to be taken to acquire the land will help to clarify the situation. The land will be acquired by purchase or condemnation in the name of the United States of America, and if condemnation is found to be necessary, the United States of America would be the proper party plaintiff. In the condemnation proceedings the Attorney General appears for the United States and files the petition or complaint, and his action must be taken upon the recommendation of the officer authorized by Congress to acquire the land. Therefore, we must know whether the Federal Emergency Administrator of Public Works or the Secretary of the Interior has the necessary congressional sanction to authorize him to acquire the land. Congress has not authorized the Secretary of the Interior to acquire by condemnation or purchase any property for Carlsbad Caverns National Park; hence he can not proceed to put into motion the authority granted by the act of August 1, 1888 (25 Stat. 357), which states:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for the condemnation, within thirty days from the receipt of the application at the Department of Justice.

SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

The act requires prior authority of Congress in order for the Secretary of the Interior or any other officer of the Government to procure real estate for a public use. It also provides by Section 2 for compliance with State procedure in the State where the property is located. The authority to condemn extends to every case in which an officer of the Government is authorized to procure real estate for public uses. *Hanson Company v. United States*. (261 U.S. 581, 587). The purchase of the property for Carlsbad Caverns National Park has not been authorized by an act of Congress. Furthermore, there is a prohibition against the acquisition of property in the act of June 12, 1906 (43 Stat. 255), which is couched in the following language:

* * * That no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year * * *

The funds are available, but the last-quoted law operates to prevent the Secretary of the Interior from expending them, as he has not been authorized by law to purchase, "on behalf of the United States", any land for Carlsbad Caverns National Park.

Having determined that the Secretary of the Interior is without authority of Congress to acquire the land desired by purchase or condemnation, we now consider the authority vested in the Federal Emergency Administrator of Public Works. Section 203 of the National Industrial Recovery Act provides, among other things, as follows:

(a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, * * *; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase: *Provided*, That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; * * *

By this quotation it is clear that the Administrator of Public Works is vested with authority to acquire land by purchase or condemnation, and if condemnation is resorted to he would be the proper officer to recommend to the Attorney General the institution of the suit and later to approve the vouchers in settlement of the judgment fixing the value of the property taken. It is feasible to follow another plan by having the President authorize or create some other agency to acquire the land by purchase or condemnation, but such plan would require the President to issue an Executive order designating or creating it to act as "such other agency." The President can designate the Office of National Parks, Buildings and Reservations or the Secretary of the Interior, if he creates them as agencies pursuant to the act. If another agency be designated or created by the President it could proceed with as much authority as that now given to the Federal Emergency Administrator of Public Works. The choice of procedure is an administrative matter and should be determined by the proper administrative officials. It is my opinion that complete authority is vested in the Federal Emergency Administrator of Public Works, and that he should sign the contract for purchase of the property or recommend institution of the suit in condemnation, if the latter course becomes desirable, in the absence of designation of some other agency by Executive Order, under the National Industrial Recovery Act.

Approved:

HAROLD L. ICKES,

Secretary.

REGULATIONS GOVERNING FUR FARMING IN ALASKA

[Circular No. 1312]¹

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 2, 1933.

REGISTER AND OFFICE OF DIVISION OF INVESTIGATIONS, ANCHORAGE,
ALASKA;

REGISTER AND RECEIVER, FAIRBANKS AND NOME, ALASKA:

Circular No. 1271, dated June 1, 1932, provides as follows:

Paragraph 5, page 3, of Circular No. 1108, and paragraph 6, page 18, of Circular No. 491, the regulations governing fur farming in Alaska, issued in pursuance of the act of July 3, 1926 (44 Stat. 821), are hereby amended to read as follows:

"Every lessee under this act shall pay to the lessor in advance a minimum rental of \$5 per annum on leases for all tracts up to and including 10 acres, a minimum of \$25 annual rental on all leases of tracts over 10 acres and not exceeding 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 percent 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."

Said paragraphs are hereby amended by adding the following:

Provided, that the specifications of minimum basic yearly rates herein shall not prevent a lower rate to be fixed, in the discretion of the Secretary, upon satisfactory showing in particular cases that the specified rate applicable to the area involved would be excessive.

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

C. E. BATES ET AL.

Opinion, September 12, 1933

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CLAIM FOR PERSONAL INJURIES
AND DAMAGE TO PROPERTY—ACT OF DECEMBER 28, 1922.

By the terms of the Act of December 28, 1922 (42 Stat. 1066), the head of an Executive Department of the United States Government, acting on its behalf, is authorized to "consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately-owned property, where the amount of the claim does not exceed

¹ Supersedes Circular No. 1271 and amends Circulars Nos. 491 and 1108.

\$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment," the amount found due to be certified to Congress as a legal claim for payment, but no claim to be considered unless presented within one year from the date of its accrual.

NATIONAL PARKS—EMPLOYEE OF THE UNITED STATES—NEGLIGENCE—ACT OF DECEMBER 28, 1922.

An employee of the United States, in the course of employment for and on behalf of the United States, negligently caused injury to the automobile of a private citizen lawfully in the Platt National Park, Oklahoma, the damage amounting to \$8.45. *Held*, That a claim for this amount, under the circumstances shown, comes within the scope of the Act of December 28, 1922.

NATIONAL PARKS—ACT OF DECEMBER 28, 1922—PERSONAL INJURIES NOT WITHIN ACT'S PURVIEW.

The scope of the act of December 28, 1922, does not embrace claims for personal injury, but only claims for damage to or loss of privately-owned property.

FAHY, *Acting Solicitor*:

There has been submitted to me for opinion the question of the validity of a claim in favor of Mr. C. E. Bates and Mrs. B. L. Bates, of Sulphur, Oklahoma, for medical and hospital costs due to personal injuries to Mrs. Bates in the amount of \$28 and property damage to the automobile of Mr. Bates in the amount of \$8.45. The claim made by Bates and wife arises from a collision in Platt National Park on August 18, 1933, between a Government-operated Chevrolet truck and the automobile of Mr. Bates.

There are attached to the papers reports by C. E. Bates and B. L. Bates, his wife, sworn to on August 23, 1933, and report by Aaron Cottle, the Government man who operated the Chevrolet truck, together with plat prepared by William C. Branch, Superintendent of the park. Aaron Cottle, the driver of the Government Chevrolet truck, was an enrollee at E.C.W. Camp N. P. 1, Platt National Park, Oklahoma, and at the time of the accident was proceeding along the highway for the purpose of obtaining a load of lumber to be used in construction work on the park. It appears that Mr. Cottle was driving the car at a speed of about 30 miles an hour and he assumes all blame for the accident; in other words, it is conceded that the accident was due to the negligence of the man operating the truck for the United States.

By the act of December 28, 1922 (42 Stat. 1066), there is provision for the head of a Department to consider, ascertain, adjust and determine damages or loss of privately-owned property where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. It appears conclusively from the

papers submitted that Cottle was acting within the scope of his employment and that by his negligence the damages occurred.

Upon consideration of the claim it is my conclusion that the only amount that could be allowed under the act would be \$8.45 for repairing the privately-owned automobile. The expenses entailed for physician, hospital treatment and X-ray pictures are expenses due to personal injury as the result of the collision between the two automobiles. The act of December 28, 1922, *supra*, does not permit the Department head to adjust claims for personal injury; it permits only the consideration, ascertainment, adjustment and determination of loss to privately-owned property. The claim in the amount of \$8.45 is one fairly for report to Congress pursuant to the act of December 28, 1922.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PAYMENT OF RENTALS AND ROYALTIES UNDER OIL AND GAS LEASES AND PERMITS—CHANGE IN METHOD OF HANDLING

[Order No. 678]

DEPARTMENT OF THE INTERIOR,
Washington, D.C., September 12, 1933.

To expedite collecting and accounting for rentals and royalties under the act of February 25, 1920 (41 Stat. 437), and other acts providing for the leasing of mineral lands, beginning October 1, 1933, remittances in payment of rentals and royalties under oil and gas leases and permits shall be made through the supervisors of oil and gas leasing operations; and rentals and royalties on coal, potash, sodium, phosphate and other mining leases and permits shall be made through the district mining supervisors. The supervisors shall note payments on their records and promptly forward the remittances direct to the General Land Office, where receipts will be issued and the money accounted for and deposited in the Treasury. Remittances shall be by check, draft, or money order drawn to the order of the Commissioner of the General Land Office, and shall be accompanied by statements prepared by the payor showing the specific items of rental or royalty the payments are intended to cover. Forms for this purpose will be provided by the Geological Survey.

The General Land Office will maintain an accounting record of all rentals and royalties due and payments made and will be responsible for making collections, but a copy of each demand for payment shall be furnished the supervisor who reports the royalty.

All regulations in conflict herewith are hereby modified accordingly.

HAROLD L. ICKES,
Secretary of the Interior.

**CEDED CHIPPEWA INDIAN LANDS, MINNESOTA, RESTORED TO
HOMESTEAD ENTRY FROM WITHDRAWAL**

REGULATIONS

[Circular No. 1313]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 18, 1933.

By Department order of July 13, 1926, all Chippewa Indian lands in Minnesota not classified as swamp, which were ceded to the United States under the act of January 14, 1889 (25 Stat. 642), were withdrawn from settlement, entry or other dispositions. On February 25, 1927, the order was revoked as to the lands in the ceded Red Lake, Bois Forte, Deer Creek, Fond du Lac, and Grand Portage or Pigeon River reservations, and such lands were restored to settlement and entry.

The Department, by order of June 21, 1933, revoked the remainder of the order of July 13, 1926, which applied to the lands in the ceded Chippewa of Mississippi, Leech Lake, Winnibigoshish, Cass Lake and White Oak Point reservations and the four ceded townships (Tps. 143 to 146 N., inclusive, R. 37 W., 5th P.M.), of the White Earth Indian Reservation, Minnesota.

The order of June 21, 1933, affects Chippewa agricultural lands, as well as "cut over" pine lands, and pine lands which have heretofore been opened to homestead entry, described in the Chippewa Agricultural schedules of October 6, 1900, September 22, 1903, April 20, 1904, June 23, 1905, April 20, 1907, July 23, 1908, May 10, 1910, May 14, 1910, July 18, 1911, February 19, 1916, and June 20, 1923, which are now vacant and unoccupied, and not otherwise reserved or withdrawn.

This opening order does not affect ceded Chippewa land classified as "pine land", not heretofore opened to entry, or other ceded Chippewa land not heretofore opened to entry.

The lands which will become subject to entry hereunder are shown on a schedule which is attached to this order.

The following lands described in the schedule were inadvertently entered subsequent to the withdrawal of July 13, 1926: NW $\frac{1}{4}$ NE $\frac{1}{4}$

sec. 34, T. 145 N., R. 26 W., Cass Lake 014560, Tom Hines; SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 22, T. 148 N., R. 26 W., Cass Lake 014649, James Farrell; NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, T. 142 N., R. 28 W., Cass Lake 014786, William H. Aldrich; W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 28, T. 142 N., R. 30 W., Cass Lake 014536, Ivan J. Aultman; SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 26, T. 147 N., R. 31 W., Cass Lake 014650, Evan C. Pierson; NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 27, T. 147 N., R. 31 W., Cass Lake 015097, Albert Harold Drescher; and SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 23, T. 143 N., R. 37 W., Cass Lake 014867, Allen Brophy, all 5th P.M., Minnesota. Under the circumstances it is held that said entrymen have equitable rights within the meaning of Public Resolution No. 85, hereinafter referred to. Accordingly, the lands covered by such entries will not become subject to entry by former soldiers under this order.

The following described lands which contain pine timber, are subject to section 27 of the act of June 25, 1910 (36 Stat. 862), and before a homestead entry can be allowed covering any of said lands, the price of the pine timber on the land entered must be paid in full: Lot 3 sec. 3, \$160.00; SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, \$25.00; NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 32, \$55.00; and SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 32, \$60.00, all in T. 143 N., R. 37 W., 5th P.M., Minnesota.

For a period of 91 days beginning with the 35th day from the date hereof the lands covered by order of June 21, 1933, *supra*, will be open to entry only under the homestead laws and section 6 of the act of January 14, 1889 (25 Stat. 642), at \$1.25 per acre, by qualified ex-service men for whose services recognition is granted by Public Resolution No. 85 (46 Stat. 580), and by persons having equitable claims subject to allowance and confirmation. Thereafter any of the said lands remaining unentered will be subject to appropriation under applicable laws by the general public.

For a period of 20 days prior to the soldiers' preference right period and for a like period prior to the date when the lands become subject to entry by the general public, soldiers and persons having equitable claims in the first instance and qualified applicants in the second, may execute and file their applications and all such applications presented within such 20-day periods, together with those filed at 9 a.m. Standard Time, on the date such lands become subject to appropriation under such applications, shall be treated as filed simultaneously. Ex-service men should file certified copies of their certificates of discharge with their applications.

Subsequent to the approval of these regulations and prior to the date of restoration to general disposition as herein provided for, no rights may be acquired by settlement in advance of entry or otherwise except strictly in accordance herewith.

Homestead application blanks may be obtained by addressing the Commissioner of the General Land Office, Washington, D.C., and all applications must be filed in his office. All applications should describe the land applied for by legal subdivision, section, township and range numbers. A fee of \$5.00 for less than 81 acres entered; or \$10.00 for 81 acres or more entered, and \$1.00 original commissions on each 40-acre tract, must be paid with each application when filed.

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

MEMORANDUM OF EFFECTIVE DATES OF ORDER

Date of order: September 18, 1933.

Soldiers' simultaneous filing period from October 3, 1933, to October 21, 1933, inclusive.

Soldiers' preference right period from October 23, 1933, to January 22, 1934, inclusive.

Simultaneous filing period for general public, from January 2, 1934, to January 20, 1934, inclusive.

Lands opened to general disposition January 23, 1934.

SCHEDULE OF CEDED CHIPPEWA LANDS RESTORED FROM WITHDRAWAL BY
ORDER APPROVED SEPTEMBER 18, 1933.

4th P.M., Minnesota

T. 55 N., R. 27 W.:	<i>Acres</i>
sec. 10, lots 2, 3,-----	24.35

5th P.M., Minnesota

T. 143 N., R. 25 W.:	
sec. 2, lots 1, 12-----	30.33
sec. 11, lot 4-----	5.25
T. 145 N., R. 25 W.:	
sec. 3, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
T. 146 N., R. 25 W.:	
sec. 7, lot 1-----	38.56
sec. 14, SW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	40.00
T. 145 N., R. 26 W.:	
sec. 13, E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	20.00
sec. 34, NW $\frac{1}{4}$ NE $\frac{1}{4}$ (in entry Cass Lake 014569)-----	40.00
T. 146 N., R. 26 W.:	
sec. 2, lots 1, 2, SW $\frac{1}{4}$ NE $\frac{1}{4}$ -----	118.60
sec. 4, lot 3, SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ -----	398.00
sec. 9, lots 2, 5-----	64.55
sec. 10, lots 3, 4, NE $\frac{1}{4}$ SE $\frac{1}{4}$ -----	97.92
sec. 11, lot 1-----	1.65
sec. 36, SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ -----	520.00

	Acres
T. 148 N., R. 26 W.:	
sec. 1, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
sec. 6, lot 11-----	32.45
sec. 7, lot 1-----	.02
sec. 22, SE $\frac{1}{4}$ SE $\frac{1}{4}$ (in entry Cass Lake 014649)-----	40.00
sec. 24, SW $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
sec. 27, lot 3-----	22.60
T. 141 N., R. 27 W.:	
sec. 5, N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	40.00
T. 142 N., R. 27 W.:	
sec. 5, lots 7, 8-----	57.50
sec. 8, lots 2, 6-----	75.55
sec. 18, lot 4-----	28.25
sec. 19, lot 3-----	12.50
T. 143 N., R. 27 W.:	
sec. 31, lots 5, 6, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ -----	129.75
sec. 32, lot 8-----	23.50
T. 148 N., R. 27 W.:	
sec. 3, NW $\frac{1}{4}$ SE $\frac{1}{4}$ -----	40.00
T. 141 N., R. 28 W.:	
sec. 18, N $\frac{1}{2}$ lot 7-----	19.89
sec. 27, W $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	5.00
T. 142 N., R. 28 W.:	
sec. 4, lot 7, SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	139.12
sec. 5, SE $\frac{1}{4}$ SE $\frac{1}{4}$ -----	40.00
sec. 5, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ (in entry Cass Lake 014786)-----	60.00
sec. 8, lots 4, 5, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ -----	168.25
sec. 9, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ -----	320.00
sec. 14, S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	40.00
sec. 15, S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ -----	20.00
sec. 16, E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ -----	40.00
sec. 17, lot 1-----	43.45
sec. 21, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ -----	100.00
sec. 22, SE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	40.00
sec. 24, lot 5-----	2.25
sec. 26, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	20.00
sec. 28, N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	20.00
sec. 32, W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ -----	20.00
T. 143 N., R. 28 W.:	
sec. 27, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
sec. 33, lots 2, 3, 6, N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ -----	178.5
sec. 34, S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	20.00
T. 147 N., R. 28 W.:	
sec. 6, lot 9-----	4.61
T. 148 N., R. 28 W.:	
sec. 18, E $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ -----	120.00
sec. 28, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
sec. 31, lots 6, 8-----	1.11
T. 141 N., R. 29 W.:	
sec. 12, W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	20.00
sec. 17, lot 4-----	.75
sec. 18, lot 20 ¹ -----	4.96
sec. 23, W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	20.00
sec. 24, lots 4, 5-----	14.61
sec. 27, lots 2, 3, 4-----	36.16
sec. 28, lot 1-----	1.70
T. 143 N., R. 29 W.:	
sec. 24, N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ -----	20.00

¹ In accordance with plat approved August 9, 1933.

	Acres
T. 141 N., R. 30 W.:	
sec. 2, lot 7	.15
sec. 3, E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$	20.00
T. 142 N., R. 30 W.:	
sec. 28, W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ (in entry Cass Lake 014536)	20.00
T. 146 N., R. 30 W.:	
sec. 5, lots 5, 6	10.33
sec. 7, lots 2, 3	1.55
sec. 8, lot 10	.65
sec. 11, lot 11	38.31
sec. 14, lot 2	3.04
sec. 15, lot 3, SW $\frac{1}{4}$ SE $\frac{1}{4}$	65.96
sec. 16, NW $\frac{1}{4}$ NW $\frac{1}{4}$	40.00
sec. 18, lots 2, 3	1.05
T. 147 N., R. 30 W.:	
sec. 22, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$	30.00
T. 142 N., R. 31 W.:	
sec. 6, lot 6	22.00
sec. 25, S $\frac{1}{2}$ lot 2	25.25
T. 143 N., R. 31 W.:	
sec. 9, lot 1	.18
T. 144 N., R. 31 W.:	
sec. 29, NE $\frac{1}{4}$ SE $\frac{1}{4}$	40.00
sec. 32, lots 1, 5	6.00
sec. 34, SW $\frac{1}{4}$ SE $\frac{1}{4}$	40.00
T. 146 N., R. 31 W.:	
sec. 9, NW $\frac{1}{4}$ NE $\frac{1}{4}$	40.00
sec. 10, lot 8	51.25
T. 147 N., R. 31 W.:	
sec. 13, lots 6, 8	53.94
sec. 14, lot 5	32.20
sec. 15, lot 6	21.20
sec. 16, lot 3	1.43
sec. 20, SE $\frac{1}{4}$ NW $\frac{1}{4}$	40.00
sec. 22, SW $\frac{1}{4}$ SW $\frac{1}{4}$	40.00
sec. 23, NW $\frac{1}{4}$ NE $\frac{1}{4}$	40.00
sec. 25, lot 1, NW $\frac{1}{4}$ NW $\frac{1}{4}$	64.65
sec. 26, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ (in entry Cass Lake 014650)	120.00
sec. 27, NE $\frac{1}{4}$ NE $\frac{1}{4}$ (in entry Cass Lake 015097)	40.00
sec. 27, SE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$	80.00
sec. 33, lot 2	.50
T. 143 N., R. 32 W.:	
sec. 36, lot 7	19.70
T. 144 N., R. 32 W.:	
sec. 11, lot 2	2.73
sec. 14, lot 1	1.31
T. 146 N., R. 32 W.:	
sec. 24, lot 11	.45
T. 143 N., R. 37 W.:	
sec. 1, lot 2	40.04
sec. 3, lot 3 (Price of timber \$160.00)	37.11
sec. 4, NW $\frac{1}{4}$ SW $\frac{1}{4}$	40.00
sec. 5, lot 4	39.22
sec. 5, SW $\frac{1}{4}$ SE $\frac{1}{4}$ (Price of timber \$25.00)	40.00
sec. 10, SW $\frac{1}{4}$ NE $\frac{1}{4}$	40.00
sec. 11, SE $\frac{1}{4}$ NE $\frac{1}{4}$	40.00
sec. 15, N $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$	240.00
sec. 16, NE $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$	240.00
sec. 23, SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00
sec. 23, SE $\frac{1}{4}$ SE $\frac{1}{4}$ (in entry Cass Lake 014867)	40.00

	Acres
T. 143 N., R. 37 W.—Continued	
sec. 24, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	40.00
sec. 25, NE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	40.00
sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ -----	80.00
sec. 28, lots 1, 5-----	2.25
sec. 29, lot 1-----	.25
sec. 32, NW $\frac{1}{4}$ NE $\frac{1}{4}$ (Price of timber \$55.00)-----	40.00
sec. 32, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ -----	80.00
sec. 32, SW $\frac{1}{4}$ SE $\frac{1}{4}$ (Price of timber \$600.00)-----	40.00
sec. 34, lot 3, NE $\frac{1}{4}$ NE $\frac{1}{4}$ -----	41.10
sec. 36, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ -----	240.00
T. 144 N., R. 37 W.:	
sec. 13, NW $\frac{1}{4}$ SE $\frac{1}{4}$ -----	40.00
sec. 30, NE $\frac{1}{4}$ SE $\frac{1}{4}$ -----	40.00
sec. 36, NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ -----	280.00

TAKING OF SAND AND GRAVEL FROM PUBLIC LANDS FOR FEDERAL AID HIGHWAYS

Opinion, September 21, 1933

MINING LAWS—LANDS SUBJECT TO LOCATION, ETC.—DETERMINING TEST.

In the solution of the question whether lands containing a given mineral substance are subject to location and purchase under the mining laws, the test is the marketability of the product, which test has been consistently applied by the courts.

MINING LAWS—DEPOSITS OF SAND AND GRAVEL—MARKETABILITY THE TEST GOVERNING LOCATION AS MINERAL LAND.

No logical reason appears for discriminating between deposits of sand and gravel, if marketable at a profit, and other low-grade deposits of wide distribution, used for practically the same or similar purposes, which meet this test.

MINING LAWS—SAND AND GRAVEL DEPOSITS—MARKETABILITY—DISPOSITION AS PRODUCTS OF A PLACER CLAIM.

Sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly located as a placer claim, may be disposed of for use not only on Federal aid highways but for other lawful purposes.

FEDERAL AID HIGHWAYS—APPROPRIATION OF SAND AND GRAVEL FROM PUBLIC DOMAIN—PAYMENT NOT REQUIRED—SALE BY ENTRYMEN.

While there is no law authorizing the removal of gravel from the public domain for public roads or highways, except as provided in the Federal Highway Act, in view of the fact that public roads and highways are a public benefit, it has been the policy of the Department to interpose no objection to the removal of such material from the public domain by State and county officers for road construction purposes, and this without payment therefor, so long as there is no substantial damage to the property; and a practice has long obtained permitting an entryman to sell sand or gravel for this purpose from the lands embraced in his claim, the purchase money being held in escrow pending final disposition of his claim.

PRIOR DECISION OF DEPARTMENT REAFFIRMED.

Case of *Layman et al. v. Ellis*. (52 L. D. 714) reaffirmed.

FAHY, *Acting Solicitor*:

By letter of September 5, 1933, the Acting Director of Investigations has requested my opinion upon certain questions propounded by Special Agent in Charge Bywater at Santa Fe, New Mexico, relative to the propriety of the practice, stated to prevail in this and the Salt Lake Field Division, of collecting trespass fees for sand and gravel obtained from the public domain and used in the construction of Federal aid highways. Two cases are specifically mentioned where sand and gravel were so taken and used. In one case the State of Arizona sought refund of \$214.48 collected by the Field Service for sand and gravel, supposedly taken from land embraced in a stock-raising homestead entry, but later ascertained to be "public domain," and used on a Federal aid highway. Refund was made by letter of August 28, 1933. In the other case, the sand and gravel used on such a highway was mined and removed under a placer mining location.

The Special Agent refers to the case of *Layman et al. v. Ellis* (52 L.D. 714) and expresses disapprobation with the action there taken in overruling *Zimmerman v. Brunson* (39 L.D. 310) and refers to the latter as in harmony with *Hughes v. Florida* (42 L.D. 401) and to both of these cases as in harmony with the attitude of the courts, expressing the view that the "present rulings" of the Department involve the consequence that it has "no right to collect trespass fees for the mining of sand and gravel, even though it be in conflict with a homestead."

A further opinion is expressed "that it is not the attitude of the Government to wish to collect trespass fees from a State which is using sand and gravel, allegedly mined in trespass, for the construction of Federal aid highways."

In *Layman et al. v. Ellis, supra*, the Department held (*syllabus*) that—

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.

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.

The reasons for the above-stated conclusions were elaborately set forth in the opinion in the case and need no restatement here. It suffices to observe that upon examination of this case it appears that the Department followed and applied the principle which it had applied in other cases there cited, involving the locatability of other kinds of commonplace stones used for construction and manufacturing purposes—the same principle that had been consistently applied by the courts, namely, that in the solution of the question whether lands

containing a given mineral substance were subject to location and purchase under the mining laws, the test was the marketability of the product.

It was pointed out that there was no logical reason for discriminating between sand and gravel, if marketable at a profit, and other low grade deposits of wide distribution, used for practically the same or similar purposes, which also met the same test; that the distinctions assigned in the Zimmerman case for excepting sand and gravel from the rule were unsubstantial and that the doctrine of that case had been vigorously criticized by the leading text-writers on the mining law.

The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and extent which under the same limitations and qualifications are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that [by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.] Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance, where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of *Layman et al. v. Ellis*. It follows that sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use, not only on Federal aid highways, but for other purposes.

With respect to the question of the propriety and legality of collecting from the State the value of sand and gravel obtained by it from the open public domain for use on Federal aid highways, it appears that the Department has ruled on that question in the identical case cited by the special agent. By letter "K" 1427700 from the Acting Commissioner of the General Land Office to the Director of Investigations, approved by the Assistant Secretary, August 28, 1933, it was held that no payment should be required of the State Highway Department of Arizona for the value of gravel taken from public land and used by it on a public highway of the State, although it did not then appear that the gravel was used on a

Federal aid highway, and directed that the sum of \$214.48 collected from the State Highway Department in payment for the gravel be returned to it. In that connection the letter stated:

Section 17 of the act of November 9, 1921 (42 Stat. 212-216), known as the Federal Highway Act, provides for the use of public lands for rights of way or materials, in connection with roads constructed under the provisions of that act.

It appears that the gravel first above referred to was taken for road construction purposes but it does not appear that it was removed in connection with a highway constructed under the Federal Highway Act, and under such circumstances the removal of the gravel was not authorized by said act.

There is no law authorizing the removal of gravel from the public domain for public roads or highways, except as provided in the Federal Highway Act. In view of the fact, however, that public roads and highways are a public benefit, it has been the policy of this Department to interpose no objection to the removal of such material from the public domain by State and county officers for road construction purposes as long as there is no substantial damage to the property, although a permit specifically granting such privilege cannot be issued.

A policy has also grown up, after repeated requests, to permit an entryman to sell sand or gravel, for construction or repair of public roads and highways, from the lands embraced in his pending claim, payment for such material to be forwarded to this office and held in escrow pending final disposition of the claim.

No substantial objection is perceived to the continuance of the policy outlined in the letter with respect to the sand and gravel taken from the public domain by instrumentalities of the State for use on State highways, and the views there expressed seem sufficiently clear for guidance of the Division of Investigations in future like cases.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

HEIRS OF MARY ROGERS

Opinion, September 21, 1933

INDIANS—INHERITANCE—TRIBAL MEMBERSHIP.

Upon the death of an Indian, the right of inheritance in his property is controlled by the laws, usages and customs of the tribe or nation of which he is at the time a member, whether by birth or adoption.

INDIANS—INHERITANCE—TRIBAL ADOPTION—RIGHT TO BENEFITS.

The absence, in an Indian tribe, of any law, rule or custom of inheritance, would not preclude a member of said tribe who had obtained adoption into another tribe, the latter having laws of inheritance, from obtaining the benefit of inheritance, even though the property involved was a benefit conferred only upon members of the tribe abandoned.

INDIANS—CHEROKEE NATION—STATUTES OF DESCENT AND DISTRIBUTION—LAWS OF ARKANSAS APPLIED.

Under authority of successive treaties with the Cherokee Nation, these Indians passed and administered their own laws, including statutes of descent, until October 1, 1898, and by the Act of May 2, 1890 (26 Stat. 81), the laws of Arkansas were extended to Indian Territory. *Held*, that upon the death, intestate, in 1888, of an Indian adopted into the Cherokee Nation, the statutes of descent of the Cherokee Nation would govern her estate, and upon the death of her husband, also adopted into the Cherokee Nation, in 1901, the laws of Arkansas relative to descent and distribution would control.

INDIANS—LOYAL SHAWNEES' CIVIL WAR CLAIMS—ACT OF DECEMBER 22, 1927—TRIBAL ADOPTION—INHERITANCE—LAW GOVERNING.

A Shawnee Indian woman entitled to share in the appropriation made by Congress (Act of December 22, 1927) in settlement of Civil War claims of certain Shawnees, was adopted, together with her husband, into the Cherokee Nation, where she died intestate and without issue in 1883, leaving a husband surviving, who died in 1901. *Held*, that the tribal laws of the Cherokee Nation covering inheritance, at the date of her death, applied in her case, and that her approved claim against the Government, although originating while she was a member of the Shawnee tribe, would be governed, in the matter of inheritance, by said laws of the Cherokee Nation.

INDIANS—JURISDICTION—DISTRIBUTION OF CHEROKEE ESTATES.

The cases of *Nivens v. Nivens* (64 S.W. 604, 76 Id. 114) and *Jones v. Meehan* (175 U.S. 1) cited and applied.

FAHY, *Acting Solicitor*:

You [the Secretary of the Interior] have requested an opinion upon the question of what laws govern in the determination of heirs of a Loyal Shawnee Indian who apparently had been adopted as a member of the Cherokee Nation.

The facts in the case are briefly as follows:

Mary, or Sally, Rogers, No. 113 of the Loyal Shawnee Indian Tribe, died intestate in 1883, in the country of the Cherokee Nation, and it appears that she had been adopted as a member of that nation. She was without issue but left Henry F. Rogers as her surviving husband, who died in 1901.

In the act of December 22, 1927 (45 Stat. 1, 18) appropriation was made to pay the Civil War claims of the Indians of the Shawnee Tribe and for the disposition of the estate of Sally Rogers the Department determined her heirs on March 1, 1932, in accordance with the laws of the State of Kansas. On February 2, 1933, the Department approved a recommendation by the Commissioner of Indian Affairs that the case be not reopened. A petition for rehearing is now pending.

Under treaties with the Cherokee Nation these Indians had the right to pass and administer their own laws until October 1, 1898.

See 9 Stat. 871, 14 Stat. 799, 26 Stat. 81, and 30 Stat. 495. The Cherokee Nation had their own statutes of descent.

By section 31 of the act of May 2, 1890 (26 Stat. 81), the laws of Arkansas were extended to the Indian Territory so far as not locally inapplicable. In the act of June 28, 1898 (30 Stat. 495), it was provided that on October 1, 1898, the tribal courts should be abolished and all cases pending therein should be transferred to the United States courts. It was held in the case of *Nivens v. Nivens* (64 S.W. 604, 76 id. 114) that as the courts of the Cherokee Nation had been abolished by law and the laws of Arkansas relative to descent and distributions had been extended over the Indian Territory, the distribution of Cherokee estates must be had under the Arkansas statute.

In the case of *Jones v. Meehan* (175 U.S. 1) it was held that when a member of an Indian tribe, whose tribal organization was still recognized by the Government, died, the right of inheritance in his property was controlled by the laws, usages and customs of the tribe and not by any State law or by any action of the Secretary of the Interior.

The Indian Office and the Department have heretofore taken the view that the estate involved came to Sally Rogers as a Shawnee Indian, and that as the Shawnees had no rule for the descent of property and as the death occurred in the Indian Territory prior to its organization in 1890, the law of Kansas should be applied. This was based upon the provision in section 5 of the act of February 8, 1887 (24 Stat. 388), that "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."

No real property is here involved. It appears that Sally Rogers and her husband were adopted and became members of the Cherokee Nation. As Cherokees the laws of the Cherokee Nation applied to them, and even though Sally Rogers had an approved claim against the Government, which originated while she was a Shawnee, her status as a Cherokee at the time of her death would not be affected.

I am of the opinion that inasmuch as Sally Rogers and her husband were adopted as members of the Cherokee Nation, her estate passed in accordance with the laws of that nation, and the heirs of the husband, Henry F. Rogers, must be determined according to the laws of Arkansas in force at the time of his death.

Approved:

T. A. WALTERS,

First Assistant Secretary.

PAUL AMANN: CLAIM FOR DAMAGES

Opinion, September 23, 1933

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CLAIM FOR DAMAGE TO PROPERTY—ACT OF DECEMBER 28, 1922.

By the terms of the Act of December 28, 1922 (42 Stat. 1066), the head of an Executive Department of the United States Government, acting on its behalf, is authorized to "consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property, where the amount of the claim does not exceed \$1000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment," the amount found due to be certified to Congress as a legal claim for payment, but no claim to be considered unless presented within one year from the date of its accrual.

NATIONAL PARKS, ETC.—CLAIM FOR DAMAGE TO PROPERTY—EMPLOYEE OF THE UNITED STATES—NEGLIGENCE—ACT OF DECEMBER 28, 1922.

An employee of the United States, in the course of employment for and on behalf of the United States, negligently caused injury to the private automobile of a private citizen lawfully upon the public highway, the damage amounting to \$275.76, to cover repairs. *Held*, That a claim for this amount, under the circumstances shown, comes within the scope of the Act of December 28, 1922.

FAHY, Acting Solicitor:

You [the Secretary of the Interior] have submitted to me for opinion the records accumulated by the Office of National Parks, Buildings and Reservations relative to a claim of Paul Amann, of Livingston, Montana, in the amount of \$275.76, to cover repairs incident to an accident near Yellowstone National Park, July 29, 1933.

A Government Dodge 1-ton truck, No. 515, driven by Tom Hall, type mapper, collided with a Packard sedan, Montana license 30-062, driven by Kenneth Amann, of Livingston, Montana, son of the claimant. The automobiles were traveling on the road from Tower Junction to Cooke City, Montana, and the accident occurred at a curve a little below Pebble Creek, at 12.05 p.m. The weather was favorable and the sky clear. The curve was sharp and the road only 15 feet wide. This would give to each automobile a width of 7½ feet for driveway.

The evidence indicates that the Government truck was driven at a speed of 25 to 30 miles per hour, and on rounding the curve the driver saw the Packard sedan approaching him, and he claims it was near the middle of the road. The measurements taken indicate that the Packard sedan was 6½ feet from the cut bank, and therefore the driver thereof would have been using 8½ feet of the roadway. To the right of the driver of the sedan the roadway dropped off suddenly, as the road was filled on that side. If it is assumed that the driver

thereof was "hogging the road", he would have been over only one foot, and there was sufficient space between the sedan and the cut bank to have permitted the Government truck to have passed between the sedan and the cut bank.

The immediate cause of the injury to the private car was due to the sudden application of the brakes on the Government truck, which caused the hind wheels to skid and throw the rear end of the truck against the left front fender and wheel of the sedan. If the driver of the truck had not applied his brakes he could probably have passed the other machine without injury or accident. The road on which the cars were traveling was infrequently used and this evidently caused the truck driver to believe that the way was unobstructed and he attained a speed unwarranted on a narrow road surfaced with gravel.

In cases like the one presented the decision frequently rests upon some small statement of fact. The truck driver applied the brakes suddenly, as he said, to prevent a collision. If the roadway between the sedan and the cut bank were sufficient to permit the truck to pass unobstructed the driver was unwarranted in applying his brakes, thus causing his car to skid. The maps submitted by the claimant indicate that the truck, after skidding into the sedan, righted itself and passed between the sedan and the cut bank and proceeded a considerable distance down the road, turning to the left and running off the roadway, thus demonstrating conclusively that there was sufficient space between the sedan and the cut bank to permit the truck to pass on its side of the road.

The amount of damage to the sedan is evidenced by estimates of the cost to repair the machine. There is no claim made for the inconvenience to the people in the machine or for transporting it in its damaged condition to a place where it could be repaired. While the repair parts seem to be high priced they are not extravagant for a Packard sedan car.

By the act of December 28, 1922 (42 Stat. 1066), the head of each Government Department is authorized to consider, ascertain, adjust and determine any claim on account of damages to and loss of privately owned property, where the amount of the claim does not exceed \$1000, caused by the negligence of an officer or employee of the Government while acting within the scope of his employment. In this case the driver of the Government truck was an employee of the Government and was acting within the scope of his employment at the time of the collision between the truck and the privately owned car.

It is my opinion that the claim of Paul Amann in the sum of \$275.76 arises on account of the negligence of an employee of the United States, acting within the scope of his employment, and the

claim is, by the approval of the Secretary to this opinion, adjusted and determined in the amount stated in favor of Paul Amann, of Livingston, Montana.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

IMPOSITION OF FINES, UNITED STATES PARK POLICE

Opinion, September 23, 1933

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—REGULATIONS AND PROCEDURE GOVERNING PARK POLICE—IMPOSITION OF FINES—PUNISHABLE OFFENSES NOT NAMED IN REGULATIONS.

No statutory authority exists for the imposition of fines upon members of the United States Park Police who violate the park regulations imposed to govern their conduct, and no particular regulations are prescribed, violation of which shall constitute a punishable offense.

NATIONAL PARKS—AUTHORITY INCIDENT TO "CHARGE AND CONTROL"—ACT OF MARCH 3, 1933—EXECUTIVE ORDER OF JUNE 10, 1933.

The "charge and control" of the park police authorized by the Executive order of June 10, 1933, to give effect to the Act of March 3, 1933 (47 Stat. 1517), includes the power of appointment, with its incident, the power of suspension and removal, but does not include the power to fine, such power not being incident to the power of appointment.

NATIONAL PARKS—ACT OF JULY 1, 1898—INTERPRETATION—FIELD OF OPERATION.

The ordinary and reasonable interpretation of the Act of July 1, 1898 (30 Stat. 570), makes it one relating to the admission of the public to park grounds, their conduct therein, and the extent of supervision over such grounds in that connection, and not to policing. It supplies no warrant for assessing fines against the members of the park police force for offenses against the regulations peculiar to them as members of that force.

COURT DECISION CITED AND APPLIED.

Case of *Burnap v. United States* (252 U.S. 512) cited and applied.

FAHY, *Acting Solicitor:*

Pursuant to your [Secretary of the Interior] request of August 26, I have carefully considered the legality of the proposed procedure for the punishment of members of the United States Park Police force who have been found guilty of minor offenses against the regulations imposed to govern their conduct. This proposed procedure involves the levying of a cash fine, the amount of the fine to be deducted from pay, and the offender to remain on active duty.

Procedure substantially the same as that proposed is already in use within the organization of the Metropolitan Police of the District of Columbia. But authority to discipline members of that police force by means of the imposition of a fine is expressly pro-

vided by statute (34 Stat. 221). There is no such authority for the imposition of fines upon offending members of the United States Park Police. The mere fact that the statutes relating to the Park Police do not authorize the imposition of fines, whereas those relating to the Metropolitan Police do, is in itself a possible ground for concluding that the proposed procedure is illegal. By providing for the fining of an offending member of the Metropolitan Police force, Congress evidenced not only its intent but also its recognition of the possible need for the enforcement of discipline through the medium of power to impose fines and its recognition of some need of specific authority granting that power. By omitting a provision regarding fines in the subsequent legislation for the Park Police, Congress may be said to have evidenced its intent to deny authority to impose fines on offending members of that police force.

Another possible basis for objection to the proposed imposition of fines to be collected by withholding sufficient portions of the offender's salaries is that such a withholding of salaries constitutes, in effect, a reduction of salaries, unwarranted and illegal because definite salaries for the members of the Park Police force have been fixed by Congress without provision for variance and without any grant of authority to assess fines to be collected therefrom.

However, I do not base my opinion upon either of those possible considerations.

At common law several types of punishment were employed against criminal offenders. One of those was the imposition of a fine. No statutory authority was necessary. But that was under a system of law in which the offenses themselves were not set out in statutes. A transition, of course, has been made to a rather different system, under which most offenses are governed by legislative act. It is true that most of the common law concepts regarding the substance of the old offenses have been preserved, but the concepts relating to punishment have necessarily become changed as a result of the common practice of providing specifically for punishment of a certain kind in connection with each individual offense set out in statutory form.

If a statute defining an offense fails to provide specific punishment, the courts will usually turn back to the common law practice to discover what punishment might be meted out thereunder. One such possible punishment is the imposition of a fine. But if the statute prescribes the method of punishment for the offense, as is usual, that punishment, and that alone, may be imposed upon the offender.

In the statutes relating to the United States Park Police no particular regulations are prescribed violation of which shall constitute a punishable offense. However, the "charge and control" of the

Park Police is vested in a director (whose functions are now included within those of the Office of National Parks, Buildings, and Reservations of the Department of the Interior under the Executive order of June 10, 1933, pursuant to the authority of the Act of March 3, 1933 (47 Stat. 1517)). Under that delegation of charge and control there is created the power to regulate the conduct of the members of the force. Is there, then, any provision for the punishment of offenders against such regulation? In my opinion there is. With the "charge and control" of the Park Police force passes the power of appointment. It is well settled that the power to remove from office, in the absence of statutory provision to the contrary, is an incident of the power to appoint, and that the power of suspension is an incident of the power of removal. *Burnap v. United States*, 252 U.S. 512, 40 S.Ct. 374, 64 L.Ed. 692. Thus it appears that the only reasonable construction of the statutes relating to the Park Police, as they stand, is that they delegate the power of regulation to the officer in charge, but that they themselves set up the punishments to be inflicted as those incidental to the power of appointment. The power to impose a fine is not incident to the power of appointment. Such being the case, no such punishment can be imposed in the absence of some specific statutory authority.

It is true, of course, that dismissal and suspension from office are not "punishments" within the meaning of that term as used in the criminal law. But neither is the administrative control of the personnel of the Park Police strictly a matter within the scope of the criminal law. Yet the analogy is close. Dismissal or suspension of an officer for violation of the administrative regulations governing him is as clearly a "punishment" as is the imprisonment of a citizen for the violation of a criminal statute. Dismissal or suspension from office is not a punishment for violation of the criminal law because it can not be; the court has no control over the employment of an individual citizen. But as to members of the Park Police it is a form of punishment, and an effective one, to be meted out by the proper authorities.

As to members of that force there are administrative rules of conduct, for violation of which the punishment might be by dismissal from office, or suspension from office, or fine, and so on. As to individual members of society there are statutory rules of conduct (the "criminal law") for violation of which the punishment might be death or imprisonment or fine. Equally applicable to both situations is the well established policy which dictates that, when certain punishments are specified in the rules of conduct, no unprescribed method of punishment may be inflicted.

Nor does section 6 of the Act of July 1, 1898 (30 Stat. 570) grant the authority to impose fines upon members of the force offending

against the regulations governing their conduct. That section reads as follows:

That the said Chief of Engineers and the said Commissioners are hereby authorized to make all needful rules and regulations for the government and proper care of all the public grounds placed by this Act under their respective charge and control; and to annex to such rules and regulations such reasonable penalties as will secure their enforcement.

Even though the powers granted by this section have come to rest in certain officials of the Office of National Parks, Buildings, and Reservations of the Department of the Interior, by various transfers of authority, and even though the phrase "reasonable penalties" may be interpreted to include the imposition of fines, the statute is not applicable to the present question. The ordinary and reasonable interpretation of that statute makes it one relating to the admission of the public to those grounds and their conduct thereon. The act as a whole deals with the extent of the power of supervision over the grounds themselves and does not relate to the policing of them. Such being the case, the section quoted can not be distorted to allow consideration thereunder of the propriety of assessing fines against the members of the Park Police force for offenses against the regulations peculiar to them as members of that force.

Thus I am of the opinion that the proposed procedure for the punishment, by imposition of fine, of members of the United States Park Police force, is improper and without the authority of law.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

AGRICULTURAL ENTRY OF LANDS WITHDRAWN AS VALUABLE FOR MINERALS SUBJECT TO LEASE—REPORT FROM GEOLOGICAL SURVEY—PROCEDURE

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 22, 1933.

THE SECRETARY OF THE INTERIOR:

The act of March 4, 1933 (47 Stat. 1570), providing for the agricultural entry of lands withdrawn, classified or reported as valuable for sodium and/or sulphur, places upon you the burden of making determinations as to whether or not the disposal, under the non-mineral public land laws with appropriate reservation of the mineral content to the United States, of lands embraced in

applications for permits or leases, or in permits granted, or for lands withdrawn, classified or reported as valuable for any mineral subject to lease, will unreasonably interfere with operations under the various leasing acts.

In order to relieve you of unnecessary detail in administering the act, it is suggested that this office be directed, in connection with each non-mineral application where your determination is necessary, to call upon the Geological Survey for a report as to whether, in its opinion, such appropriation will unreasonably interfere with leasing operations and, if the Geological Survey report be favorable, to proceed thereon with a view to the allowance of the application with appropriate mineral reservation to the United States, in the absence of other objection; but, if the report of the Geological Survey be adverse, to transmit the entire record to you for consideration.

ANTOINETTE FUNK,
Acting Commissioner.

Approved: September 29, 1933.

OSCAR L. CHAPMAN,
Assistant Secretary.

HELEN V. WELLS ET AL.

Decided September 30, 1933

MINING CLAIM—PLACER—EVIDENCE.

In an application for placer mineral patent, the evidence in support thereof, adduced at a hearing called, consisted of little more than the finding of a few fine colors of gold and some black sand in soil and disintegrated bed-rock on slopes and high lands, and the principal witness for the applicant admitted that 89 pans from 15 holes on the land showed only a fraction of a cent in gold per-cubic yard. *Held*, That this showing does not justify the conclusion that there are valuable deposits of mineral upon the surface of the claim, within the purview of the statute.

MINING CLAIM—DISCOVERY—PLACER LOCATION AND LODE LOCATION—SUPPORTING EVIDENCE.

It is well settled that a placer discovery will not sustain a lode location, nor a lode discovery sustain a placer location, and *a fortiori*, a mere possibility of a lode discovery will not sustain a placer claim.

MINING CLAIM IN NATIONAL FOREST—TIMBER—EVIDENCE AS TO CHARACTER OF LAND.

While the existence of valuable timber on a mining claim, though in a national forest, in no way qualifies the locator's rights under the mining law if he has a valid claim, it is a proper element for consideration in determining the weight and credibility to be attached to the testimony in determining the character of the land; and the fact that the tract contains

some valuable timber and timber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States.

CHAPMAN, *Assistant Secretary*:

Helen V. Wells, as heir, and for the heirs of John H. Wells, deceased, has appealed from so much of the decision of the Commissioner of the General Land Office, dated December 10, 1932, as rejected her application Coeur d'Alene 013163 for patent to the Bliss claim and to specifically described ten-acre tracts in the Dorothy, Lassie, Harvey, Blanche and Vida placer claims within the Clearwater National Forest, Idaho.

The Commissioner found from the evidence adduced in protest proceedings brought by the Forest Service that the tracts above mentioned were not valuable for placer gold, on account of which minerals the locations were made. The register held the law had been complied with and recommended that patent issue for the claims in their entirety.

No specifications of error were filed, but from perusal of appellant's brief it appears the Commissioner's decision is assailed for alleged errors in the estimation and appreciation of the evidence as to the value of the land in contest for placer gold. The Commissioner has set forth a rather lengthy summary of the evidence. Only such facts and circumstances will be stated here as are deemed sufficient to justify the conclusions reached.

The testimony and maps exhibited show that the claims for which patent is sought are laid-over lands along and adjacent to the North Fork of Orofino Creek; that the Government is not questioning the mineral character of land covered by the channels and borders of the creek, though it seems from defendant's own testimony that it has been twice dredged for gold. It has contested only the Bliss claim and ten-acre tracts in other claims which cover the highlands and slopes to the creek, a few of which tracts have slight areas close to the bed of the creek or its tributaries. It is the contention of defendant that the lands within these tracts covering the highlands and slopes, in addition to those in the channels of the creek, contain sufficient concentration of placer gold to warrant its extraction by a hydraulic process which it seems involves an estimated outlay of about \$35,000. As proof of the value of the contested tracts for gold, the defendant offered evidence of panning of material in test pits sunk in soil to bedrock of disintegrated granite, such pit sunk on nearly all the tracts contested, panning from each foot in depth being alleged to have been made, disclosing colors of gold and black sand yielding on fire assay sufficient values per cubic yard to mine. The testimony of defendant shows that these test holes were dug and sampled for

applicant, with the exception of a few instances, by one Newman, who was the only witness for the defendant that attempted to give any definite evidence as to the gold content of the tracts in controversy. It is also shown that Newman accompanied two mineral examiners for the Forest Service in their examination of these holes, pointing the holes out to them, and had two laborers with him to clean out the holes to enable the examiners to test the ground.

The substance of the testimony of the two examiners for the Forest Service is set forth in the Commissioner's decision. Briefly stated, it shows that these holes were not sunk in placer gravel beds; that the panning done by them showed no colors on some of the tracts, and on others a few fine colors which, upon assay, yielded from a fraction of a cent to a few cents in gold per cubic yard, except one showing of \$1.68 per yard on a tract traversed by a creek 30 yards wide, which tract was not eliminated by the rejection complained of; that the examiners were of the opinion the tracts were worthless for placer mining operations, not only because of the dearth of values in the samples taken, but also on account of the situation and character of the ground. The uncontradicted evidence shows that, in most instances, the holes were cleaned to enable the observation and sampling of virgin ground. The register's conclusions that the panning was from mud and debris and not truly representative of conditions are not justified by the evidence.

The Department agrees with the Commissioner that the testimony of Newman is vague and uncertain. It is also very plain that his estimates of values per yard are not supported by data given in his testimony; that he has but a nebulous recollection of the number of colors he found in the pan, or how many pans he took at each pit; that he attributes a value of more than 60 cents a cubic yard to certain tracts where he admitted he had made no tests; and that he assumes, in many instances, from the finding of a few fine colors and black sand in soil and disintegrated bedrock on the slopes and high lands, such a concentration of gold as would be profitable to exploit. He thought the Bliss claim presented "a chance", though he admits 89 pans from 15 holes thereon showed only a fraction of a cent in gold per cubic yard. The weakness of his testimony is not strengthened by any other witness. The testimony of Gransaboe that the mountainous land in the locality would be profitable to work by hydraulicking is shown to be mere theory. The specific instance he cites is evidently hearsay, and on cross-examination shows that such placer operations as have been conducted of which he has knowledge were in channels of the various creeks mentioned. Other evidence of the finding of good colors in a hole or two in an area where a creek from the Bliss claim debouches into Orofino Creek plainly does not

justify the inference that there are valuable deposits on the surface of that claim.

It is common knowledge among miners that placer gold in sufficient quantities to be minable is usually found in the beds, bars, and benches of gravel along streams or in ancient river channels, and, to a limited extent, at other places in the detritus that comes from disintegrated, adjacent, auriferous seams and veins. While there is some suggestion and discussion that such river channels and veins are present near the land in question, there is nothing definite or persuasive mentioned to substantiate it.

The appellant urges the Department to attribute greater weight to the conclusions of the register, who saw the witnesses and heard the testimony. The register's decision shows on its face that he based his conclusions at least in part on facts averred by him to be within his own knowledge, but nowhere mentioned in the testimony, and on a newspaper clipping from a local paper relating to the discovery of a valuable quartz vein which the register avers is in the locality of the land. Speaking of this assumed discovery, the register inquires: "Why not allow her (the claimant) to have the hillsides and give her a chance to uncover a ledge?" It is well settled that a placer discovery will not sustain a lode location, nor will a lode discovery sustain a placer location. *Cole v. Ralph* (252 U.S. 286, 295); *E. M. Palmer* (38 L. D. 295); *Layman et al. v. Ellis* (52 L. D. 714). *A fortiori* a mere possibility of a lode discovery will not sustain a placer claim. The register was plainly in error in going outside the record in the proceedings and in applying the law in reaching his conclusions; moreover, his inferences from the evidence do not seem warranted, and the decision lacks the weight that otherwise might be attributed to it.

The Government offered evidence of the amount of white pine, cedar, larch and fir timber on each tract in controversy, and to the effect that such of the first two species mentioned of merchantable size is now marketable and other stands will grow into value, and that the marketable timber forms an essential part of twenty million board feet on these claims and neighboring land, constituting what is termed a logging chance. While the existence of valuable timber on a mining claim, though in a national forest, in no way qualifies the locator's rights under the mining law if he has a valid claim (see *United States v. Deasy*, 24 Fed. 2d, 108), it is a proper element for consideration in determining the weight and credibility to be attached to the testimony in determining the character of the land. *E. M. Palmer* (38 L. D. 295). No bad faith is charged or proven in this case, nevertheless, the fact that the tracts in controversy contain more or less valuable timber and tim-

ber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States. It is the conclusion of the Department that such evidence has not been adduced.

The Commissioner's decision should be, and is, hereby

Affirmed.

INDIAN LIFE INSURANCE POLICIES

Opinion, October 14, 1933

INDIANS—FIVE CIVILIZED TRIBES—TRUSTS—INSURANCE—ACT OF JANUARY 27, 1933.

The Act of January 27, 1933 (47 Stat. 777), in so far as it relates to the creation of trusts out of the restricted property of Indians of the Five Civilized Tribes, is without application to life insurance policies or annuity contracts.

FIVE CIVILIZED TRIBES—SEC. 2, ACT OF JANUARY 27, 1933—LEGISLATIVE INTENT—TRUSTS.

Had Congress in mind insurance or insurance companies when it enacted section 2 of the Act of January 27, 1933, the authority granted would not have been confined, as it was, to the creation of "trusts," to be administered by "incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees."

TRUSTS—INSURANCE—DISTINGUISHING FEATURES.

In a policy of insurance and in annuity contracts no trust is created, the relations of the parties being those of debtor and creditor, the premiums paid belonging absolutely to the insurer, in consideration for which it binds itself to pay a given sum or sums according to the terms of the policy it has issued to the insured.

FIVE CIVILIZED TRIBES—ACT OF JANUARY 27, 1933—AUTHORITY OF SECRETARY OF THE INTERIOR OVER RESTRICTED FUNDS.

While the authority granted the Secretary of the Interior by section 2 of the Act of January 27, 1933, being confined to trusts, does not contemplate or include life insurance policies or annuity contracts, it does not follow that the Secretary is nowhere clothed with authority to permit Indians of the class named in the Act to purchase annuities or life insurance out of restricted funds, section 1 of said Act placing such funds under his jurisdiction and control until April 26, 1956, "subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds * * * belong, under such rules and regulations as said Secretary may prescribe", thus conferring a broad discretionary power upon the Secretary over expenditure of the funds of these Indians, including authority to permit any such Indian to purchase life insurance or an annuity, if the Secretary determines it is for his benefit so to do.

MARGOLD, *Solicitor*:

At the suggestion of the Assistant Commissioner of Indian Affairs, my opinion has been requested as to whether the provisions of the act of January 27, 1933 (47 Stat. 777), relating to the creation of

trusts out of the restricted funds or other property belonging to Indians of the Five Civilized Tribes in Oklahoma, apply to life insurance policies.

Numerous applications have been received from various insurance companies involving not only ordinary life insurance but also single premium and annuity contracts, and it appears that the Superintendent for the Five Civilized Tribes has taken the position that it is necessary for such companies to meet the requirements of the act of January 27, 1933, *supra*, and the regulations prescribed thereunder, governing the creation of trust estates.

Section 1 of the act of January 27, 1933, *supra*, deals with the restrictions applicable to the Indians of the Five Civilized Tribes, and sections 2 to 7 inclusive deal with the creation of trusts. Section 2 is the authorizing section and so far as material reads:

The Secretary of the Interior be, and he is hereby, authorized to permit in his discretion and subject to his approval, any Indian of the Five Civilized Tribes, over the age of twenty-one years, having restricted funds or other property subject to the supervision of the Secretary of the Interior, to create and establish, out of the restricted funds or other property, trusts for the benefits of such Indian, his heirs, or other beneficiaries designated by him, such trusts to be created by contracts or agreements by and between the Indian and incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees: * * *

It is significant to note that the statute makes no mention of insurance or insurance companies and it is evident that Congress did not have in mind this class of business; otherwise, the authority granted would not have been confined as it is, to the creation of "trusts" to be administered by "incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees." The insurance company in the ordinary life insurance policy, whether the premiums thereunder are payable in single or periodic installments, is not a trustee for the policy holder. So far from becoming a trust fund, the premiums paid belong absolutely to the insurance company in consideration of which the company binds itself to pay a given sum according to the terms of the policy to the persons in whose favor the policy is granted. No trust is created, the relation between the parties being that of debtor and creditor with their respective rights governed by the provisions of the policy, and this is true even though the policy be of the tontine type, under which the policy holder participates in an equitable apportionment of the surplus and profits of the insurance company. *Everson v. Equitable Assurance Society* (68 Fed. 258, affirmed, 71 Fed. 570); *Equitable Life Assurance Society v. Brown* (213 U.S. 25); *Equitable Life Assurance Society v. Weil* (103 Miss. 186, 60 So. 133); *Townsend v. Equitable Life Assurance Society* (263 Ill. 432, 105 N.E. 325). So also of an annuity contract, which has been defined

as an obligation to pay the annuitant a certain sum of money at stated times during life or a specified number of years in consideration of a gross sum paid for such obligation. *Chisholm v. Shields* (66 N.E. 93, 94); *Town of Hartland v. Damon's Estate* (156 Atl. 518, 523). Such a contract possesses none of the elements of a trust. (*In re Collins*, 39 N.E. 629; *in re Tom's Estate*, 147 N.Y.S. 550, 554; *Reid v. Brown*, 106 N.Y.S. 27).

I find no difficulty in holding that the act of January 27, 1933, in so far as it relates to the creation of trusts out of the restricted property of Indians of the Five Civilized Tribes, is without application to life insurance policies or annuity contracts. It does not follow, however, that the Secretary of the Interior is without authority to permit these Indians to purchase annuities or life insurance from their restricted funds. Section 1 of the act of January 27, 1933, places such funds under the jurisdiction and control of the Secretary of the Interior until April 26, 1956, "subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds * * * belong, under such rules and regulations as said Secretary may prescribe." Broad discretionary power is thus conferred upon the Secretary in the matter of the expenditure of the funds belonging to these Indians, and this obviously extends to and includes the authority to permit any such Indian to purchase life insurance or an annuity whenever the Secretary finds that it is for his benefit so to do. The authority of the Secretary is, of course, discretionary, and he may grant or withhold his consent. The right to withhold consent includes the right to impose conditions. *Sunderland v. United States* (266 U.S., 226); *United States v. Brown* (8 Fed. 2d. 564). Accordingly, if consent be given in any case, the Secretary may impose such conditions as he may deem advisable for the protection of the interests of the Indian.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

MURIEL MUSSER

Decided October 24, 1933

OIL AND GAS LANDS—PROSPECTING PERMIT APPLICATION—NAVAL PETROLEUM RESERVES NOS. 1 AND 3.

Under the Department's instructions of May 1, 1924, lands located within one mile of the exterior boundaries of Naval Petroleum Reserves Nos. 1 and 3 are not subject to filing under section 13 of the Act of February 25, 1920 (41 Stat. 437).

OIL AND GAS LANDS—APPLICATION FOR PROSPECTING PERMIT—PRIOR ERRONEOUS ACTION NO JUSTIFICATION FOR LATER SIMILAR ACTION.

The fact that there are instances where oil and gas permits under section 13 of the Act of February 25, 1920, have been erroneously granted in the past, supplies no justification for later similar erroneous action.

WALTERS, *First Assistant Secretary*:

Muriel Musser has appealed from a decision of the Commissioner of the General Land Office dated May 12, 1933, holding for rejection her oil and gas application, filed June 1, 1932, for prospecting permit under section 13 of the act of February 25, 1920 (41 Stat. 437), for the S½ Sec. 12, T. 30 S., R. 22 E., M.D.M., California, on the ground that said land is within one mile of a naval petroleum reserve. [Naval Petroleum Reserve No. 1.]

Applicant has filed a brief in support of her appeal, which has had careful consideration.

The Geological Survey, in report dated December 14, 1932, advised that said land is within one mile of Naval Petroleum Reserve No. 1.

Under the Department's instructions of May 1, 1924, lands located within one mile of a petroleum reserve are not subject to filing under section 13 of the act of February 25, 1920, *supra*.

In her appeal applicant states that a permit was granted to Robert Hawxhurst, Jr., for lands similarly located since the order of May 1, 1924, and that to deny her application would constitute an unreasonable and unjust discrimination against her. Applicant also referred to other permits granted prior to the order of May 1, 1924.

The permit granted to Hawxhurst, Jr. (Sacramento 027179) was through inadvertence, and said permit was on April 11, 1933, held for cancellation by the Commissioner of the General Land Office.

The fact that permits have been erroneously granted on similarly located lands would not be a justification for granting the permit to applicant.

It is now the established policy of the Department not to grant permits within one mile of a naval petroleum reserve, and for that reason an exception can not be made in the instant case. Said application must therefore be rejected.

The decision of the Commissioner appealed from is correct and is
Affirmed.

MURIEL MUSSER

Motion for rehearing of the Department's decision of October 24, 1933 (54 I.D.), denied by first Assistant Secretary Walters, March 29, 1934.

TRANSFER OF NATIONAL MONUMENTS LOCATED IN NATIONAL FORESTS

Opinion, October 24, 1933

NATIONAL MONUMENTS IN NATIONAL FORESTS—EXECUTIVE ORDER OF JUNE 10, 1933, UNDER ACT OF MARCH 3, 1933—WHEN TRANSFER EFFECTIVE—RESULTING STATUS.

Executive Order No. 6166 (dated June 10, 1933, effective 60 days later), issued under authority of the Act of March 3, 1933 (47 Stat. 1489), which, among other things, transferred administration of national monuments located in national forests from the Department of Agriculture to the Office of National Parks, Buildings and Reservations, contained the proviso, "except that where deemed desirable there may be excluded from this provision any * * * reservation which is chiefly employed as a facility in the work of a particular agency." *Held*, That in the absence of any action taken regarding this proviso during the 60-day period following June 10, 1933, the order became effective on August 10, 1933, and the status of this agency and others within the scope of the order became crystallized, so that subsequent changes could be effected only through further action by the President or Congress.

MARGOLD, Solicitor:

You [the Secretary of the Interior] have asked for my opinion on the attached letter of September 29, 1933, from the Secretary of Agriculture, in which certain data are presented for your consideration in support of the request made therein that the fifteen national monuments located in national forest reserves and hitherto administered by the Agriculture Department be excluded from the operation of Section 2 of Executive Order No. 6166, dated June 10, 1933, which consolidates all functions of administration of national monuments in an Office of National Parks, Buildings and Reservations in the Department of the Interior.

The provision of the Executive Order on which the Agriculture Department relies and upon which it bases its request reads as follows:

* * * except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. * * *

The language of this excepting provision does not of itself operate to exclude any particular building or reservation from the transfer and consolidation, and the only way this provision can become operative is by a mutual understanding by, or an agreement reached between, the departments involved, on a showing that a particular building or reservation is in fact chiefly employed as a facility of a particular agency. Therefore in the absence of any agreement in the matter prior to the effective date of the Executive Order, the status of these national monuments as of, and after, the effective date of the order must be that they were transferred as directed.

The Secretary of Agriculture submits various reasons why the administration of these national monuments should be continued under the Department of Agriculture. These are given in his letter as follows:

First, a change in the administrative status of these fifteen areas would not result in any saving of public funds but evidently would entail increased costs of administration.

Second, the change would not be productive of increased efficiency in the management of public properties or service to the public, but by substituting two administrative jurisdictions for one would create new complications of Federal administration.

Third, the lands embraced within the fifteen National Monuments involved are also under withdrawal for National Forest purposes, this duality of withdrawal being specifically recognized in the proclamations by which fourteen of the Monuments were created, and by long-established legal and administrative interpretation in relation to the fifteenth Monument. The function of National Forest administration in relation to the fifteen areas is neither transferred nor abrogated by the Executive Order of June 10, 1933, hence remains vested in this Department.

He concludes by suggesting that—

The most practicable and satisfactory adjustment of this matter would be to recognize and classify the fifteen areas as facilities essential to the work of this Department, or to the redemption of the responsibilities imposed upon it by law; such action, under the provisions of Section 2 of the Executive Order, operating to exclude the areas from the general provisions of the Order. I recommend that course to your favorable consideration.

Whether or not these national monuments, due to their dual status as both national forests and national monuments, may be more efficiently administered under the jurisdiction of the Agriculture Department than by the Interior Department is not for legal determination, but should be considered administratively. Therefore, as to this phase of the presentation I do not intend to express an opinion herein. It appears clear, however, that the dual aspect of these reservations pointed out by the Secretary of Agriculture does not from the legal standpoint make their administration for national monument purposes by the Interior Department impossible or impracticable. In this connection I am advised informally by the Office of National Parks, Buildings and Reservations that the obstacles pointed out to satisfactory administration of these areas by an agency other than the Agriculture Department are not insurmountable from the administrative standpoint and that the same principle of separation of administration can be employed that has been followed in the case of the Bandelier National Monument in New Mexico, which was transferred from the Forest Service of the Department of Agriculture to the Office of National Parks of the Interior Department a little over a year ago. See Executive Proclamation No. 1991, dated February 25, 1932. More recently the same principle

of separation of administration has been employed under reorganization of Government agencies in connection with the Lee Mansion at Arlington, Virginia, which has been separated from the national cemetery, under the administration of the War Department, and placed under the jurisdiction of the Office of National Parks of the Interior Department on account of its unusual historical qualities. See Executive Order No. 6228 dated July 28, 1933, supplementing Executive Order No. 6166 dated June 10, 1933.

The Executive Order of June 10, 1933, by its terms did not go into effect until 60 days from its date, and in my opinion the President intended that any exceptions to be made under the excepting clause should be agreed to between the Departments involved within the 60-day period. After the effective date of the Executive order, the status of all agencies transferred or consolidated became crystallized, and changes can be effected only through further action by the President or Congress.

It is therefore my conclusion that these national monuments were transferred to the Office of National Parks, Buildings and Reservations, on August 10, the date on which the Executive order became effective, there having been no prior agreement between the two Departments which served to exempt these monuments from the scope of the order.

SALE OF ELECTRIC ENERGY FROM HETCH HETCHY POWER SITE, CALIFORNIA

Opinion, October 27, 1933

POWER SITE—HETCH HETCHY—SALE OF ELECTRIC ENERGY BY CITY AND COUNTY OF SAN FRANCISCO TO PRIVATELY OWNED UTILITY COMPANY.

Electric energy produced by a power plant to be erected on the Hetch Hetchy site by the city and county of San Francisco may be legally sold by the municipality to a privately-owned electric utility company only upon condition that such power will be consumed by the company and not resold or redistributed, since the Act of Congress granting the site, etc. (38 Stat. 242), contains a prohibition against the grantees' selling or letting to any private corporation the right to sell or sublet the electric energy sold or given to it by said grantees.

MARGOLD Solicitor:

You [the Secretary of the Interior] have requested my opinion as to whether electric energy produced by a power plant to be erected on the Hetch Hetchy site by the city and county of San Francisco may legally be sold by the municipality to a privately-owned electric utility company.

The rights and obligations of the city and county of San Francisco in this connection depend upon the Act of December 19, 1913

(38 Stat. 242), commonly known as the Raker Act. Section 1 of the act states that the grant to the city and county of San Francisco is made, among other purposes, "for the purpose of constructing, operating, and maintaining power and electric plants, poles, and lines for generation and sale and distribution of electric energy." Section 9 (1) of the act states that the grantee, after making provision for certain requirements of the Modesto and Turlock Irrigation Districts, and municipalities therein, may "dispose of any excess electrical energy for commercial purposes." Section 9(m) further refers to the development of electric power for "commercial use." It is therefore reasonably clear that it was contemplated by Congress that under certain circumstances power developed at Hetch Hetchy should be sold to private companies.

Section 6 of the act, however, provides as follows:

That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided*, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

I wish particularly to emphasize the fact that this section prohibits, not only the transfer by the municipality of its right to sell the energy produced in its plant, but also its transfer of any right to resell or sublet any electric energy which it may sell to a private company.

Since the city and county of San Francisco may properly sell power so developed to a private company if the company is going to consume it, but since the sale would clearly not be proper if it expressly included any right in the purchaser to resell or sublet the power, it is my opinion that the municipality would violate the act if it were blindly to sell energy to a private company which notoriously uses electric power for resale rather than for consumption. I therefore suggest that Mr. Burkhardt be notified that the city and county of San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the municipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**COAL LAND REGULATIONS (CIRCULAR 679) AMENDED:
LIMITED LICENSES TO MINE COAL****REGULATIONS**[Circular No. 1314]¹

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., October 30, 1933.

REGISTERS, UNITED STATES LAND OFFICES:

Section 8 of the act of February 25, 1920 (41 Stat. 437) authorizes the Secretary of the Interior to issue under such regulations as he may prescribe in advance limited licenses to individuals and associations to mine and take coal from the public lands for their own use without payment of rents or royalties.

In order that the purpose of this provision may be made use of to the fullest extent during the national emergency and government-owned coal made more easily available for relief, authority may be granted by the Secretary of the Interior to the recognized established relief agency of any State, upon its request, to take government-owned coal deposits within the State in localities where needed to supply families on the rolls of such agency who require coal for fuel for their homes and who are unable to pay for same.

The State agency may, directly or through its county branches, designate the lands to be mined in tracts of not more than 40 acres, by legal subdivisions if surveyed, of vacant public lands, or lands in which the coal deposits are owned by the United States, provided arrangements are made with the surface owner for protection from damage to his crops and improvements on the land. Such tracts shall be selected at points convenient to supply the families in the locality thereof, and each family shall be restricted to the amount of coal actually needed for its use, which in no case shall exceed 20 tons.

Coal may be taken from such tracts only by those given written authority by the relief agency, and all mining shall be done pursuant to permission and under the supervision of the county relief agency or such other agent as the State relief agency may provide, and all Federal and State laws and regulations for the safety of miners, prevention of fires and of waste, etc., shall be observed. The relief agency shall see that the premises are left in a safe condition for future mining operations.

The local relief agency may take coal from available land prior to issuance of license, but within 5 days after commencement of

¹ See 47 L.D. 489, and Circulars 809, 922, and 1193.

removal of coal therefrom, shall file in the local United States land office of the district wherein the land is situated an application for license, which shall be forwarded with appropriate recommendations by the register to the Commissioner of the General Land Office, who will report to the Department whether the records of his office show any objections to granting the license. If no such objections appear and if the application is otherwise regular, a license will be granted as provided by existing regulations. Payment of filing fees will not be required. Pending action on the application for a license, the relief agency may continue to take the coal.

FRED W. JOHNSON, *Commissioner*.

Approved:

HAROLD L. ICKES,
Secretary.

DIVESTING THE UNITED STATES OF TITLE TO PART OF ORIGINAL LOT 9, SQUARE 406, IN THE DISTRICT OF COLUMBIA

Opinion, October 30, 1933

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CONVEYANCE OF TITLE BY DIRECTOR—TITLE OF UNITED STATES NAKED ONLY.

Request having been made by the ostensibly proper parties, the United States, by duly constituted agent, is warranted in executing a quitclaim deed to real property which, in 1794, with good title thereto, it sold to private parties, through its commissioners empowered to do so, and was paid in full, the deed, if executed and delivered, never being recorded, leaving record title to the property standing in the name of the United States.

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CONVEYANCE OF TITLE ON BEHALF OF THE UNITED STATES—AUTHORITY OF DIRECTOR—EXECUTIVE ORDER OF JUNE 10, 1933.

The Director of National Parks, Buildings and Reservations, by virtue of authority conferred upon him by Executive order of June 10, 1933, succeeds to the authority originally conferred by Congress upon the commissioners empowered to sell and convey lots of the Government in the District of Columbia, in so far as authority to convey title on behalf of the United States is concerned, including execution of a quitclaim deed.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have submitted to me for opinion certain questions submitted by the Director of National Parks, Buildings and Reservations, relative to the desirability of execution of a quitclaim deed by the Secretary of the Interior for the purpose of assisting in the correction of the title to lot 15 in the subdivision of part of the original lot 9 in square 406, District of Columbia.

The land records of the District of Columbia as shown by the abstract dated July 23, 1932, and prepared by Charles W. Stetson, vice president and title officer of the District Title Insurance Company, disclose that the outstanding legal title is in the United States of America. After the limits of the District of Columbia were located a division of lands was made between the original proprietors and the United States Commissioners. Lot 9 in square 406 was allotted to the United States on May 3, 1792, as shown by the original division sheet of this square on file in the office of the Surveyor for the District of Columbia. Ledger 5, page 48, Accounts of Commissioners of Federal City, shows payment for lots 9 and 10 in square 406 on May 23, 1799, and that said lots were purchased by George and Andrew Thompson. In accordance with an act of May 30, 1908 (35 Stat. 544), a commission was appointed to investigate the title of the United States to lands in the District of Columbia, and in Senate Report No. 907, 62d Congress, Second Session, there is set forth at page 32 the following history of the lot above described:

Square 406, Lot 9, This lot was assigned to the public on division. In Sales Book No. 6, List 7 has a memorandum of the sale of Lots 9 and 10, in Square 406, to George and Andrew Thompson, June 25th, 1794, at a price of 220 pounds sterling. There is a charge of this amount to George and Andrew Thompson at page 133 of Ledger A on the above date. The account is carried to page 48 of Ledger B, and owing to delay in payment these lots were advertised for sale June 8th, 1797. They were, however, withdrawn, and on May 23rd, 1799, George Thompson paid the balance of the account, \$488.95. He did not take out certificates for the lots, although he entered into a form of agreement dated February 13th, 1801, with his co-purchaser (Liber F, Folio 197), by which Lot 9 was taken by Andrew and Lot 10 by George. The latter assigned his lot to James McCormick, who took out a certificate dated June 7th, 1811, recorded in Liber AC Folio 54. Nothing appears, however, of record showing that Andrew Thompson took out a certificate for Lot 9. There seems to be no question as to the sale or payment for this lot, but the legal title was never conveyed and is still outstanding in the United States.

It is possible that a conveyance of lot 9 was made to Andrew Thompson, but he failed to record the deed. There appears to be no question about the purchase of the land and payment of the purchase price and there is no direct proof that the deed was not executed and delivered. With this state of facts the questions that arise are (1) would a transfer by a quitclaim deed of the land in question be inimical to the interest of the United States, and (2) is authority vested in the Secretary of the Interior or some other officer to execute a quitclaim deed? If the United States sold lot 9 to Andrew Thompson and received payment in full of the purchase price, there was a legal necessity set up for it to convey the land by appropriate instrument, and lapse of time would not relieve it of this obligation. The United States having received the consideration agreed to for

the lot soon after the sale, it would lose nothing by making a deed at this time.

The authority to execute the quitclaim deed is partially settled by the decision of the Attorney General. (See 29 Atty. Gen. 1). In the decision the law concerning the conveyance of salable lots in the District of Columbia is discussed and he concluded that a quitclaim deed executed by the Chief Engineer of the Army would be valid. The deed referred to by the Attorney General was to be executed pursuant to the act of March 2, 1867 (14 Stat. 466), to correct the record evidence of title where the contract of sale was in existence but not recorded within the time allowed by law.

Under the provisions of the act of Congress approved July 16, 1790 (1 Stat. 130), three commissioners were appointed and apparently empowered with the authority to sell and convey salable lots of the Government in the District of Columbia. This authority was set forth in the act of Congress of May 2, 1802 (2 Stat. 175), and the act of Congress approved April 29, 1816 (3 Stat. 324). This authority was transferred to the Chief of Engineers, United States Army, in accordance with the provisions of the act of Congress approved March 2, 1867 (14 Stat. 466); then to the Director of Public Buildings and Public Parks of the National Capital by the act approved February 26, 1925 (43 Stat. 983), and finally to the Office of National Parks, Buildings, and Reservations under the Secretary of the Interior, by the Executive order of June 10, 1933.

Section 2 of the Executive order provides, among other things, that:

All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations in the Department of the Interior at the head of which shall be a Director of National Parks, Buildings, and Reservations; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. * * *

The functions of the following agencies are transferred to the Office of National Parks, Buildings, and Reservations of the Department of the Interior, and the agencies are abolished: * * * Public Buildings and Public Parks of the National Capital * * *

It is my opinion that it is not inimical to the interest of the United States to make a quitclaim deed to lot 15 in the subdivision of part of the original lot 9 in square 406 in the District of Columbia and that the Director of National Parks, Buildings and Reservations is the officer authorized to make such a conveyance.

A form of quitclaim deed should be used in which the grantor is designated the United States of America, by Arno B. Cammerer, and the grantee should be the heirs, devisees or assigns of Andrew

Thompson. The form of acknowledgment should be that prescribed by section 151, page 358, of the Code of the District of Columbia.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

ALLOTMENT TO THE DEPARTMENT OF THE INTERIOR OF SPACE IN THE NEW POST OFFICE DEPARTMENT BUILDING

Opinion, November 6, 1933

WORDS AND PHRASES—INTERPRETATION OF STATUTES.

There is a clear distinction between administration of a Government building, meaning supervision and maintenance, and the allotment of space therein, and these functions have been given distinct treatment by Congress, as appears from the Act of February 26, 1925 (43 Stat. 983), and by the courts (see *In re Lyman*, 55 Fed. 29).

SUPERVISING ARCHITECT OF THE TREASURY—SCOPE OF AUTHORITY AS TO PUBLIC BUILDINGS IN DISTRICT OF COLUMBIA—TRANSFER OF OFFICE—EFFECT.

Among the duties laid by Congress upon the Supervising Architect of the Treasury has been that of passing upon designs and estimates of projected public buildings, but that official has never had control of the allotment of space in the Federal buildings in the District of Columbia, and hence neither the newly created Procurement Division (to which the Office has been transferred), the Treasury Department, nor the Post Office Department, can have acquired any such power by transfer from the Supervising Architect.

OFFICE OF PUBLIC BUILDINGS AND PUBLIC PARKS—ACT OF FEBRUARY 26, 1925—AUTHORITY RESERVED TO PUBLIC BUILDINGS COMMISSION OVER SPACE ALLOTMENT.

The Act of February 26, 1925 (43 Stat. 983), vested in the Office of Public Buildings and Public Parks of the National Capital broad powers of maintenance, care, custody, policing, upkeep and repair of public buildings in the national capital, but provided that nothing contained in the Act "shall be held to modify existing law with respect to the assignment of space in the public buildings in the District of Columbia by the Public Buildings Commission", from which it is clear that when Congress centralized the administration and policing of many Government buildings in the Office of Public Buildings and Public Parks of the National Capital, it expressly negated any intention to disturb the complete control of the Public Buildings Commission over the allotment of space in all except certain designated public buildings in the District of Columbia, vested in the Commission by the Act of March 1, 1919 (40 Stat. 1269).

OFFICE OF PUBLIC BUILDINGS AND PUBLIC PARKS—EXECUTIVE ORDER OF JUNE 10, 1933—SUCCESSORSHIP.

The Office of National Parks, Buildings and Reservations succeeded to all powers and functions of the Public Buildings Commission by Executive Order No. 6166, promulgated June 10, 1933.

MARGOLD, *Solicitor*:

Pursuant to your [Secretary of the Interior] request of October 23, 1933, I have considered the legality of the proposed assignment by the Office of the National Parks, Buildings and Reservations of space in the new Post Office Department Building for use and occupancy by the Department of the Interior.

The Post Office Department and the Office of National Parks, Buildings and Reservations appear to be in some doubt whether the general authority of the Office to allot space in public buildings extends to the new Post Office Department Building because of the presence in section 1 of Executive Order No. 6166, promulgated June 10, 1933, of the following sentence:

The Office of the Supervising Architect of the Treasury Department is transferred to the Procurement Division, except that the buildings of the Treasury Department shall be administered by the Treasury Department and the administration of post office buildings is transferred to the Post Office Department.

In my opinion there is a clear distinction to be taken between "administration" of a building, meaning supervision and maintenance, and "allotment of space", and therefore this provision does not deprive the Office of National Parks, Buildings and Reservations of authority to allot space in the new Post Office Department Building.

The position of Supervising Architect of the Treasury Department appears to have been created by the appropriation act of March 14, 1864 (13 Stat. 22, 27). No statute has defined or set forth this officer's duties and scope of authority, but from time to time statutes have vested him with various miscellaneous powers. Among his duties has been that of passing upon designs and estimates of projected public buildings. (R.S. sec. 3734; act of June 25, 1910, 36 Stat. 699; 40 U.S.C.A. sec. 267). He has never had control of the allotment of space in the Federal buildings in the District of Columbia, and hence neither the Procurement Division, the Treasury Department, nor the Post Office Department can have acquired any such power by transfer from the Supervising Architect.

The Treasury Department itself has for a long time exercised control over many public buildings within the District of Columbia and elsewhere in the United States. Thus by the act of July 1, 1898 (30 Stat. 614), all courthouses, custom houses, post offices, and other public buildings outside the District of Columbia were declared to be under the exclusive jurisdiction and control of the Secretary of the Treasury. Likewise, no control of any Treasury or Post Office buildings was transferred to the Office of Public Buildings and Public Parks, to which was, nevertheless, transferred the con-

trol of the State, War and Navy Building, and the Interior, Commerce, Justice, Labor and other buildings.

It seems clear that the sentence from the Executive Order under discussion was intended to give to the Post Office Department control of Post Office buildings heretofore under the control of the Treasury Department, and to keep in the control of the Treasury Department other buildings which it had theretofore controlled.

But these provisions for maintenance and supervision have no bearing on the question of authority to allot space. *In re Lyman* (55 Fed. 29). That administration of buildings on the one hand and allotment of space on the other, have been given distinct treatment by Congress is clear from the act of February 26, 1925 (43 Stat. 983), which vested in the Office of Public Buildings and Public Parks of the National Capital broad powers of maintenance, care, custody, policing, upkeep and repair of public buildings. Section 6 of this act provides that:

Nothing contained in this Act shall be held to modify existing law with respect to the assignment of space in the public buildings in the District of Columbia by the Public Buildings Commission * * *.

Thus it is clear, that when Congress centralized the administration and policing of many Government buildings in the Office of Public Buildings and Public Parks of the National Capital it expressly negated any intention to disturb the complete control of the Public Buildings Commission over the allotment of space in all except certain designated public buildings in the District of Columbia which was vested in the Commission by the act of March 1, 1919 (40 Stat. 1269; 40 U.S.C.A., Sec. 1).

The Office of National Parks, Buildings and Reservations succeeded to all powers and functions of the Public Buildings Commission by Executive Order No. 6166, promulgated June 10, 1933. In my opinion allotment of space in the new Post Office Building is clearly within its powers as such successor.

Approved:

T. A. WALTERS,

First Assistant Secretary.

HOME OWNERS' LOAN CORPORATION

Opinion, November 6, 1933

OFFICE SPACE ALLOTMENT—HOME OWNERS' LOAN ACT OF 1933—ACT OF MARCH 1, 1919—OFFICE OF NATIONAL PARKS, BUILDINGS AND RESERVATIONS—EXECUTIVE ORDER OF JUNE 10, 1933.

The Act of March 1, 1919 (40 Stat. 1269), in express terms gives to the Public Buildings Commission control of the allotment of space in buildings

leased by the United States as well as in publicly owned buildings, and by Executive Order No. 6166, promulgated June 10, 1933, all functions of this Commission were transferred to the Office of National Parks, Buildings and Reservations.

HOME OWNERS' LOAN ACT OF 1933—ACT OF MARCH 1, 1919—AUTHORITY TO CONTRACT INDEPENDENTLY.

Unless the provisions of the Home Owners' Loan Act of 1933 evince some intent on the part of Congress to except the Home Owners' Loan Corporation from the general administrative scheme embraced in the Act of March 1, 1919, for the allotment of space to Government departments, etc., it is without authority to contract independently for space in a privately owned building in the District of Columbia.

HOME OWNERS' LOAN ACT OF 1933—STATUTORY CONSTRUCTION.

A provision in the Home Owners' Loan Act of 1933 that "the Corporation * * * shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds", does not relieve the Office of National Parks, Buildings and Reservations of the obligation of allotting to the Corporation space in some building or buildings in the District of Columbia owned or leased by the United States.

STATUTORY CONSTRUCTION—EXCEPTION TO SYSTEM ESTABLISHED BY GENERAL ACT NOT READILY IMPLIED.

It is a well established principle of law that, where a statute sets up a general scheme for the administration of a given field, subsequent and more particular statutes will not readily be construed to enact a departure from the general scheme. (*United States v. Barnes*, 222 U.S. 513; *Automatic Registering Machine Company v. Pima County*, 285 Pac. 1034.)

MARGOLD: Solicitor:

You [the Secretary of the Interior] have requested my opinion concerning the legality of the proposal by the directors of the Home Owners' Loan Corporation that it relieve the Office of National Parks, Buildings and Reservations of the obligation of allotting to the Corporation space in some building or buildings owned or leased by the United States in the District of Columbia, and that the Corporation act independently in renting space in some privately owned building for its accommodation in the District. In my opinion the directors of the Home Owners' Loan Corporation have no authority to take such action.

Considering the question first apart from any problems raised by the terms of the Home Owners' Loan Act of 1933 (47 Stat. 128), which provides for the establishment of the Home Owners' Loan Corporation, it is apparent that the proposed action would be wholly unauthorized. The Act of March 1, 1919 (40 Stat. 1269, 40 U.S.C.A. sec. 1), gave to the Public Buildings Commission—

* * * the absolute control of and the allotment of all space in the several public buildings owned or buildings leased by the United States in the

District of Columbia, with the exception of the Executive Mansion and Office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space.

This act in express terms gives to the Public Buildings Commission control of the allotment of space in buildings *leased* by the United States as well as in publicly owned buildings.

By Executive Order No. 6166, promulgated June 10, 1933, all functions of the Public Buildings Commission were transferred to the Office of National Parks, Buildings and Reservations. Unless the provisions of the Home Owners' Loan Act of 1933 show some intent on the part of Congress to except the Home Owners' Loan Corporation from this general administrative scheme for the allotment of space to Government departments, agencies and instrumentalities, the Corporation has no authority independently to contract for space in a privately owned building in the District of Columbia.

Section 4(j) of the Home Owners' Loan Act of 1933 (47 Stat. 128, 131-132) provides in part that—

The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds.

It is my opinion that this provision confers no authority on the Corporation to take the proposed action. The provision exempts the Corporation, it is true, from other laws "governing the expenditure of public funds." But I do not see how it can reasonably be contended that a law which vests authority in a given administrative agency over allotment of space in publicly owned or leased buildings is a law "governing the expenditure of public funds". It is a purely administrative measure establishing a method for distributing space in Government buildings. This process of distribution does not necessarily involve the expenditure of any public funds whatsoever.

In addition, attention should be called to the following provision in the Act of March 3, 1877 (19 Stat. 370, 40 U.S.C.A. sec. 34):

No contract shall be made for the rent of any building, or part of any building to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building.

I find no provision in the Home Owners' Loan Act of 1933 which constitutes an "appropriation in terms" for a contract for rent of

a building in the District. If Congress had desired to authorize rent of a building, the sort of provision which would confer such authority was clear. In view of this, and since repeals by implication are not favored, I do not think the provision in the Home Owners' Loan Act of 1933 exempting the Corporation from other laws "governing the expenditure of public funds", authorizes any departure from the provisions of the Act of March 3, 1877, quoted above.

Finally, the proposal of the directors of the Corporation necessitates a departure from a general scheme of administration established by Congress. It is a well established principle of law that, where a statute sets up a general scheme for the administration of a given field, subsequent and more particular statutes will not readily be construed to enact a departure from the general scheme. *United States v. Barnes* (222 U.S. 513); *Automatic Registering Machine Company v. Pima County* (36 Ariz. 367, 285 Pac. 1034). Obviously the authority of the Office of National Parks, Buildings and Reservations to control the allotment of space to Government agencies will be reduced to a nullity if such agencies as are dissatisfied with their allotments are to be permitted to hire and occupy space on their own initiative, and spend their appropriations for this purpose.

I conclude that the action proposed to be taken by the directors of the Home Owners' Loan Corporation is unauthorized.

Approved:

T. A. WALTERS,

First Assistant Secretary.

HOURS OF LABOR AND METHOD OF PAYMENT OF WAGES, IN NATIONAL PARKS, FOR WORK PERFORMED WITH FUNDS OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Opinion, November 13, 1933

NATIONAL PARKS—WORK PERFORMED WITH FUNDS OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS—HOURS OF LABOR.

The order of the Secretary of the Interior of August 23, 1933, requiring that all work performed with funds granted by the Federal Emergency Administration of Public Works shall be subject to the labor policies and wage requirements prescribed by said organization, embraces work performed in National Parks, whether under contract or by the Government's own forces.

NATIONAL PARKS—CIRCULAR NO. 1—HOURS OF LABOR—RULE, WITH EXCEPTIONS—PROCEDURE.

By subsection (b) of section 3, Article II, Circular No. 1, it is provided that, if work is located at points remote and inaccessible, 40 hours' work in one week shall be permitted after it is determined by the State Engineer (P. W.A.), *prior to advertisement*, that the work is remote and inaccessible;

and this regulation vests authority in the State Engineer (P.W.A.) for determining whether 40 hours shall constitute a week's work on any designated project with authority lodged in the Federal Emergency Administration of Public Works to modify such regulation.

NATIONAL PARKS—NATIONAL INDUSTRIAL RECOVERY ACT AND FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS—CHANGE IN WORKING HOURS—AUTHORITY.

To be legally effective, a change from or waiver of the statutory 30-hour work week prescribed by the National Industrial Recovery Act and the Federal Emergency Administration of Public Works, as applied to National Parks, must be authorized by officials of the latter organization or the State Engineer (P.W.A.), in such persons residing the duty of determining whether it is impracticable or infeasible to do the work required on the 30-hour week basis or to substitute therefor the 40-hour week authorized in Circular No. 1 and the rules and regulations approved August 9, 1933.

OFFICE OF NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CHANGING HOURS OF LABOR—AUTHORITY OF SECRETARY OF THE INTERIOR.

The Secretary of the Interior, as such, is without authority to approve and make effective plans submitted by the Director of the Office of National Parks, Buildings, and Reservations, for changing the hours of labor from 30 to 40 per week, upon work in National Parks, within the scope of the Federal Emergency Administration of Public Works, his authority in this connection being that conferred upon him as head of the Federal Emergency Administration of Public Works.

NATIONAL PARKS—PAYMENT BY CHECK FOR WORK PERFORMED—EXCEPTION.

Nothing in the National Industrial Recovery Act or the regulations adopted to give it effect forbids payment by Government check for work performed with funds granted by the Federal Emergency Administration of Public Works; but where, owing to difficulties in the way of cashing checks, such method of payment would work a hardship, the purpose of the regulations would seem to require payment in cash.

MARGOLD, Solicitor:

You [the Secretary of the Interior] have submitted to me for opinion administrative problems that arise by reason of the National Industrial Recovery Act, approved June 16, 1933, Circular No. 1, issued July 31, 1933, by the President under the act, and memorandum of the Secretary of the Interior issued August 23, 1933, relative to labor and wage provisions. The Office of National Parks, Buildings, and Reservations has submitted for the approval of the Secretary of the Interior a memorandum which includes two principal questions, which are stated by the Director as follows:

(1) In practically all of the national parks the work will be situated in remote sections of the country, far removed from centers of industry and entertainment, and in localities where, due to weather conditions, it is desirable to utilize the 40-hour week provisions contained in section 3 of Article II of Circular No. 1 and in your rules and regulations approved August 9.

(2) Due to the remote location of national park headquarters and the distance from Federal Reserve or other banks, where lawful money of the United States might be obtained, information is requested as to whether it would be permissible to pay these men by Government check.

In the first sentence of the memorandum of August 23, 1933, issued by the Secretary of the Interior to the heads of bureaus and offices, he prescribes the following rule:

All work performed with funds granted by the Federal Emergency Administration of Public Works is subject to the labor policies and wage requirements prescribed by the Administration whether or not such work is done on force account.

This regulation operates to define the provisions of section 206 of the National Industrial Recovery Act to include work done by the Government with its own forces as well as work done by contractors or those to whom loans or grants might be made. Assuming that the regulation has the effect of law, consideration can be given to the extent of authority vested in the administrative officer to change the hours of work under the provision of subsection (2) of section 206 of the act, which is quoted for convenience:

(2) That (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than 30 hours in any one week:

This provision of the statute has been elucidated by subsection (b) of your regulations of August 23, 1933, which states:

30-Hour Week: Except in executive, administrative and supervisory positions, so far as practicable and feasible in the judgment of the Federal Emergency Administration of Public Works, no individual directly employed on the project shall be permitted to work more than thirty hours in any one week, but in accordance with rules and regulations from time to time made by the Federal Emergency Administration of Public Works, this provision shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding thirty days.

The regulation, which must be included in all contracts, permits a waiver of the 30-hour provision of the law by the Federal Emergency Administration of Public Works. The officials authorized to extend the hours of labor are the Federal Emergency Administration of Public Works, and State Engineer (P.W.A.). Therefore the memorandum above described, in so far as it affects hours of labor, if approved by you, would not be legally effective, because the change from the statutory 30-hour period should be made by the Federal Emergency Administration of Public Works, or the State Engineer (P.W.A.), and the one who acts must determine whether it is impracticable and infeasible to do the work with men working 30 hours per week.

By subsection (b) of section 3, Article II, Circular No. 1, it is provided that, if work is located at points remote and inaccessible, 40 hours' work in one week shall be permitted after it is determined by the State Engineer (P.W.A.), *prior to advertisement*, that the work is remote and inaccessible. This regulation vests the authority for determining whether 40 hours shall constitute a week on any designated project in the State Engineer (P.W.A.). The regulation may be modified by the Federal Emergency Administration of Public Works, but the Secretary of the Interior can not approve and make effective the plan submitted by the Director of the Office of National Parks, Buildings, and Reservations, for changing the hours of labor from 30 to 40 hours per week.

Turning our attention to the second question to be considered in the memorandum submitted, we find that subsection (3) of section 206 of the National Industrial Recovery Act contains the following provision:

That all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort.

Subsection (c) of the regulations of August 23, 1933, provides under (3) that:

All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the payroll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

Subsection (a), section 3, Article II, Circular No. 1, of the rules prescribed by the President, July 31, 1933, provides:

All wages shall be paid in full not less often than once each week and in lawful money of the United States in the full amount earned by each individual at the time of payment. There shall be no deductions on account of goods purchased, rent, or other obligations. Such obligations shall be subject to collection only by legal process.

It is evident, however, that this rule is directed to contractors, because it is further provided that any violation of rule 3 (a) may be modified by the Administrator, or by the agency of the United States *executing the contract*. Its purpose is to guard against abuses sometimes complained of under a practice of paying workers by checks which from practical necessity or convenience are to be cashed under conditions whereby the contractor may in a measure be able to restrict the free use of the funds by deducting for rent, the purchase of goods, or for other obligations. It was intended that employees should have free use and control of their earnings. This purpose will not be thwarted where the Government

pays by checks. I understand it to be the general practice to pay Government employees in the field services by checks, and I see no sufficient reason for concluding that it was intended by the said instructions to disturb the established practice in this regard, except perhaps in particular cases where, owing to lack of banking facilities or other difficulties in the way of cashing the checks, the employe could not conveniently convert his check into cash. Where the latter conditions prevail, I think the purpose of the regulations requires that the Government assume the burden, inconvenience and responsibility involved in the transportation and payment of cash.

I see no legal objection to granting the relief requested, but I believe that any action you take in the matter should be in the capacity of Administrator of Public Works, and whether the relief requested may or should be granted is properly for consideration by that unit of the service.

Approved:

HAROLD L. ICKES,

Secretary.

**REGULATIONS TO GOVERN SALE OF LOTS IN TOWN OF NEWELL,
WITHIN THE BELLE FOURCHE IRRIGATION PROJECT, SOUTH
DAKOTA**

[Circular No. 1315]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., November 20, 1933.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

On October 23, 1933, the Department approved instructions submitted by the Commissioner of Reclamation providing that a sale of lots situated in Newell, South Dakota, be held. It is, therefore, directed that in accordance with said regulations and pursuant to the acts of April 16 and June 27, 1906 (34 Stat. 116, 519), June 11, 1910 (36 Stat. 465), and September 8, 1916 (39 Stat. 852), and the general regulations in Townsite Circular No. 1122, the unreserved lots in the townsite of Newell, South Dakota, within the Belle Fourche Irrigation Project, included in the attached list, shall be offered for sale at public auction at not less than their appraised value at 10 a.m., December 2, 1933, at Newell, South Dakota.

F. C. Youngblutt has been designated as superintendent of the sale and J. B. Siebeneicher as auctioneer. Full payment for the lots must be made in cash on the date of the sale.

The superintendent conducting the sale is authorized to reject any and all bids for any lot; to suspend, adjourn, or postpone the sale of

any lot or lots to such time and place as he may deem proper. The unsold or forfeited lots will then be subject to private sale at the office of the Register at the Pierre, South Dakota, land office, at the appraised value for cash at the time 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.

Mimeograph copies hereof, showing a list of the lots and the appraised prices, will be furnished to the superintendent of the sale and the Register of the land office as soon as they can be provided.

T. A. WALTERS,

First Assistant Secretary.

APPRAISED PRICE OF LOTS, NEWELL, SOUTH DAKOTA

Block	Lots	Price	Block	Lots	Price
3	5 to 10 inclusive	\$10. 00		13 to 15 inclusive	\$15. 00
4	1	25. 00		17 to 32 "	15. 00
	2	20. 00	40	22, 23	20. 00
	3 to 6 inclusive	10. 00	42	1 to 8 inclusive	50. 00
5	1 to 10 "	10. 00		14 to 20 "	25. 00
	14 to 16 "	10. 00		23	25. 00
6	1 to 9 "	10. 00	43	1 to 4 inclusive	25. 00
	12 to 16 "	10. 00		14 to 18 "	15. 00
7	1 to 16 "	10. 00		21 to 32 "	15. 00
8	1 to 12 "	10. 00	45	21, 22, 23, 25	15. 00
9	1 to 12 "	10. 00	56	2 to 6 inclusive	15. 00
12	2	10. 00	65	3	10. 00
20	9 to 11 inclusive	10. 00	74	3 to 10 inclusive	10. 00
21	7 to 11 "	10. 00	75	3 to 9 "	10. 00
22	12 to 16 "	15. 00	88	2 to 6 "	15. 00
28	8	10. 00	89	1 to 8 "	15. 00
31	5, 6, 13	20. 00	90	1 to 8 "	15. 00
	14 to 23 inclusive	15. 00	91	1, 2	15. 00
33	7 to 11 "	15. 00		4 to 8 inclusive	15. 00
34	7 to 12 "	15. 00	92	1 to 8 "	15. 00
35	1 to 12 "	15. 00	95	1	20. 00
36	1, 2, 3	20. 00	96	1 to 8 inclusive	15. 00
	7 to 16 inclusive	15. 00	97	1 to 8 "	15. 00
37	3 to 6 "	20. 00	98	1 to 8 "	15. 00
	7 to 11 "	15. 00	99	1, 5	15. 00
	15, 16	15. 00	100	1, 2, 7, 8	15. 00
38	1 to 12 inclusive	15. 00	101	1, 2, 3, 4, 7, 8	15. 00
	13 to 32 "	10. 00	110	Whole block	125. 00
39	7 to 12 "	20. 00	111	" "	75. 00

MCNEIL ET AL. v. MARIAS

Decided November 23, 1933

OIL AND GAS LANDS—PROSPECTING PERMIT APPLICATION—EFFECT OF FILING.

An application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is, in effect, a mere request that a license be granted and confers upon the applicant no interest in the lands or the mineral deposits therein.

OIL AND GAS LANDS—REINSTATEMENT OF CANCELED PERMIT AND EXTENSION OF TIME GRANTED—EQUITIES.

Neither the Leasing Act of February 25, 1920, nor the regulations issued thereunder, give exclusive segregative effect to an application for a prospecting permit, and a permittee, in default under the regulations, resulting in cancellation of his permit, but able to show substantial equities, may, upon proper application, have his permit reinstated, to the exclusion of the claims of mere permit applicants.

DEPARTMENT DECISION CITED AND APPLIED.

Case of *Enlow v. Shaw et al.* (50 L. D. 339) cited and applied.

WALTERS, *First Assistant Secretary:*

On December 1, 1930, the Secretary of the Interior, on recommendation of the departmental committee, extended oil and gas prospecting permit Sacramento 019264 of W. A. McNeil and others to November 1, 1932, on condition that there should be filed within 60 days from notice a drilling bond in the sum of \$5000, conditioned on the proper abandonment of all wells theretofore drilled on the permit area. This decision was duly promulgated by the Commissioner of the General Land Office, and on August 3, 1931, the Register of the local land office reported that the parties had been notified but had made no response. He transmitted evidence of service showing that all the parties except McNeil had receipted for notice and copy of the decision. A registered letter addressed to McNeil and returned unclaimed was submitted for service of notice upon him. On January 15, 1932, the Department approved a letter by the Commissioner canceling the permit, which covered the $W\frac{1}{2}W\frac{1}{2}$ and $NE\frac{1}{4}NW\frac{1}{4}$ Sec. 22, T. 30 S., R. 24 E., M.D.M., California.

On May 17, 1932, Joseph F. Marias filed application for a permit, in accordance with the regulations of April 4, 1932, to prospect for oil and gas upon certain lands in said township, including all of Sec. 22. On February 6, 1933, McNeil filed a petition for reinstatement of the canceled permit, alleging that he had acquired the interests of the other parties to said permit and that he had satisfactorily plugged and abandoned the wells on the land. He consented and agreed that reinstatement and extension should be subject to the conditions and stipulations in the regulations of April 4, 1932.

By decision of March 3, 1933, the Commissioner rejected McNeil's application for reinstatement on the stated grounds that the permit had been canceled after due service of notice; that when Marias filed his application for the land it was subject to such application because there was no application for reinstatement of the former permit pending; and that the application of Marias should therefore be allowed.

McNeil has appealed. He alleges that the permittees caused two wells to be drilled on the land, the first to a depth of 4,497 feet and the second 4,403 feet; that the total cost of said wells was approximately \$100,000; that the second well was completed on November 12, 1925; that no further development on the land was undertaken due to the general conservation policy in both Federal and State governments and the general condition of the oil industry; applications for extension of time were filed setting forth the facts; that on or about January 10, 1931, he received through one of the other permittees a notice from the oil and gas supervisor requiring certain work to be done in connection with abandonment of the wells on the land; that he thereupon made several trips to the land and made efforts to have the other permittees join in sustaining the cost of abandonment of the wells, which he was informed and believed would relieve him from the requirements of furnishing a \$5000 bond; that on or about February 2, 1932, he received a letter from the oil and gas supervisor instructing him that he must complete abandonment of the wells; that he then consulted with said supervisor who advised him that the permit would not be finally canceled until the work had been done, and that he could not ask for further extension of time until he had performed the work of abandonment of the wells as required by the supervisor; that he then proceeded to abandon the wells as required, and having completed the work in good faith he filed his application for reinstatement on February 6, 1933.

McNeil does not deny that he received notice of the requirement to furnish a \$5000 bond within 60 days, even though it was indirectly. If he then had written to the Register or the Commissioner, all difficulties could probably have been avoided. However, he was justified in relying upon the advice of the oil and gas supervisor and in assuming that the Commissioner would be informed of the supervisor's instructions and advice to him.

Ordinarily, if a permittee is called upon to comply with reasonable and proper requirements, under penalty of suffering cancellation of the permit for failure to comply within a stated time, and he fails to take any action after due service of notice, his permit may lawfully be canceled and he will not be in a position to ask for reinstatement

in the face of an allowable intervening permit application. But the circumstances of this case are different. The good faith and equities of McNeil have been clearly established, and it seems that the present situation has arisen on account of orders and instructions from two different bureaus of this Department.

Inasmuch as McNeil has equities which the Department recognizes, the filing of a permit application by Marias prior to the filing of the application for reinstatement is not an insurmountable bar to reinstatement of the former permit. In the case of *Enlow v. Shaw et al.* (50 L.D. 339), the Department said:

An application for a permit to prospect for minerals pursuant to the leasing act is a mere request that a license be granted, and confers upon the person making such application no interest in the land described or the mineral deposits therein.

In the adjudication of this case the Commissioner overlooked the fact that there was a permit application for the land in question which was prior to that of Marias. The files of the General Land Office show that on April 22, 1932, Lloyd Crutts filed a permit application (Sacramento 027407) for said land and other lands, while, as hereinbefore noted, the application of Marias was filed May 17, 1932.

McNeil served a copy of his appeal upon Marias, but inasmuch as he was not advised of the application of Crutts, he did not serve notice upon the latter.

The decision appealed from is reversed and the case is remanded with instructions that a copy hereof be served upon Crutts and that he be allowed 30 days from notice to show cause why his application should not be rejected as to the $W\frac{1}{2}W\frac{1}{2}$ and $NE\frac{1}{4}NW\frac{1}{4}$ Sec. 22, T. 30 S., R. 24 E., M.D.M., and the permit of W. A. McNeil and others reinstated and extended. A copy hereof should also be served upon Marias. If Crutts and Marias do not take any action after due service of notice the Commissioner will submit the case to the Department recommending reinstatement of the permit and extension of time thereon as in the absence of any intervening application.

AUTHORITY TO EXTEND TIME OF PAYMENT OF CHARGES ON INDIAN IRRIGATION PROJECTS

Opinion, December 1, 1933

ADMINISTRATIVE OFFICERS OF THE UNITED STATES—AUTHORITY REGARDING DEBTS DUE THE GOVERNMENT.

As a general rule, no administrative officer of the United States is vested with authority to extend without consideration the time of payment of a debt due the United States.

INDIAN IRRIGATION PROJECTS—SECRETARY OF THE INTERIOR—AUTHORITY TO FIX CHARGES—LIMITATIONS UPON AUTHORITY.

Under the authority vested in him, the Secretary of the Interior may amend any notice fixing the amount and date of payment of charges so as to change the amount of the charge, and may also defer the time when the payment falls due, but when the charges thus fixed fall due, he is given no authority to extend them.

INDIAN IRRIGATION PROJECTS—AUTHORITY OF SECRETARY OF THE INTERIOR TO EXTEND TIME OF PAYMENT TO OWNERS OF IRRIGATED LANDS.

Congress has not granted to the Secretary of the Interior general authority to extend the time of payment, after they fall due, of either the operation and maintenance charge or the construction charge on Indian irrigation projects, and legislation passed by it from time to time, notably the Act of February 13, 1931 (46 Stat. 1093), clearly indicates that it considers the Secretary is without such authority, except with Congressional sanction previously given; and this, furthermore, has been the view of the Department, since where such authority has been required, appropriate legislation from Congress has been obtained.

MARGOLD, *Solicitor*:

The Commissioner of Indian Affairs has submitted for opinion two specific questions as follows:

1. Is it permissible on Indian irrigation projects for suitable contracts to be entered into between the United States and the owners of irrigable land against which there are unpaid delinquent operation and maintenance assessments, such contracts definitely to provide for payment by the landowner of the current irrigation assessments as and when due, and to make annual payments of certain percentages of the total unpaid delinquency plus interest on the unpaid portion of the deferred amount, water to be delivered upon execution of and compliance with such contract?

2. Would it be permissible to include in such contracts unpaid delinquent construction assessments in the same manner as suggested for unpaid delinquent operation and maintenance assessments?

On many of the Indian irrigation projects there are quite a number of landowners who are several years behind in the payment of the operation and maintenance charges, and on projects where public notices have been issued, fixing the construction charges, the landowners are also delinquent in payment of construction charges.

On all Indian irrigation projects water can not be delivered until past due charges are paid. Inability to pay the charges puts the landowner in a position where he can not obtain irrigation water and therefore can not cultivate his land. Many suggestions have been made by landowners and business men of the vicinity of the various projects that some plan be devised whereby the landowners could secure an extension of time on the past due charges and make them payable in annual installments over a period of years, the deferred payments being due and payable each year with the current charges for that year. Interest would be charged at a rate to be

fixed by the Secretary of the Interior and paid annually at the same time and place as the deferred charges.

Under the act of August 1, 1914 (38 Stat. 583), the Secretary is authorized to fix maintenance charges which may be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected. He has also been authorized to fix operation and maintenance charges by various acts of Congress, and to determine and announce the construction charges which shall be levied against the irrigable lands within Indian irrigation projects.

As a general rule no administrative officer is vested with authority to extend without consideration the time of payment of a debt due the United States. The Secretary could amend any notice fixing the amount and date of payment of charges so as to change the amount of the charge and could also defer the time when the payment fell due, but when the charges thus fixed fall due he is given no authority to extend them. During the last few years business necessity has caused the Department to take promissory notes, secured by chattel mortgages, for operation and maintenance charges, thus making the charges due at the end of the irrigation season instead of compelling payment in advance, as required by the published notice. The consideration for the extension is interest exacted, and this may be sufficient to make the transaction valid; a question not necessary here to decide. It seems probable that the theory on which annual operation and maintenance charges have been extended for a time before water is delivered in the spring to some time in the fall after the irrigation season is past arises from the fact that the Secretary of the Interior is authorized by law to fix the annual operation and maintenance charges per acre and announce the date of payment. Hence, if he issued a notice prescribing that payment by the landowner of annual operation and maintenance shall be made in advance of the irrigation season he would be authorized to change the notice to provide for payment at the end of the irrigation season.

It has evidently been the view of the Department that the Secretary of the Interior is without authority to extend payments, after they fall due, of the operation and maintenance or construction charges, because it has secured legislation from Congress in several instances where such authority has been required. The act of February 13, 1931 (46 Stat. 1093), is such an act. It authorized the Secretary of the Interior to adjust payment of charges due on the Blackfeet Indian Irrigation project, Montana. This act was the result of Senate Bill No. 1533, which, as originally written, was intended to give the Secretary of the Interior authority to extend past

due water-right charges on any irrigation project, constructed or being constructed and operated under the direction of the Commissioner of Indian Affairs, the extension to be limited to the term of five years. Congress, however, changed the bill to make it applicable only to the Blackfeet project, Montana, and prescribed that the extension should not exceed ten years. This action of Congress, together with other similar acts passed by it, indicates clearly that Congress considers that the Secretary of the Interior is without authority to extend the time of payment of operation and maintenance or construction charges on Indian irrigation projects except with Congressional sanction previously given. Congress has not granted to the Secretary of the Interior general authority to extend the time of payment, after they fall due, of either the operation and maintenance charge or the construction charge, on Indian irrigation projects, and in my opinion, he can not extend such charges without specific authority of Congress.

Approved: December 1, 1933.

OSCAR L. CHAPMAN,
Assistant Secretary.

CONSTRUCTION OF EXPRESSIONS "COMPACT" AND "REASONABLY COMPACT" AS USED IN THE MINERAL LEASING ACT

Opinion, December 1, 1933

MINERAL LEASING ACT—CONSTRUCTION OF STATUTES.

As used in sections 13 and 14 of the Mineral Leasing Act of February 25, 1920 (31 Stat. 437), the expressions "compact" and "reasonably compact" relate to squares, so that, to be "compact", the selection of primary lease acreage must be in the form of a square wherever possible, and where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square in dimensions would conform to the statutory requirement.

MINERAL LEASING ACT—INCONTIGUOUS TRACTS—METHOD OF SELECTION.

Where the land embraced in a permit is composed of two or more contiguous tracts, the permittee should be required first to choose the tract from which acreage for primary lease is desired, and he should be required to make his entire selection for a lease, in so far as possible, from the chosen tract. When the area of the chosen tract is exhausted the permittee should be required to select any additional acreage to which he is entitled from the permitted tract nearest thereto, taking first the portion thereof nearest to the first chosen tract. If the permittee is entitled to lease for additional acreage after two tracts have been exhausted, he should be required to select such additional acreage from the tract second nearest to the first chosen tract, then from the tract third nearest, and so forth.

PRIOR DEPARTMENT DECISION CITED AND APPLIED.

Case of *William J. O'Haire* (50 L.D. 562) cited and applied.

MARGOLD, *Solicitor*:

The question of the proper construction and interpretation of sections 13 and 14 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), with reference to the meaning of "reasonably compact" and "compact" as used in these sections, has come before me for consideration and expression of opinion as a guide to administrative action.

Section 13 of the Mineral Leasing Act authorizes the Secretary of the Interior to issue oil and gas prospecting permits to qualified applicants under the act upon not to exceed 2,560 acres of land wherein the oil and gas deposits belong to the United States, and provides that:

Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a *reasonably compact form* and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one half times its width.

Section 14 of the Act provides that 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 permit, the permittee shall be entitled to a primary lease, at a royalty of 5 per cent., covering one-fourth of the land embraced in the permit (but not less than 160 acres if there be that number of acres in the permit). Provision is also made in section 14 of the Act that:

The area to be selected by the permittee *shall be in compact form* and, if surveyed, to be described by the legal subdivisions of the public land surveys.

Thus, section 13, relating to the issuance of permits, provides that the area, not in excess of 2,560 acres, selected by the permittee, must be "*in a reasonably compact form.*" However, section 14, which relates to the issuance of leases on the permit area after valuable discovery of oil and gas has been made, provides that the area, not in excess of 640 acres, to be selected by the permittee for incorporation into the primary lease to which he has become entitled, "*shall be in compact form.*" This distinction in language clearly indicates an intent on the part of Congress to permit greater liberality as to compactness in the selection of 2,560 acres of permit area than in the selection of one-fourth of that area for the primary lease.

In the case of *People v. Thompson* (155 Ill. 451, 40 N.E. 307, 315), wherein the word "compact" was interpreted, the court said:

The most compact district, territorially, would be a circular plane, every point on the boundary of which would be equidistant from the center. Next would come the square.

The phrase "shall be as nearly compact in form as possible" as used in the Act of April 28, 1904 (33 Stat. 547), relating to homestead entries, was construed by the Department in *Ralph E. Wertz et al.* (35 L.D. 585). In that case it was held that a "compact location is a square, and any departure therefrom will only be permitted where it is impossible, under the circumstances existing at the date of filing the application to enter, to secure the full area allowed by taking land in such form."

The phrase here construed is as liberal a paraphrase of compact form by legal subdivisions as can reasonably be accepted, and the construction of this phrase in the Act of 1904 is correctly applicable to the similar provision in section 14 of the Act of 1920.

In *William J. O'Haire* (50 L.D. 562), involving section 14 of the Act of February 25, 1920, the Department ruled that when the permit consists of two incontiguous tracts, and the tract on which the discovery well is located does not contain the amount of 5 per cent. acreage to which the permittee is entitled, he may select the tract embracing the discovery well and such remaining land as nearthereto as is possible, up to the prescribed amount, whether contiguous or incontiguous. This ruling conforms to the conception that the selection shall be as compact in form as possible, approaching the form of a square as nearly as possible.

We are here dealing with a selection by legal subdivisions, themselves approximate squares, and therefore may eliminate consideration of a circular plane. To be compact, therefore, the selection of primary lease acreage must be in the form of a square wherever possible. Where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square in dimensions would conform to the statutory requirement.

If the land embraced in a permit is composed of two or more incontiguous tracts, the permittee should be required first to choose the tract from which acreage for primary lease is desired, and he should be required to make his entire selection for a lease, in so far as possible, from the chosen tract. When the area of the chosen tract is exhausted the permittee should be required to select any additional acreage to which he is entitled from the permitted tract nearest thereto, taking first the portion thereof nearest to the first chosen tract. If the permittee is entitled to lease for additional acreage after two tracts have been exhausted, he should be required to select such additional acreage from the tract second nearest to the first chosen tract, then from the tract third nearest, and so forth.

My attention has been called to several instances where primary leases were issued in disregard of the statutory requirement as to compactness. These instances involve leases in the North Dome Kettleman Hills oil and gas field, California, particularly the fol-

lowing cases: Sacramento 019327, 019419, 019445, 019492, and 019699. These cases will now be reviewed with a view to instituting appropriate action looking to compliance with the statutory requirement.

Approved:

T. A. WALTERS,

First Assistant Secretary.

AUTHORITY OF SECRETARY OF THE INTERIOR TO ACCEPT BONDS OF HOME OWNERS' LOAN CORPORATION, ON BEHALF OF RESTRICTED OSAGE INDIANS, IN SATISFACTION OF MORTGAGES HELD BY THEM

Opinion, December 8, 1933

INDIANS AND INDIAN LANDS—RESTRICTED OSAGES—INVESTMENT OF INDIAN FUNDS IN BONDS OF HOME OWNERS' LOAN CORPORATION—AUTHORITY OF SECRETARY OF THE INTERIOR.

The Act of February 27, 1925 (43 Stat. 1008), specifically enumerates the forms of investment of Indian funds the Secretary of the Interior is authorized to make, and nowhere in the act are bonds of the Home Owners' Loan Corporation mentioned by name nor can they be regarded as falling within any of the classes of investments enumerated in said act.

INDIANS AND INDIAN LANDS—BONDS OF HOME OWNERS' LOAN CORPORATION—INVESTMENT OF INDIAN FUNDS—ACT OF FEBRUARY 27, 1925.

Bonds of the Home Owners' Loan Corporation are not United States bonds, but are direct obligations of the Corporation, the liability of the United States extending only to guaranteeing the interest, with no responsibility whatever as to the principal; accordingly, an investment in bonds of the Home Owners' Loan Corporation would not be a compliance with the terms of the Act of February 27, 1925, directing the Secretary of the Interior to invest the funds of restricted Osage Indians in United States bonds; nor do they come within the scope of the statute by regarding them as a form of first mortgage real estate investment, since the Act of 1925 contemplates direct investment of the Indians' funds in first mortgages, while the loans made by the Corporation represent investments in its own behalf, the notes and mortgages taken by it being the means by which to raise funds to retire its bonds.

MARGOLD, *Solicitor:*

You [the Secretary of the Interior] have requested my opinion as to whether bonds issued by the Home Owners' Loan Corporation may be accepted on behalf of restricted Osage Indians in satisfaction of first mortgages held by such Indians on home properties, and if so, whether any action can be taken to provide additional security for the Indians where the amount of the loan obtained by the home owner is less than the amount of the note and mortgage outstanding.

The Home Owners' Loan Corporation was created by the act of June 13, 1933 (48 Stat. 128), for the purpose of affording relief to distressed home owners by providing a method for refunding or refinancing pressing mortgage indebtedness against their homes. The Corporation has a capital stock of \$200,000,000 fully subscribed by the United States, and is authorized to issue bonds up to \$2,000,000,000 to carry out the objects for which it was created. The plans of the Corporation provide for the exchange of its bonds in the acquisition of first mortgages on homes and also for the making of loans in cash in certain cases, but with the latter we are not here concerned. Where bonds are taken, the amount is limited to 80% of the appraised value of the property involved and the rate of interest paid by the home owner will not exceed 5 per cent. The consent of the owner of the existing mortgage to take bonds of the Corporation in consideration of the release of all his claims against the property is, of course, required. The bonds draw interest at the rate of 4% payable semi-annually and mature in 18 years, but are callable at par by lot on any interest date. The bonds are guaranteed fully and unconditionally as to interest only by the Government of the United States. They are acceptable at face value in payment of indebtedness due to the Home Owners' Loan Corporation and are exempt as to both principal and interest from all Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). The bonds are the direct obligation of the Home Owners' Loan Corporation, and the fixed assets supporting the bonds will consist of the first mortgages acquired by the Corporation, including those acquired in consideration of loans made in cash provided by the issuance of capital stock and those acquired through the exchange of bonds. The Corporation plans to retire bonds as payments of principal on loans are made and the loans satisfied.

The question presented by the present inquiry has arisen, it appears, in connection with an application made by one O. L. Barlow for a loan from the Home Owners' Loan Corporation of a sufficient amount to satisfy a mortgage now held by the Superintendent of the Osage Indian Agency for the benefit of the estate of Wiley (Wally) Whitewing, deceased Osage allottee No. 686. The mortgage was given to secure the payment of a note in the amount of \$6,000, dated October 23, 1924, due October 23, 1929, with interest at 7% payable semi-annually. The loan was made from funds in the hands of the legal guardian of Wiley Whitewing and the funds were apparently unrestricted at that time. However, the restrictions upon such funds in the hands of legal guardians, or the property into which such funds may have been invested, appear to have been reimposed by certain provisions contained in the act of February 27, 1925 (43 Stat. 1008). See *Hickey v. United States* (64 Fed. 2d, 628). Accordingly,

the United States District Court for the Northern District of Oklahoma, in the case of *United States v. Bennett*, No. 1721 Law, handed down a judgment on May 18, 1933, holding that the note and mortgage under consideration, together with certain other securities, were subject to the jurisdiction of the Secretary of the Interior. The Court found, among other things—

That the said judgment property and notes and mortgages are hereby declared subject to the jurisdiction and control of the Secretary of the Interior for the use and benefit of the said heirs of Wally Whitewing, deceased, to be administered by him in accordance with law.

The existing mortgage covers improved property owned by Mr. Barlow in the town of Hominy, Oklahoma, and there is now due thereon the sum of \$7,890, including interest to October 11, 1933. The record does not disclose the present appraised value of the property, but the Superintendent of the Osage Indian Agency reports that he does not believe that the "Indians will ever realize a sufficient sum from the security to enable them to come out whole on this loan." The Indian heirs of Wiley Whitewing have given their written consent to take the bonds of the Home Owners' Loan Corporation and in consideration therefor to release all their claims against Mr. Barlow's property.

Regarding the question generally of the authority of the Secretary of the Interior to invest the restricted funds of members of the Osage Tribe of Indians in bonds of the Home Owners' Loan Corporation, it may be pointed out that the moneys belonging to these Indians are derived from leases of the minerals, chiefly oil and gas, underlying their reservation, which were reserved to the tribe in common by the act of June 28, 1906 (34 Stat. 539). That act directed, among other things, that the income from the mineral and other tribal sources should be paid quarterly *pro rata* to the members of the tribe as shown by a final roll made and approved under the provisions of the act. By the act of March 3, 1921 (41 Stat. 1249), however, Congress placed the members on quarterly allowances (\$1000 for adults and \$500 for minors) and directed that the remainder of the share of each member, commonly called the "surplus" be invested and conserved for his future benefit. Section 1 of the act of February 27, 1925 (43 Stat. 1008), increased the quarterly allowances for minors between the ages of 18 and 21 and broadened the scope of the authority of the Secretary of the Interior with respect to the expenditure and investment of the surplus. The latter provision being of most importance here, it is quoted in full below:

The Secretary of the Interior shall invest the remainder, after paying the taxes of such members, in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per centum of the appraised value of such real estate, and where the member is a resident of

Oklahoma such investment shall be in loans on Oklahoma real estate, stock in Oklahoma building and loan associations, livestock, or deposit the same in banks in Oklahoma, or expend the same for the benefit of such member, such expenditures, investments, and deposits to be made under such restrictions, rules, and regulations as he may prescribe: *Provided*, That the Secretary of the Interior shall not make any investment for an adult member without first securing the approval of such member of such investment.

It will be observed that the foregoing provision specifically enumerates the forms of investment which the Secretary of the Interior is authorized to make from the funds of these Indians. The bonds issued by the Home Owners' Loan Corporation are not mentioned, nor can they be regarded as included within any of the forms of investment enumerated. They are not United States bonds, but are direct obligations of the Corporation, the liability of the United States extending only to a guarantee of the interest, with no responsibility whatever towards the principal. They can not be brought within the authority of the statute by regarding them as a form of first mortgage real estate investment. It is true that the Corporation takes first mortgages from the home owners, which are in a sense security for the bond issue. But the amount advanced by the Corporation exceeds by 30% the limit fixed by Congress for loans from Indian funds. Furthermore, the act of 1925 contemplates direct investments of the Indians' funds in first mortgage real estate loans. The loans made by the Corporation represent investments by it rather than by the bondholders, and the notes and mortgages taken by the Corporation are the media through which it expects to raise the funds necessary to retire the bonds. Obviously, therefore, the act of 1925 contains no authority for the investment of the funds belonging to restricted Osage Indians in the bonds of the Home Owners' Loan Corporation.

Regarding the exchange of the Corporation's bonds for an existing first mortgage investment, it may be said that the substitution of an unauthorized investment for an authorized one can not be justified where the existing authorized investment is safely secured, but where the security is impaired to the extent that the Indians face a certain loss, their manifest interests would appear to demand that such measures as may be available be taken to avoid or mitigate the loss. As the guardian of the Indian wards in the administration of their affairs, the Secretary of the Interior is charged with the duty of protecting their interests and promoting their welfare, and this duty would appear to draw to it the power and authority necessary to take appropriate action in such perilous cases. The facts in connection with the Barlow mortgage are not sufficiently stated to enable me to determine with certainty whether the case is one in which the acceptance of the bonds of the Home Owners' Loan Corporation is justified as a measure essential to the protection of the

interests of the Indians. If upon further investigation it develops that such is the situation, the bonds of the Corporation may be accepted, otherwise not. It is difficult to see, however, how the proposed exchange could improve the position of the Indians, since not more than 80% of the value of the property could be acquired in such bonds. We are here dealing with trust funds, and we are not permitted to release any portion thereof without an adequate return. The existing mortgage is security for 100% of the loan if the property has that value. If it is good for only a portion of the debt, the Indians are entitled to its full value rather than 80% of the value as proposed in the exchange.

The further question as to whether any action can be taken to provide additional security for the Indians where the amount of the loan obtained by the home owner is less than the amount of the outstanding note and mortgage cannot well be answered without having before me a concrete case with a statement of the facts showing the amounts involved, the appraised value of the property, the status of the borrower as a moral risk and his earning power, and the kind of security he is able to furnish. I shall be pleased to consider this question further upon presentation of such a concrete case.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

MEASURE OF DAMAGE IN TIMBER TRESPASS CASES

INSTRUCTIONS

[Circular No. 1317]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D.C., December 9, 1933.

THE SECRETARY OF THE INTERIOR:

Circular No. 881, approved by the Department March 14, 1923 (49 L.D. 484) directs that thereafter in timber trespass cases the law of the State in which the trespass is committed shall fix the measure of damage therefor. In the absence of State law, the amount of liability is fixed by the rules of the Supreme Court of the United States in the case of *Wooden-ware Company v. United States* (106 U.S. 432).

The State laws relating to innocent timber trespass have generally been construed to fix the liability of an innocent trespasser and the liability of an innocent purchaser from an innocent trespasser, and such laws relating to wilful timber trespass have generally been construed to fix the liability of a wilful trespasser and the liability of a wilful purchaser from a wilful trespasser.

Heretofore this office has held that the liability of an innocent purchaser from a wilful trespasser is not governed by State laws, which laws do not in terms refer to purchasers, but is fixed by Rule 3 of the rules set forth in the Wooden-ware decision. However, upon careful consideration of the applicable laws and decisions, this office is of the opinion that such holding is not correct, and that where the State law prescribing the penalty for wilful trespass may be construed to fix the liability of a wilful purchaser, such law should be held to also fix the liability of an innocent purchaser.

The liability of an innocent purchaser from a wilful trespasser under Rule 3 of the rules in the Wooden-ware decision is the amount which he pays for the timber. This frequently includes the cost of delivery to distant points. The penalties usually prescribed by State law are single damages for innocent trespass and double damages for wilful trespass. In Oregon the penalty is double damages for innocent trespass and treble damages for wilful trespass (Secs. 5-306 and 5-307, Oregon Code 1930, amended, 1931). Such penalties may be much less than the amount of the liability of an innocent purchaser from a wilful trespasser under Rule 3 of the Wooden-ware decision. It seems illogical and unjust that in any case an innocent purchaser from a wilful trespasser should be held liable to the Government for a greater sum than the penalty prescribed by the State law for the wilful trespass.

Accordingly, it is recommended that hereafter in timber trespass cases where demand for settlement is made on an innocent purchaser from a wilful trespasser, and the State law prescribing the penalty for wilful trespass may be construed to fix the liability of a wilful purchaser, such law shall be held to also fix the liability of the innocent purchaser.

FRED W. JOHNSON,
Commissioner.

Approved, Dec. 13, 1933.

T. A. WALTERS,
First Assistant Secretary.

**OIL AND GAS REGULATIONS AMENDED—FORM OF PERMIT
REVISED—CIRCULAR NO. 1111 MODIFIED**

[Circular No. 1816]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., January 5, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

The form of prospecting permit prescribed by Section 6 of the oil and gas regulations, Circular No. 672 (47 L.D. 437), as revised

in April, 1932 (Form 4-208b) is hereby amended by changing paragraph No. 7 thereof to read as follows:

7. As to any lands covered by this permit within the area of any Government reclamation project or in proximity thereto, take such precautions as required by the Secretary to prevent any injury to lands susceptible of irrigation under such project or to the water supply thereof: *Provided*, That drilling is prohibited upon any constructed works or right of way of the Bureau of Reclamation, and provided further, that there is reserved to the United States, its successors and assigns, the superior right at all times to construct and operate and maintain reclamation works in which construction, operation, and maintenance, the United States, its successors and assigns, shall have the right to use any or all of the lands herein described without making compensation therefor, and shall not be responsible for any damage resulting from such construction or operation and maintenance, including damage from the presence of water thereon or on account of ordinary, extraordinary, unexpected or unprecedented floods; and nothing shall be done under this permit to increase the cost of or interfere in any manner with the construction or operation and maintenance of such works.

Until the supply of permit forms now on hand is exhausted, only permits for lands any part of which is within a reclamation project will be issued on the amended form.

Circular No. 1111, approved February 21, 1927 (52 L.D. 40) is hereby modified to provide that the bond required thereby where any part of the land embraced in the permit constitutes a portion of a reclamation project will not be required prior to issuance of the permit, nor until the permittee shall give notice to the oil and gas supervisor of his intention to drill and submit his drilling plan for approval together with the \$5,000 drilling bond. Such drilling bond may be also conditioned on the protection of the reclamation project, or an additional bond may be required of the permittee in such amount as determined to be necessary for the purpose of the bond.

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

FRED W. JOHNSON, *Commissioner*.

I concur:

W. C. MENDENHALL,

Director Geological Survey.

Approved,

F. A. WALTERS,

First Assistant Secretary.

CHARLES B. STILLMAN

Opinion, January 8, 1934

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CLAIM FOR DAMAGE TO PROPERTY—ACT OF DECEMBER 28, 1922.

Under the terms of the Act of December 28, 1922 (42 Stat. 1066), an injury is compensable only if it was caused by the negligence of an officer or

employee of the United States while acting within the scope of his employment.

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—CLAIM FOR DAMAGE TO PROPERTY—ACT OF DECEMBER 28, 1922—ESSENTIALS TO A RECOVERY OF DAMAGES UNDER ACT.

In order to warrant a recovery of damages under the Act of December 28, 1922, it must be established that there was a breach of duty which was the efficient cause of the accident resulting in damage, and that the claimant himself did not neglect any duty which, if performed, would have prevented the accident.

NATIONAL PARKS, BUILDINGS AND RESERVATIONS—AUTOMOBILE DRIVERS' RESPONSIBILITIES.

A motorist following another vehicle along the highway must keep his automobile under such control and at such a distance behind the leading vehicle as will enable him to cope with the exigencies of ordinary travel.

MARGOLD, *Solicitor*:

A claim has been filed with the office of National Parks, Buildings and Reservations by Charles B. Stillman in the total sum of \$136.65, on account of property damage alleged to have been sustained by the claimant in an automobile accident in Glacier National Park on August 24, 1933.

The injury is compensable only if it was caused by the negligence of an officer or employee of the United States while acting within the scope of his employment. Act of December 28, 1922 (42 Stat. 1066).

It is not disputed that on August 24, 1933, at about 9 o'clock, a.m., in Glacier National Park, an automobile owned and operated by the claimant was damaged in a collision with a motor truck owned by the United States, and then and there operated by an employee of the United States acting within the scope of his employment. Each driver, however, denies negligence on his part and alleges that the accident was caused by negligence of the other.

On the morning in question a Government dump truck and the claimant's passenger sedan were proceeding in the same direction along a highway in Glacier National Park between Avalanche Camp and Lake MacDonald Hotel. The claimant thus describes the situation: "I overtook the road maintenance truck and followed it for a mile, both of us traveling about twenty miles an hour." Rain was falling and the highway was slippery. Attached to the rear of the sedan was a loaded trailer. Upon a straight section of the road intervening between two curves, the driver of the truck decreased his speed to allow a workman to alight. He did not know that a car was following him and gave no warning before decreasing speed. The truck had decreased its speed from 20 miles per hour to 5 or 8 miles per hour when it was struck from the rear with considerable

force by the claimant's car. The claimant says that he became aware that the truck was diminishing its speed "while there was still distance enough between us to give a chance for me to stop in time." He tried to stop, but the combined momentum of car and trailer caused the sedan to skid on the wet road and strike the still moving truck. Only the passenger vehicle was damaged. It does not appear how far to the rear of the truck the sedan had been traveling, or how much that distance was shortened before the claimant observed that the truck was slowing down.

If the claimant is to recover it must appear that a breach of duty by the truck driver was the efficient cause of the accident and also that the claimant himself did not neglect any duty which, if performed, would have prevented the accident. *Swedman v. Standard Oil Co.*, 125 So. 481 (La. App. 1929); *Knudson v. Bockwinkle*, 120 Wash. 527, 208 Pac. 59 (1922); See *Little v. Hackett*, 116 U.S. 366, 371 (1885).

The relative duties of drivers proceeding in the same direction along a highway have been stated judicially:

When two automobiles are being driven along a public road in the same direction, the relative duties the one owes to the other are to be governed somewhat by the circumstances of the particular case. The driver of the front car owes no duty to the rear or trailing car except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume, either that there is no other automobile in close proximity to his rear, or that, being there, it is under such control as not to interfere with his free use of the road in front of and to the side of him in any lawful manner.

* * * * *

"Where two automobiles are traveling the public road in the same direction, the one ahead has the superior right, * * *

It is the duty of a driver operating an automobile, upon approaching another automobile from the rear, while both cars are traveling in the same direction, to exercise a greater degree of care. He must look out for the man ahead, realizing that the man ahead is engaged in handling a high-power, dangerous machine, requiring constant attention and quick action, and that his lookout is ahead, and not behind. He must have his machine well in hand to avoid doing injury to the car ahead, so long as the man ahead is driving in accordance with his rights. *Government Street Lumber Co. v. Ollinger*, 94 So. 177, 180 (Ala. App. 1922):

So great is the responsibility which the law imposes upon the following motorist that the mere fact of collision with a moving vehicle ahead is accepted as evidence—subject to rebuttal, of course—that the rear car was following more closely than ordinary care would allow. See *Woolner v. Perry*, 265 Mass. 74, 77, 163 N.E. 750, 751 (1928); *Gornstein v. Priver*, 221 Pac. 396, 399 (Cal. App., 1923). The sole exculpatory circumstance alleged by the claimant in the present case is that the leading vehicle slowed down without warning.

The claimant is not on this account blameless. No traffic regulation required that warning be given by the truck driver. The decrease in speed from 20 miles per hour to 5 miles per hour was not great nor could it have been very sudden since it was accomplished without causing the heavy truck to skid. Such conduct by the driver ahead is an exigency of ordinary travel which the driver behind may reasonably be required to take into account in regulating the distance between the two vehicles. Moreover, in the present case peculiar circumstances place a particular burden upon the claimant. The trailer increased the momentum of his vehicle without compensating increase of braking power. Indeed, the slippery road caused a substantial loss of normal braking power. The inference is unavoidable that immediately before the accident the claimant was not observing the road ahead or else that he was following the truck more closely than prudence under the circumstances would permit. His own contributory negligence defeats his claim.

The claim is rejected.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

COAL PROSPECTING PERMITS AND LEASES—WHEN ADVISABLE TO WITHHOLD—AMENDMENT OF REGULATIONS

DEPARTMENT OF THE INTERIOR,
Washington, D.C., January 24, 1934.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

I have before me your memorandum of January 9, and related correspondence, concerning the advisability of withholding new leases of coal lands of the United States.

In section 2 of the leasing act of February 25, 1920 (41 Stat. 437), it is provided—

That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal * * * owned by the United States * * * into leasing tracts. * * * and thereafter the Secretary of the Interior shall, *in his discretion*, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon * * *

It is further provided in said section of the leasing act that where prospecting or exploratory work is necessary "the Secretary of the Interior *may* issue * * * prospecting permits * * *"

It is thus clear that it is discretionary with the Secretary of the Interior whether he shall issue coal leases and coal prospecting per-

mits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the operation of the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained.

In the Coal Land Regulations under the leasing act (Circular No. 679, 47 L.D. 489), it is prescribed that any person, association of persons, or corporation applying for a coal lease shall submit a "statement of the general situation of the land with respect to other mines, its topography, outlet to market, and transportation facilities." The information thus acquired serves to show, in a measure, whether there will be any market for the coal to be mined. In numerous cases the Director of the Geological Survey has recommended that you call upon lease applicants to show why they should not accept leases for reduced acreages. It is advisable that you in the first instance require lease applicants to show fully the need for additional production of coal.

The regulations do not require any similar showing from applicants for coal prospecting permits. But it is essential that information of the same kind be required of them.

Hereafter in considering applications for coal leases by competitive bidding and for prospecting permits you will recommend the issuance of leases and prospecting permits only in cases where you are satisfied that there is actual need for coal which cannot otherwise be reasonably met. When applications for lease are filed pursuant to discovery of coal in commercial quantities on lands embraced in coal prospecting permits, leases cannot be denied, but it may be possible in many cases to hold down such leases to minimum areas. Instructions are also being given to the Director of the Geological Survey as to the action to be taken on applications for coal leases and for prospecting permits.

HAROLD L. ICKES,
Secretary of the Interior.

[Note: Instructions of the Commissioner of the General Land Office (Circular 1318) to field officers follow.]

INSTRUCTIONS

[Circular No. 1318]

GENERAL LAND OFFICE,
Washington, D.C., February 1, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

January 24, 1934, the Secretary of the Interior issued certain instructions concerning applications for coal leases by competitive bidding and applications for prospecting permits and directed that favorable recommendations for the issuance of leases and prospecting permits be made only in cases where a satisfactory showing is made that there is actual need for coal which cannot otherwise be reasonably met.

Attention is directed to that part of the coal leasing regulations, paragraph 9 of Circular 679, which requires that any person, association of persons, or corporation applying for a coal lease shall submit a statement of the general situation of the land with respect to other mines, its topography, outlet to market and transportation facilities.

Many applications for coal leases are received in this office which do not contain a statement in accord with the above, and it has been found for various causes that many of the present lessees are unable to comply with the minimum tonnage required by their leases, and numerous requests are made for relief under this requirement, as well as relief in the matter of payment of annual rental.

In cases hereafter, this office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.

Since coal prospecting permits are issued for the express purpose of determining the extent and workability of the coal deposits with a view to granting a preference right mining lease if and when it has been demonstrated that a commercial deposit of coal has been discovered, it is essential that permit applicants furnish, as pertinent to section 22-D of the regulations, similar information.

Therefore, in the future, when a petition for a lease or an application for a permit is filed, you will examine the papers filed and if the showing furnished with regard to the matters outlined herein is not deemed sufficient, you will require additional evidence.

You will, therefore, as far as possible, in advising the public with regard to coal leases and permits, and in explaining to inquirers the provisions of the coal leasing circular emphasize the matters stated above.

FRED W. JOHNSON, *Commissioner.*

GRAZING DISTRICTS UPON PUBLIC LANDS

Opinion, January 25, 1934

PUBLIC LANDS—EXECUTIVE POWER OF WITHDRAWAL—SOURCES OF AUTHORITY—ACT OF JUNE 25, 1910.

The power of the Executive to withdraw public lands from private acquisition antedates and is independent of the Act of June 25, 1910 (36 Stat. 847) or any other statutory grant of withdrawal power. (Citing *United States v. Midwest Oil Company*, 236 U.S. 459.)

PUBLIC LANDS—WITHDRAWAL FOR GRAZING DISTRICT—ACT OF DECEMBER 29, 1916.

A withdrawal of public lands for the purpose of reserving them for use as federally regulated grazing lands is a withdrawal for a public purpose, and is analogous to a withdrawal under Section 10 of the Act of December 29, 1916 (39 Stat. 862), to provide for stock-raising homesteads.

PUBLIC LANDS—WITHDRAWAL ORDER—EXCEPTIONS TO ORDER—PERSONS NOT ENTITLED TO EXEMPTION.

Persons whose use of public lands rests merely upon the sufferance of the United States do not come within the purview of the exception contained in an order of withdrawal that it shall be subject "to all valid existing rights", the sole "right" of those so using the lands being to graze stock thereon at the sufferance of the United States.

PUBLIC LANDS—APPROPRIATION FOR A PUBLIC PURPOSE—EFFECT—JUDICIAL DETERMINATION.

The Federal courts have repeatedly held that an appropriation of public lands for a public purpose by proper Executive withdrawal prevents their further use by private persons for any purpose which is in conflict with the purpose for which the withdrawal was made.

PUBLIC LANDS—REGULATION OF GRAZING—AUTHORITY OF SECRETARY OF THE INTERIOR.

Specific legislative authorization for regulation by the Secretary of the Interior of grazing upon public lands withdrawn for a Federal grazing district is not necessary, his designation in the Executive order being sufficient. Such designation is consonant with the Secretary's general jurisdiction over the public lands of the United States; and by virtue of this general authority he may prescribe such rules and regulations as are necessary to effectuate the purposes for which the withdrawal and reservation are made.

PUBLIC LANDS—AUTHORITY OF DEPARTMENT RULES AND REGULATIONS—JUDICIAL RECOGNITION.

Rules and regulations whose sole statutory basis is Section 1201 of Title 413 of the United States Code have been given judicial sanction by the Supreme Court.

MARGOLD, *Solicitor*:

Relative to the proposed Executive order for Public Grazing Withdrawal No. 4, Utah, you have requested my opinion as to the legal authority to create grazing districts upon public lands by exercising the Executive withdrawal power and to prescribe Executive regulations governing grazing in districts so created.

It is my opinion that there is legal authority for the creation of grazing districts upon public lands by Executive withdrawal of the lands involved from settlement, location, sale, or entry for the purpose of reserving the lands for federally regulated grazing, and that there is legal authority for Executive regulation of grazing upon the lands so withdrawn.

I

The proposed Executive order recites its authority as derived from the act of June 25, 1910 (36 Stat. 847). Since, however, the Executive power of withdrawal derives from general nonstatutory sources as well as from statutory sources, I suggest that the order be changed to read as follows:

By virtue of the authority vested in me as President of the United States and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to all valid existing rights, it is hereby ordered that the land hereinafter listed in so far as title thereto remains in the United States be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for classification, in aid of legislation, for conservation and development of natural resources and for use as grazing land in accordance with such rules and regulations as may be prescribed by the Secretary of the Interior.

The leading case of *United States v. Midwest Oil Company* (1915) (236 U.S. 459, 471, 483), definitely recognized the existence, independent of statutory grant, of the President's power to order withdrawal of public lands from private acquisition. This case involved the validity of "Temporary Petroleum Withdrawal No. 5," proclaimed by the President on September 27, 1909. Subsequent to its proclamation and before the *Midwest Oil Company* case, the President's power in the premises was questioned; and in a message to Congress the President called attention to the existence of the doubt and suggested the desirability of legislation expressly granting the power and ratifying what he had already done. There resulted the act of June 25, 1910 (36 Stat. 847). In the *Midwest Oil Company* case, however, the court held that, as to the 1909 withdrawal, "The act left the rights of parties in the position of these appellees, to be determined by the state of the law when the proclamation was issued." This express holding on the effect of the act of 1910 definitely limited the court's decision to determination of the withdrawal power vested in the President independent of statute.

On the question of the President's nonstatutory withdrawal power the court concluded: "As heretofore pointed out the long-continued practice, the acquiescence of Congress, as well as the decisions of

the courts, all show that the President had the power to make the order." Mr. Justice Lamar's opinion for the court described exhaustively the long-continued administrative practice, in which "there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory purposes." The opinion pointed out that not one of those withdrawals was disaffirmed by Congress, that in many instances Congress enacted legislation in assistance of the purposes for which withdrawals were made, and that not one of those withdrawals was declared invalid by the courts. The holding in this case, after the exhaustive consideration of the question by the court, established with certainty in constitutional law the Executive's withdrawal power, independent of statute.

The Midwest Oil Company case was followed in *Mason v. United States* (1923) (260 U.S. 545, 553), in which a 1908 Executive order withdrawing certain lands in Louisiana was upheld. Mr. Justice Sutherland, in his opinion for a unanimous court: stated:

Whatever legitimate doubts existed at the time of the locations respecting the validity of the executive order, were resolved by the subsequent decision of this Court in *United States v. Midwest Oil Co.*, 236 U.S. 459, where it was held that a similar order, issued in 1909, was within the power of the executive. Upon the authority of that case the order here in question must be held valid.

The Executive power of withdrawal, both under the act of 1910 and under the state of law existing prior to that act, has been recognized in several United States Supreme Court cases: *United States v. Wilbur* (283 U.S. 414, 419); *Sinclair v. United States* (279 U.S. 263, 285); *Kinney Coastal Oil Co. v. Kieffer* (277 U.S. 488, 490).

Among the many decisions in the lower Federal courts sanctioning the Executive withdrawal power, *Shaw v. Work* (9 Fed. 2d, 1014, 1015), certiorari denied (270 U.S. 642), is outstanding. There it was held that under the act of 1910 the President could withdraw public lands for purposes which by provision of the same statute could be accomplished only by means of legislation, and that such a withdrawal remained effective notwithstanding the failure in Congress of the necessary legislation.

The decisions referred to above show definite judicial sanction of the Executive power of withdrawal, whether its basis be nonstatutory or statutory.

Section 1 of the act of 1910 provides:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including 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.

The statutory enumeration of certain purposes for reservation is followed by the omnibus clause, "or for other public purposes to be specified in the orders of withdrawals"; so that the statute may properly be construed as declaratory of the general nonstatutory power. An Executive order withdrawing public lands for any public purpose may, therefore, with legal propriety, rely for authority upon both the nonstatutory and the statutory powers.

It can not be questioned that withdrawal of public lands for the purpose of reserving them for use as federally regulated grazing lands is a withdrawal for a public purpose. Congressional determination supports this conclusion. Section 10 of the act of December 29, 1916 (39 Stat. 862), "an act to provide for stockraising homesteads, and for other purposes," provides:

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe; *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands.

I have made particular reference herein to the proposed order's purpose of creating a grazing district because the second question herein considered is concerned with regulations of the use of the withdrawn lands for grazing. The other purposes expressed in the proposed order are expressly recognized in the act of 1910 or may be included in the act's omnibus phrase, "other public purposes."

Although the act of 1910 makes certain exceptions to the effect of withdrawals, and although the proposed order subjects the withdrawal "to all valid existing rights", neither the statute nor the order would protect against the withdrawal's effect those who are using the lands involved for grazing stock, at the sufferance of the landowner, the United States.

Protection under section 2 of the act of 1910 would not be available, unless the lands for which protection was claimed were at the date of the 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" (36 Stat. 847, 848). Nor would mere use of the lands for grazing, at the sufferance of the United States, be sufficient to establish a "valid existing right" to which the proposed withdrawal is declared subject. The only right of those so using the

lands is to graze stock upon the land so long as the United States suffers them to do so. *Buford v. Houtz* (133 U.S. 320). The proposed withdrawal order would terminate the sufferance. There is direct authority for this position in *Omahevarria v. Idaho* (246 U.S. 343, 352), which held constitutional an Idaho statute that regulated the United States public lands located in Idaho as between those grazing cattle thereon and those grazing sheep thereon. In affirming the Idaho Supreme Court decision upholding the act against objections made by sheep owners, Mr. Justice Brandeis stated in his opinion for the court:

This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used. *Buford v. Houtz, supra*. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom, *United States v. Grimaud*, 220 U.S. 506; *Light v. United States*, 220 U.S. 523.

The proposed withdrawal order necessarily would terminate the sufferance by the United States of the present grazing upon its public lands. The proposed withdrawal derives its authority under the act of 1910 from any one or a combination of the purposes expressed in the proposed order, *i. e.*, "for classification" and "in aid of legislation." The Federal courts have repeatedly held that an appropriation of public lands for a public purpose by proper governmental action prevents the further use of the withdrawn lands by private persons for any purpose which is in conflict with the purpose for which the withdrawal was made. Case law supports this position. *United States v. Tygh Valley Land & Livestock Co.* (76 Fed. 693); *Shannon v. United States* (160 Fed. 870); (grazing on lands appropriated for a specified public purpose deemed inconsistent with the purpose, and therefore unlawful and subject to being restrained, notwithstanding *Buford v. Houtz*, 133 U. S. 320); *Scott v. Carew* (196 U.S. 100); *United States v. Hodges* (218 Fed. 87); *Stockley v. United States* (271 Fed. 632).

Examination of the pertinent case law and statute law makes it clear that the President has the power to make the proposed withdrawal order, and that the order would be effective to terminate the unregulated grazing on the public lands involved.

II

There is no specific legislative authorization for the Secretary of the Interior's regulation of Federal grazing districts, but specific legislative authorization is not needed. The proposed order's desig-

nation of the Secretary of the Interior as the official to regulate grazing upon the lands withdrawn clearly places the lands under his jurisdiction; and this designation of jurisdiction or regulatory authority is consonant with the Secretary's "general powers over the public lands as guardian of the people." And, having jurisdiction over the land withdrawn, the Secretary of the Interior, by virtue of his general authority, may prescribe such rules and regulations as are necessary to effectuate the public purposes for which the withdrawal and reservation are made.

There is a general statutory authorization of appropriate regulation by the Secretary of the Interior in the execution of those land laws not otherwise specially provided for. In Title 43 of the United States Code (which contains the public land laws, including the act of 1910 relied upon in the proposed order), section 1201 provides:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Rules and regulations which had no statutory basis of authority other than the section set forth above have been given judicial sanction by the Supreme Court of the United States. *Caha v. United States* (152 U.S. 211, 216); *Roughton v. Knight* (219 U.S. 537).

When the general authorization of Executive regulation (R.S. 2478, 43 U.S.C. 1201) is considered in the light of the withdrawal power granted in the act of 1910 (36 Stat. 847, 43 U.S.C. 141) and elaborated in section 10 of the Stock-raising Homestead act of December 29, 1916 (39 Stat. 862, 43 U.S.C. 300) the inevitable conclusion is that the Secretary of the Interior has legislative authority to prescribe such regulations for public lands withdrawn under the act of 1910 as are necessary and proper to effectuate the public purposes of the withdrawals.

This conclusion is borne out by judicial pronouncements of the general powers of the Secretary of the Interior over the public lands. *Williams v. United States* (138 U.S. 514, 524); *United States v. Wilbur* (283 U.S. 414, 419).

Finally, since effective exercise of the well-established Executive withdrawal power requires the concomitant power to regulate for the purposes for which the withdrawn lands are reserved, policy favors the legal conclusion I have reached.

Approved:

T. A. WALTERS,

First Assistant Secretary.

LANDS OF PAPAGO INDIANS

Opinion, March 7, 1934

PAPAGO INDIAN LANDS—TITLE—PROPRIETORSHIP OF THE UNITED STATES—INDIAN RIGHT OF OCCUPANCY—RIGHT TO MINERALS.

Held, That under dominion of Spain and Mexico the Papago Indians did not have title in fee to the lands they occupied; that in 1853, through the Gadsden Purchase, the United States acquired title to these lands, subject to an Indian right of occupancy of an area not exactly determined; that no interest in minerals was accessory or incidental to whatever surface rights the Indians may have enjoyed; that complete and unincumbered title to minerals in the land was formerly vested in the Mexican State and passed to the United States upon cession of the territory; that the appropriate manner of protecting the Papagos in their possession is a matter exclusively of political cognizance.

INDIANS AND INDIAN LANDS—JURISDICTION AND OWNERSHIP RESULTING FROM DISCOVERY—TITLE TO SPANISH AND MEXICAN LANDS—SUCCESSORSHIP.

It was accepted legal theory of the European nations which colonized America that upon discovery of any new lands complete jurisdiction and ownership became vested in the sovereign to whom the discoverer owed allegiance, from which it follows that all rights or titles to lands once a part of Mexico, vested in private persons, severally or in groups, must derive their legal character from the Spanish crown or succeeding proprietors.

PAPAGO INDIAN LANDS—LAW GOVERNING LAND TITLES.

Spanish and Mexican law are decisive of the question of the title under which the lands of the Papago Indians are held.

INDIANS AND INDIAN LANDS—NATURE OF GRANT BY SPANISH CROWN.

The numerous decrees of the monarchs of Spain protecting Indians in their occupation of lands are not in effect a grant of complete title to Indian communities in possession generally.

PAPAGO INDIAN LANDS—TITLE BY COMMUNITY OWNERSHIP—REQUISITES.

A claim of tribal ownership of a large land area cannot be established without a fixing of boundaries, and ownership by village communities can be established only if such communities can be defined.

INDIAN LANDS—TITLE—UNITED STATES COURTS—CONFIRMATION OF GRANTS MADE BY SPANISH OFFICERS.

By confirming the acts of Spanish officers in granting lands which were in Indian possession, United States courts, Federal and State, have accorded recognition to the doctrine that title to lands held by Indians in Mexico was not a fee simple title.

PAPAGO INDIAN LANDS—OWNERSHIP OF MINERALS BY THE SPANISH CROWN—SUCCESSORSHIP BY THE UNITED STATES.

Since the cession to the United States of the territory which embraces the Papago lands, the courts in this country have recognized the ownership of mines by Spain and Mexico before the cession as well as the succession of the United States to that ownership; and the Supreme Court has stated expressly that under Spanish law minerals in Indian lands were the property of the Crown; also the Executive and Legislative branches of the Federal Government have likewise recognized the succession of the Federal

Government to the ownership of mines in what was formerly Spanish and Mexican territory.

INDIANS AND INDIAN LANDS—SPANISH LAWS—INCOMPATIBILITY WITH RECOGNITION OF ULTIMATE TITLE.

Certain laws of the Spanish regime are incompatible with recognition of ultimate title in the Indians, as, for instance, the law (Law 23, Book 4, Title 7, "Compilation of the Indies") permitting Spaniards to make new settlements in Indian territory, peaceably, if possible, but otherwise if necessary.

PAPAGO INDIAN LANDS—EXECUTIVE ORDER CREATING RESERVATION—MINERAL DEPOSITS EXCEPTED.

The Executive order of February 1, 1917, reserving lands for the Papago Indians, excepted mineral deposits and provided that the reservation area should be open to entry and location under the mining laws of the United States.

INDIANS AND INDIAN LANDS—PRESCRIPTIVE RIGHT AS AGAINST THE CROWN—FORMAL PROCEDURE ESSENTIAL.

Even if prescriptive right, as against the Crown, resulting from immemorial possession, was recognized by the Spanish law, an appropriate formal procedure was necessary to a complete title. Case of *Carino v. The Insular Government of the Philippine Islands* (212 U.S. 449, 461) distinguished.

MARGOLD, *Solicitor*:

At the suggestion of the Commissioner of Indian Affairs, there has been referred to me for opinion the question of the validity of certain claims of surface and mineral rights asserted by the Indians of the Papago Tribe. These claims embrace an existing Indian reservation of more than two and one-half million acres, and a large amount of adjacent land in southern Arizona. The area is bounded, in a general way, by the Gila River, the Santa Cruz River, the Mexican boundary, and the Growler Mountains. For centuries it has been, and it still is, the home of the Papago Indians.

The Papagos claim that both surface and minerals belong to them in fee by virtue of a title vested in them before the area in question came under the sovereignty of the United States. Therefore, they allege, the land never became part of the public domain of the United States.

In 1853, this territory, then a part of Mexico, was acquired by the United States as a part of the Gadsden Purchase. 10 Stat. 1031 (1854). By Act of July 22, 1854, Congress established the office of Surveyor General of the Territory of New Mexico and placed under the jurisdiction of the Surveyor General the examination of all claims to land asserted under the laws, usages, and customs of Spain and Mexico. Ultimate confirmation and rejection of such claims was made a function of Congress acting upon such report and recommendation as the Surveyor General might make. 10 Stat. 308 (1854). After Arizona became a separate territory, similar legis-

lation was enacted creating the office of Surveyor General of Arizona and defining the duties of that office. 16 Stat. 291 (1870). In 1891 Congress created the Court of Private Land Claims and conferred upon it jurisdiction to hear and adjudicate claims asserted under the Spanish and Mexican law. 26 Stat. 854 (1891). As early as 1874 the President of the United States, by Executive order, set apart a small tract of land within the Papago country, immediately around the old Jesuit Mission and Indian village of San Xavier del Bac, as an Indian reservation. Other comparatively unimportant reservations followed until Executive Order No. 2524, dated February 1, 1917, effected the reservation of more than two million acres in the Papago country for the Indian inhabitants, but excepted mineral deposits and provided that the reservation area be open to entry and location under the mining laws of the United States. Congress recently has added to this reservation a contiguous strip of some three hundred thousand acres with the same exception and provision concerning minerals. 46 Stat. 1202 (1931). From time to time the United States has issued patents to white settlers and miners within the Papago country. It is to be remarked that during all these years of Indian occupancy and of Federal action presupposing the inclusion of the land in question within the public domain, only one instance of formal assertion of Indian title is recorded. In that case the Supreme Court of the United States considered an Indian claim to a particular small area within the Papago country. The litigation was indecisive. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927). Under these circumstances and at this late date, those who assert that the Indians hold fee simple title to this land must bear a substantial burden of persuasion.

A number of surveys and studies have been made of the Papago Indians and the territory they occupy. From such sources it is possible to draw a significant picture of the factual relation between these Indians and the land in controversy. The Geological Survey has published a monograph embodying the results of a recent survey. Bryan, "The Papago Country, Arizona" (1925). Ten years earlier the United States Indian Service, through the agency of H. V. Clotts, assistant engineer, completed a comprehensive survey of the Papago country. Also valuable is an unofficial study by Carl Lumholtz, published in 1912, in his book "New Trails in Mexico." Studies by the Bureau of American Ethnology, official Census reports, and reports of the Secretary of the Interior, the Commissioner of Indian Affairs, the Surveyors General of New Mexico and Arizona and subordinate officials in the Indian Service, complete the picture.

Lumholtz writes the following description :

The Papago Indians of today, the principal natives of the desert, live in Arizona to the west and southwest of Tucson, as far as the Growler Mountains in the west, the Gila River in the north, and the range of Baboquivari in the east. * * * Until recent times they were found as far as the Colorado River. They occupy much the same land as they did when first discovered in the seventeenth century by the Spaniards. The region was early named Papageria, or, in its greater extension, Primeria Alta. It is part of the great arid region called the Sonora Desert. * * *

The greater part of the tribe never could be induced to live in pueblos, or villages, which was always the policy of the Spanish missionary. In spite of the efforts of the Jesuits and Franciscans, the Papagoes are still living in their *rancherias* as of old, half nomadic in habit, resorting in the winter to the sierras where water is more plentiful and where their cattle, horses, mules and donkeys find good grazing ground. In the summer they move to the broad, flat valleys to devote themselves to agriculture which is made possible by the aid of the showers that fall in July and August. (At pp. 16, 25.)

See also Bryan at p. 1; Indians Taxed and Indians Not Taxed in the United States at the 11th Census, 1890 (Dept. of Interior, Census Office, 1894) 142 ff.

The character and location of the Indian communities in the so-called Papageria have been the subject of census. Clotts, Bryan and Lumholtz report the Indian communities in some detail. Clotts describes 62 inhabited villages, aggregating 1,013 houses, with a total population of 5,560 persons and with 9,200 acres under cultivation. Lumholtz, similarly, lists 88 *rancherias*. Bryan devotes more than 150 pages to a description of all traveled routes through the Papageria, and names and describes the scores of inhabited places to be observed along these routes. Earlier reports, apparently not predicated upon any detailed survey, show a much smaller number of communities. Soon after the Gadsden Purchase, Gov. Meriwether, Superintendent *ex officio* of Indian Affairs in New Mexico, reported, "from the most reliable information in my possession", that the Indians within the area of the Gadsden Purchase were concentrated in "six pueblos, or villages", near Tucson. 2 Sen. ex. doc., 34 Cong., 3d sess. (1856-57) 734. The Surveyor General of New Mexico appended to his annual report for the year 1861 a table in which he attempted to include "all the pueblos whether in New Mexico proper or in Arizona." He listed therein 11 "Papago pueblos" located in Arizona, all of them, however, unsurveyed and of unknown area. 1 Sen. ex. doc., 37 Cong., 2d sess. (1861-62) 574, 578, 580, 581. In 1863, Charles D. Poston, the first Superintendent of Indian Affairs in the Territory of Arizona, listed 18 Papago villages within his jurisdiction. 3 H. R. ex. doc. 38 Cong. 1st sess. (1863-64) 503, 504.

The discrepancy between the earlier and later reports seems to reflect both incompleteness of the earlier data and some recent migrations of the Indians.

The primitive condition of Papago society is giving way to the new. * * *

Formerly they lived in large rancherias, but in the last twenty years the tendency has been to scatter. They have been touched by Americanism and are now showing energy in acquiring cattle and other properties. * * * During the last twenty years the tribe has acquired a considerable number of live stock, often 20 cows, and from 10 to 12 horses to a family. Lumboltz, at pp. 363, 364.

Comparison of the recent reports with the older ones confirms the quoted statement. Most of the communities named in the earlier reports appear in the recent ones, but with decreased population. This much seems clear: the life of the Papagos, conditioned by the aridity of the Papaguera, has not been sedentary. It is their habit to make seasonal migrations of some regularity between winter rancherias and summer rancherias. The search for pasturage and water for herds and flocks has necessitated even more extended wanderings than the exigencies of human life in an arid country alone would require. Yet, certain villages have existed for centuries. No survey of any of them seems to have been made at any time during the Spanish or Mexican dominion. Grazing lands throughout the Papaguera seem to have been common to the entire tribe regardless of village affiliations.

From so much as already has been said by way of description, it must be apparent that, at the outset, the proponents of Indian title must face serious difficulties of proof in defining the area claimed and identifying the claimants to that area. Ownership in severalty is not asserted. Ownership by village communities can be established only if such communities can be defined. Moreover, a great part of the Papago country seems not to be part of any village community. A claim of tribal ownership of the entire Papaguera cannot be established without a fixing of boundaries. Certainly, the present arbitrary reservation is less extensive than the area over which the Papagos formerly roamed. The evidence at hand is insufficient for decision upon questions of boundary, but these difficulties of proof deserve mention, at least, before the general law of Indian tenure, and of mines, is considered.

The question of Indian tenure to be decided is this: Must the interest of the Papagos in the land they claim be subordinate to a superior proprietorship in the United States, or can these Indians have a perfected title in fee which precludes the United States from exercising any proprietorship over the land? That the Papagos have long occupied the Papaguera and should be protected in that occupancy, is not disputed. Indeed, the Executive order of February 1, 1917, is a recognition of an obligation which officials in the Indian Service have pointed out repeatedly ever since the annexation of the territory in question. That order, however, confirms and confers surface rights only. The contention now is that at the time of

cession the Papagos had a perfected communal title in fee, no more subject to interference by the Federal Government, whether by creation of a reservation for the occupants, or by alienation of their land or its mineral wealth, than the fee simple title of any individual owner.

Had the land been part of the original territory of the United States, it is clear that the contention advanced on behalf of the Indians would fail. *Spalding v. Chandler*, 160 U.S. 394 (1896); *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831). However, Spanish and Mexican law are decisive of the question here presented.

It was the accepted legal theory of the European nations which colonized America that upon discovery of any new lands complete jurisdiction and ownership, both *imperium* and *dominium*, became vested in the sovereign to whom the discoverer owed allegiance. For a convenient compendium, see "Indian Land Cessions in the United States" (Ethnology Bureau, 1897), H. R. doc. 118, 56 Cong. 1st sess. (1899-1900) 527ff. The King of Spain asserted a twofold claim to the vast area of New Spain and Mexico, predicating his title not alone on the right of discovery, but also upon a grant from the Pope contained in the Papal Bull of 1493. See *Johnson v. McIntosh*, 8 Wheat. 543, 573 (1823); Hall, "Laws of Mexico" (1885), secs. 1, 2; Solorzano, "Politica Indiana," bk. 1, ch. 9, sec. 16; *id.* bk. 6, ch. 12, sec. 3. It follows that all rights or titles vested in private persons, severally or in groups, must derive their legal character from the Spanish Crown or succeeding proprietors.

It is not claimed that a particular grant to the Papago Indians as a tribal group was ever made by Spain. It is contended, however, that the numerous decrees of the Spanish King protecting Indians in their occupation of land are in effect a grant of complete title to Indian communities in possession generally.

The laws governing the disposition of Crown lands in Mexico under the Spanish regime appear principally in title 12 of book 4 of the "Recopilacion of the Indies," and in a few uncompiled royal decrees. Law 14 of book 4, title 12 (apparently issued originally in 1578, but amended or republished in final form in 1591) is a convenient starting point.

Whereas we have fully inherited the dominion of the Indies; and whereas the waste lands and soil which were not granted by the Kings, our predecessors, or by ourselves, or in our name, belong to our patrimony and royal crown, it is expedient that all the land which is held without just and true titles be restored, as belonging to us, in order that we may retain, before all things, all the lands which may appear to us and to our Viceroys, Audiencias and Governors, to be necessary for public squares, liberties (*cevidos*), reservations (*propios*), pastures, and commons, to be granted to the villages and councils already settled, with due regard to their present condition as to their future state, and to the increase they may receive, and after distributing among the Indians whatever they may

justly want to cultivate, sow and raise cattle, confirming to them what they may want besides, all the remaining land may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure. For all this we order and command the Viceroy, Presidents and Pretorial Audiencies, whenever they shall think fit, to appoint a sufficient time for the owners of land to exhibit before them and the ministers of their audiencies, whom they shall appoint for that purpose, the titles to lands, estates, Indian settlements, and *caballerias*, who, after confirming the possession of such as hold the same by virtue of good and legal titles, or by a just prescription, shall restore to us the remainder, to be disposed of according to our pleasure. See Reynolds, "Spanish and Mexican Laws" (1895) 47.

Supplementing this law is a separate decree of the same date, providing that lands occupied without lawful title—which lands are to be restored to the Crown under Law 14, *supra*—"may be admitted to some convenient composition" and thereby confirmed to the possessor, thus providing much needed accessions to the King's revenue. Exceptions are made, including a reservation "to the Indians what may be necessary for them to sow, cultivate and raise stock." Among the lands to be admitted to composition are "*chacaras*" which seem to have been Indian farms or settlements. Unoccupied "*chacaras*" may be conceded to those who present proper petitions. The execution of this decree is entrusted to the Viceroy and the Council of the Indies. Hall, 11, 12. In 1735, another decree made it necessary that grants of Crown lands be confirmed by the King himself. The great inconvenience of this system resulted in the decree of October 15, 1754 (Galvan's "Ordinances on Land and Water") in which formal confirmation was entrusted to local officers and their procedure and jurisdiction defined. Section 2 of that decree provided:

The judges and officers in whom is delegated the jurisdiction over the sale and composition of crown lands shall act with lenity, forbearance and moderation, with verbal and not judicial process, in questions of lands held by Indians, and of others where it may be necessary, and in particular where their farms, farming and stock-raising are in question; since in regard to community lands and those granted their towns for pastures and commons, there is no occasion to do anything new but to maintain them in possession thereof and to restore to them those that have been taken from them and give them more land as the exigencies of the population require, and do not use rigor in regard to those held by Spaniards and people of other castes, keeping in mind the provisions of Laws 14, 15, 17, 18 and 19, Title XII, Book IV, of the Compilation of the Indies. Reynolds, 51.

Without further setting out in detail the text of title 12 of book 4, it seems a fair generalization that the several laws therein protect the Indians in their occupancy without defining any estate. Moreover, it seems a clear implication of Law 14, and of the Ordinance of 1754, that Indian lands are Crown lands and a part of the royal patrimony, the occupancy of which is surrounded by a special protection. This conclusion is supported by inference to be drawn

from other laws of the Indies concerning Indians. In titles 2 and 3 of book 6 appear laws for the assembling of the Indians in villages. Law 23, in book 4, title 7, permits Spaniards to make new settlements in Indian territory, peaceably, if possible, but otherwise "without doing any greater damage than shall be necessary for the protection of the settlements and to remove obstacles to the settlement." Such laws are incompatible with any recognition of ultimate title in the Indians. Again, the several laws with respect to compositions, quoted above, are significant in their reference to Indians. They indicate that occupants without grants from the Crown, whether Indians or Spaniards, remained in possession by sufferance only. Although the Indian occupant enjoyed a particular paternal protection, neither Indian nor Spaniard could obtain title except by formal composition. The Papagos might have perfected their title by formal proceeding, but, failing to do so, they continued in a protected possession subject to the superior title of the Crown.

Our courts have accorded significant recognition to this legal situation by confirming the power of Spanish officers to grant lands while still in the possession of the Indians. *United States v. Fernandez*, 10 Pet. 303 (1836); *Breaux v. Johns*, 4 La. Ann. 141 (1849); cf. *United States v. Arredondo*, 6 Pet. 691 (1832).

It is next contended on behalf of the Indians that even if no grant to them can be proved, lapse of time has resulted in the vesting of perfect title in them.

It has been asserted by the Supreme Court of the United States that prescription as against the Crown was recognized by the Spanish law. See Holmes, J., in *Carino v. The Insular Government of the Philippine Islands*, 212 U.S. 449, 461 (1909); cf. *United States v. Pendell*, 185 U.S. 189 (1902); *United States v. Chavez*, 175 U.S. 509 (1899). But see Field, J., in *Harrison v. Ulrichs*, 39 Fed. 654 (C.C.S.D. Cal., 1889); *Crespin v. United States*, 168 U.S. 208, 218 (1897). But, under Spanish law, the prescriptive right which resulted from immemorial possession seems to have been no more than a privilege of acquiring title by appropriate formal procedure. See Ordinance of October 15, 1754, section 4 (Reynolds, 50): "Novisima Recopilacion," bk. 11, tit. 8, law 4 (2 White, "New Recopilacion," 154); Hall, section 56; *Balanton v. Murciano*, 3 Philippine Reports, 537 (1904). In the *Carino* case, *supra*, where the question was whether the United States should confirm the title of an individual owner based on immemorial possession of a defined tract, no such formal proceeding had ever occurred. The Supreme Court avoided this difficulty by resort to the power of the United States, as a sovereign, to ignore "refined interpretation of an almost forgotten law of Spain," and to "recognize actual fact" in an effort to achieve what the court considered an essentially just result. In contrast; the

present question is essentially a formal one, although its decision must affect substantial claims. But more fundamental distinctions are to be observed: (1) This is a case of Indian tribal occupancy which seems to have been permissive and under royal protection. (2) The tract in question is not clearly defined. (3) The claim is one of communal ownership, whether by tribe or by villages.

This last consideration is decisive in itself. The nature of municipal and communal ownership of land under Spanish law too often has been adjudicated by the Supreme Court any longer to be a subject of controversy. The question has arisen most frequently with respect to the title of Spanish and Mexican pueblos rather than communities or tribes of Indians. Mr. Justice Field has thus described the tenure by which common lands within any community were held:

By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. * * * It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands.

It was not an indefeasible estate, ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasturelands, or as a source of revenue, or for other public purposes. *The right of disposition and use was, in all particulars, subject to the control of the government of the country.* (Emphasis added.) *Townsend v. Greely*, 5 Wall. 326, 336 (U. S. 1866). Accord *United States v. Sandoval*, 167 U.S. 278; 295-298 (1897); *United States v. Santa Fe*, 165 U.S. 675, 707-711 (1897); *Grisor v. McDowell*, 6 Wall. 363, 372-3 (1867); *United States v. Pico*, 5 Wall. 536, 540 (1866); *State v. Gallardo*, 106 Tex. 274, 166 S.W., 369, 372 (1914).

It is clear that the fee to all community land within the limits of any pueblo remained in the sovereign. Lapse of time did not improve the communal title of the group. There is no basis for any contention that the communal title of Indians, whether claimed by villages or by tribe, attained any greater estate. Indeed, in the case of the Papagos, where the greater part of the area involved is grazing land, both within and outside of the limits of particular villages, prescription is further impeded by specific provision of the law of the Indies that pastures are common to all persons. Bk. 4, tit. 17, law 5 (2 White, 56). The Papago claim to ownership in fee under the Spanish and Mexican law, whether based on grant or prescription, must fail.

Other and additional considerations make it clear that the Papagos enjoy no estate in the minerals contained in the land. The Spanish law concerning mines, as it existed from medieval times down to 1783, is conveniently summarized in an opinion of Chief Judge (later Mr. Justice) Field. See *Moore v. Smaaw*, 17 Cal. 199, 213-215 (1861). The modern Spanish and Mexican mining law begins with a complete mining code for Spain and its colonies, issued in 1783 and promulgated in Mexico the next year. For translations, see Hamilton, "Mexican Law" (1882), 235ff.; 1 Rockwell, "A Compilation of Spanish and Mexican Mining Law" (1851), 49 ff. This code, commonly called the Ordinance of 1783, remained authoritative in New Spain and in the Republic of Mexico until after the Gadsden Purchase. See *United States v. Castellero*, 2 Black, 17, 167 (U.S. 1862); Hall, p. 357. Title 5 of the ordinance concerns the ownership of mines.

Sec. 1. The mines are the property of my royal Crown * * *.

Sec. 2. Without separating them from my royal patrimony I grant them to my subjects in property and possession * * *.

That section 2, *supra*, is not a present grant and does no more than make possible specific transfers of a qualified property right in the future is made clear in title 6 of the ordinance. In that title the manner in which new mines may be discovered and the formal proceeding of denouncement and registry, whereby a qualified title to any particular mine may be acquired from the Crown, are described. The exact language of certain sections may indicate more clearly the purport of this title.

Sec. 14. Anyone may discover and denounce a vein, not only on common land, but also on the property of any individual, providing he pays for the extent of surface above the same, and the damage which immediately ensues therefrom * * *.

Sec. 18. Beds of ore (*placeros*) and all other deposits (*criadores*) of gold and silver, on being discovered, shall be registered and denounced in the same manner as mines or veins, the same being understood of all species of metal.

Section 22 makes the ordinance applicable to deposits of copper, tin, lead, quicksilver, and other metals.

In the "Laws of the Indies" special provisions were made to bring the Indians within the general mining laws. The occasion seems to have been a loss of royal revenue caused by the failure of Indians to disclose mines for fear of confiscation. See Gamboa, "Commentaries on Mining Ordinances of Spain" (Heathfield's Trs. 1830) 34. In book 4, title 19, it is provided that all persons, including Indians, may discover and work mines, but that in doing so they must refrain from injuring Indians or other persons. Law 14 prohibits any restriction from being "imposed on their (the Indians) discovering, holding and occupying mines of gold and

silver or other metals, * * * in conformity with the ordinance of any province." Law 16 provides that groups of Indian discoverers shall share in a mine in the same way as Spaniards. In brief, under the mining laws of Spain and Mexico the Indian enjoyed the same status and privileges as persons of Spanish descent. The legal situation as it existed down to the time of the Gadsden Purchase is summarized in two statements, one a judicial opinion of the Mexican Supreme Court of Justice, the other a text by a Spanish juriconsult, preeminent in the field of mining law.

"The ordinance (of 1783) disallows and condemns the system of accession, preserving the principles by which mines may be denounced upon the land of another person, and establishing the right upon the owner of the land to demand its estimated value (*pro tanto*) thus declaring that mines are not accessories to the soil; 5th, as a consequence of this principle, independent in their judicial relations, the ownership of the mine and that of the soil, create two separate and diverse proprietors." Opinion of Chief Justice Vallarta, June 24, 1880, Hamilton, Appendix VIII.

The correct opinion then seems to be that the property of the mines remained in the Crown, and that as the Sovereign can not work them on his own account, he has given his subjects a partial interest in them under various restrictions." Gamboa, at 24.

Since the cession to the United States, the courts in this country have recognized both the ownership of mines by Spain and Mexico before the cession, and the succession of the United States to that ownership. See *United States v. Castellero*, *supra*, at p. 190; *Chouteau v. Molony*, 16 How. 203, 228 ff. (U.S. 1853); *Moore v. Smaw*, *supra*, at 217; *Boggs v. Merced Mining Co.*, 14 Cal. 279, 308-313 (1859). The Supreme Court has stated expressly that under Spanish law minerals in Indian lands were the property of the crown, "but the privilege to work the mines in lands still in the occupancy of the Indians, he (the Spanish Governor) could give, because the mines were a part of the royal patrimony of the Crown, and the King had directed that they might be searched for and worked in all his dominions by his subjects, both Spaniards and Indians." *Chouteau v. Molony*, *supra*, at 240.

The executive and legislative branches of the Federal Government likewise have recognized the succession of the Federal Government to the ownership of mines in what was formerly Spanish and Mexican territory. The Secretary of the Interior in his annual report for 1849 made the following statement:

By the laws of Spain these mines did not pass by a grant of the land, but remained in the crown, subject to be disposed of according to such ordinances and regulations as might be from time to time adopted. Any individual might enter upon the lands of another to search for ores of the precious metals; and having discovered a mine, he might register and thus acquire the right to work it on paying to the owner the damage done to the surface, and to the crown, whose property it was, a fifth or tenth, according to the quality of the mine.

If the finder neglected to work, or worked it imperfectly, it might be denounced by any other person, whereby he would become entitled.

This right to the mines of precious metals, which, by the laws of Spain, remained in the crown, is believed to have been also retained by Mexico while she was sovereign of the Territory, and to have passed by her transfer to the United States. It is a right of the sovereign in the soil as perfect as if it had been expressly reserved in the body of the grant, and it will rest with Congress to determine whether, in those cases where lands duly granted contain gold, this right shall be asserted or relinquished. If relinquished, it will require an express law to effect the object; and if retained, legislation will be necessary to provide a mode by which it shall be exercised. For it is to be observed that the regulation permitting the acquisition of a right in the mines by registry or by denouncement was simply a mode of exercising by the sovereign the proprietary right which he had in the treasure as it lay in and was connected with the soil. Consequently, whenever that right was transferred by the transfer of the eminent domain, the mode adopted for its exercise ceased to be legal, for the same reason that the Spanish mode of disposing of the public lands in the first instance ceased to be legal after the transfer of the sovereignty. 2 Sen. ex. doc., 31st Cong., 1st Sess., 1849-50, 9-10.

When Congress created the office of Surveyor General of New Mexico and provided machinery for the establishment and confirmation of land claims existing under the Spanish and Mexican law, it expressly excluded mineral lands from the operation of the statute. 10 Stat. 308, sec. 4 (1854). In the Court of Private Land Claims Act it is provided:

Third. No allowance or confirmation of any claim shall confer any right or title to any gold, silver or quicksilver mines or minerals of the same unless the grant claimed effect the donations of such mines or minerals to the grantee or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain in the property of the United States. 26 Stat. at L. 854, 860 (1891); see *Lockhart v. Johnson*, 181 U.S. 516, 524 (1900).

Upon the whole case, in the light of the facts now at hand, it is my opinion that in 1853 the United States acquired title to the land in question subject to an Indian right of occupancy of an area not exactly determined; that whatever surface rights the Papago Indians may have enjoyed, no interest in minerals was accessory or incidental to those surface rights; that complete and unencumbered title to minerals in the land was vested formerly in the Mexican State and passed to the United States upon cession of the territory. It follows that the question of the appropriate manner of protecting the Papagos in their possession was, and still is, a matter exclusively of political cognizance. Cf. *United States v. Santa Fe*, 165 U.S. 675 (1896); *Les Bois v. Bramell*, 4 How. 449 (1846). The present measure of the legal rights of the Papagos is the Executive order of February 1, 1917, as modified by the act of February 21, 1931. The Papagos have no independent title which can make that action

ineffective or embarrass any future action that to Congress may seem appropriate in the premises.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PRODUCERS AND REFINERS CORPORATION

Opinion, March 10, 1934

OIL AND GAS LANDS—SALE OF INTERESTS IN PROSPECTING PERMITS—SEC. 27, ACT OF FEBRUARY 25, 1920, AS AMENDED—INTEREST ACQUIRED BY PURCHASER.

Where interests in Government lands are in the form of agreements held by a corporation organized for the operation, drilling, or production of lands held by others under oil and gas *prospecting permits*, such interests pass, by a sale thereof, unincumbered by the acreage limitations of section 27 of the Leasing Act of February 25, 1920 (41 Stat. 437), as amended, since such agreements create only a potential interest in any oil or gas which may be discovered, which interest may be divested if the agreement is canceled or forfeited prior to the discovery of oil or gas and the resulting issuance of a lease.

OIL AND GAS LANDS—SALE OF INTERESTS IN LEASES UNDER SECTIONS 14 AND 17 OF LEASING ACT—WHAT PURCHASER ACQUIRES—QUALIFICATIONS REQUIRED.

The purchaser of interests in Government lands included within oil and gas *leases* held by others under sections 14 and 17 of the Leasing Act, will not automatically become entitled to the benefits of the fifth proviso of section 27 of the Leasing Act as amended by the Act of March 4, 1931, which, under certain conditions, waives acreage limitations, but such purchaser must qualify as required by Circular No. 1252.

OIL AND GAS LANDS—INTERESTS ORIGINALLY OBTAINED UNDER SECTIONS 18 AND 19 OF LEASING ACT—SALE—INTEREST ACQUIRED BY PURCHASER.

Where interests in oil and gas lands comprised within the public domain, whether operating agreements or actual permits and leases, were obtained originally under the so-called "relief sections" of the Leasing Act, and are sold, the purchaser acquires the interest purchased, unless it be an interest in a prospecting permit under section 19 of the Leasing Act, free from any charge under the acreage limitations of section 27, and this whether the holder of the interest conveyed was an original holder or an assignee.

OIL AND GAS LANDS—SECTION 27, LEASING ACT—SCOPE AS TO CLASSES OF BENEFICIARIES.

The class of persons entitled to the benefit of the exemptions of section 27 of the Leasing Act is not limited to original claimants under section 18 of that act, but includes their assignees.

Cases of *Midland Oilfields Company* (50 L.D. 620) and *Kanawha Oil and Gas Company, Assignee* (50 L.D. 639) overruled, in so far as in conflict.

OIL AND GAS LANDS—LEASING ACT PERMITS AND LEASES HELD DIRECTLY UNDER SECTIONS 13 AND 14 OR 17—ACREAGE LIMITATIONS—RIGHTS OF ASSIGNEES.

Where Federal oil and gas permits and leases are held directly under sections 13 and 14 or 17 of the Leasing Act, they are subject to the acreage limitations of section 27 and remain so in the hands of a purchaser from the original holder.

OIL AND GAS LANDS—SECTION 27 OF LEASING ACT—EXEMPTION FROM ACREAGE LIMITATION—WHO ENTITLED.

The ordinary purchaser of interests in oil and gas in Federal lands at a public auction ordered by a court is not, merely as such, entitled to that benefit of the exception in section 27 of the leasing act permitting ownership of such interests in excess of the acreage limitation to be held for a period limited to two years, but, instead, title must have come to him *notens volens*.

MARGOLD, *Solicitor*:

Under date of November 10, 1933, the receivers for the Producers and Refiners Corporation requested the Department's ruling upon the interpretation of section 27 of the Act of February 25, 1920 (41 Stat. 437), as amended, in so far as it relates to certain specified factual situations. The matter has been referred to me for my opinion upon the questions presented.

The Producers and Refiners Corporation, a Wyoming corporation, was placed in receivership on May 7, 1932, by order of the United States District Court for the District of Wyoming, in equity suit No. 2217, *Consolidated Oil Corporation v. Producers and Refiners Corporation*. On October 18, 1933, the court directed the receivers to sell all of the properties and assets of the corporation at public auction.

Among those assets are interests in Government oil and gas leases and permits covering several thousand acres of land in the State of Wyoming. Those interests are held under the Leasing Act of February 25, 1920 (41 Stat. 437), as amended. It appears that the court, in ordering the sale, has divided the holdings of the corporation, including those on Government lands, into groups, each of which is to be offered as a separate unit. It further appears that certain of those units cannot be acquired *in toto* by the prospective purchasers if the public lands contained in those units are to be charged against those purchasers under section 27 of the Leasing Act (*supra*).

The interests in Government lands held by the Producers and Refiners Corporation may be classified as follows:

- (1) Agreements for the operation, drilling or production of lands held by others under prospecting permits.
- (2) Agreements for operation, drilling or production of lands held by others under leases issued pursuant to sections 14 and 17 of the Leasing Act.
- (3) Interests held by the corporation under the so-called relief sections (18 and 19) of the Leasing Act.

(4) Prospecting permits and leases held by the corporation under sections 13 and 14 or 17 of the Leasing Act.

As to each class the general question is this: Will the land covered by these interests be charged against the purchaser under the specific acreage limitations of section 27 of the act, or will it be held by the purchaser free from those limitations?

Those interests contained in the first class present no real problem. Under well established practice the acreage covered by those operating, drilling, or producing agreements is not charged against the Producers and Refiners Corporation, and will not be charged against its assignees, for the reason that the agreement creates only a potential interest in any oil or gas which may be discovered. That potential interest may be divested if the agreement is canceled or forfeited prior to the discovery of oil or gas and the resultant issuance of leases. Thus, until leases are actually issued, the full acreage is charged against the permittee rather than against his operator.

The second class of interests embodies operating, drilling, and producing agreements covering lands included within leases held by others under sections 14 and 17 of the Leasing Act. With reference to this type of an interest, the receivers of the corporation have asked whether or not the purchasers would be allowed the benefits of the fifth proviso of section 27 of the Leasing Act, as amended by the act of March 4, 1931, which authorizes the Secretary of the Interior

on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more permittees or lessees in oil or gas leases or permits, with one or more persons, associations, or corporations, whenever in his discretion and regardless of acreage limitations, provided for in this act, the conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby.

If that provision be invoked, the lessee is charged with the full acreage and the operator is charged with none. *Raymond Barber et al.* (53 I.D. 646). But, before the operator can secure that exemption from acreage charge, the agreement must have received the approval of the Secretary after submission to him in accordance with the provisions of Circular No. 1252 of June 4, 1931 (53 I.D. 386). In that circular it is stated:

The contract submitted for approval under this provision should be accompanied by a statement showing all the interests held by the contractor in the field and the proposed or agreed plan of operation or development of the field. All the contracts held by the same contractor in the field should be submitted for approval at the same time, and full disclosure of the project made. There must be complete details furnished in order that the Secretary of the Interior may have facts to make a definite determination in accordance with the provisions of the act, and prescribe the conditions on which approval of the contracts is made.

If the Producers and Refiners Corporation has submitted operating agreements to the Secretary in accordance with the requirements, and if those agreements have been approved by the Secretary under that fifth proviso, then the corporation, as operator, is entitled to exemption from acreage limitation. But the purchaser of those operating agreements will not automatically become entitled to a like exemption. That purchaser will also have to qualify by submitting the necessary information (that required in Circular No. 1252, quoted above) to establish the fact that the purposes of the act will continue to be met by his operations under the assigned agreements.

If, at the time of the sale, the corporation has not qualified under that fifth proviso, the purchaser must make application and the necessary showing *ab initio* in order to secure the benefit of exemption from acreage limitation thereunder.

The third class of interests held by the corporation includes those initiated under the "relief sections" (18 and 19) of the Leasing Act. In so far as those holdings may be in the form of operating agreements on "relief section" acreage, held by other permittees or lessees, they are subject to the same considerations that have been discussed in connection with holdings of the first and second classes. However, inasmuch as these interests, whether operating agreements or actual permits and leases held by the corporation, were obtained originally under the "relief sections", an additional question is raised: Are such interests subject to the acreage limitations of section 27 under any circumstances? This inquiry follows from consideration of the clause in section 27 which reads:

Provided, That nothing herein contained shall be construed to limit sections 18, 18a, 19 and 22 * * *

Before entering a discussion of the interpretation of that clause, when considered in connection with the detailed provisions of sections 18 and 19, it may be well to outline the purpose of sections 18 and 19.

Prior to the adoption of the Leasing Act, oil and gas lands in the public domain were subject to disposition under the placer mining laws. Sections 18 and 19 provided the means whereby a claimant under the placer laws might secure a permit or a lease under the Leasing Act with certain advantages. He was granted a preference right so that no newcomer might appropriate the claim, and he was granted the right to take land, included in his old claim, free from the acreage limitations of section 27, though certain other limitations on holdings were imposed and certain of the limitations of section 27 invoked under particular circumstances. The two sections contain different provisions and have application to dif-

ferent classes of land, section 18 governing claims on land which was withdrawn from appropriation for placer claims by Executive order of September 27, 1909, and section 19 governing claims on public land still open for the establishment of claims. For convenience these two sections are quoted in full.

SEC. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however*, That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however*, That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further*, That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locator's in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (thirty-eight statutes at large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants, for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided*, That no claimant acquiring any interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided, further*, That no lease or leases under this section shall be granted, nor shall any interest therein inure to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

SEC. 19. That any person who on October 1, 1919, was a bona fide occupant or claimant of oil or gas lands under a claim initiated while such lands were not withdrawn from oil or gas location and entry, and who had previously performed all acts under then existing laws necessary to valid locations thereof except to make discovery, and upon which discovery had not been made prior to the passage of this Act, and who has performed work or expended on or for the benefit of such locations an amount equal in the aggregate of \$250 for each location if application therefor shall be made within six months from the passage of this Act shall be entitled to prospecting permits thereon upon the same terms and conditions, and limitations as to acreage, as other permits provided for in this Act, or where any such person has heretofore made such discovery, he shall be entitled to a lease thereon under such terms as the Secretary of the Interior may prescribe unless otherwise provided for in section 18 hereof: *Provided*, That where such prospecting permit is granted upon land within any known geologic structure of a producing oil or gas field, the royalty to be fixed in any lease thereafter granted thereon or any portion thereof shall be not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided, however*, That the provisions of this section shall not apply to lands reserved for the use of the Navy: *Provided, however*, That no claimant for a permit or lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

All permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear.

In the present case no question is raised as to the interpretation of those sections, or the applicability of the acreage limitations of

section 27, when the interests thereunder are in the hands of the original permittee or lessee. Suffice it to say that the Department has consistently ruled that such a person holds his interests, except an interest in a prospecting permit under section 19, without any charge under the acreage limitations of section 27. The Producers and Refiners Corporation comes within that ruling as to its "relief-section" holdings. The specific question which now arises is this: May the purchaser, at the forthcoming sale, acquire those holdings with the same exemption from the acreage limitations of section 27 now enjoyed by the original holder?

Since section 27 expressly provides that nothing therein contained shall limit sections 18 and 19, it is necessary to examine those latter sections to determine whether or not they allow a purchaser or other assignee to acquire interests thereunder free from the acreage limitations contained in section 27.

Section 19 contains the following language:

All permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear.

Exactly the same provision is contained in section 18 except that its applicability is limited to leases, inasmuch as permits are not granted by that section. The Department has consistently, and properly, held that assignees are included by that language. Since the lease may cover acreage in excess of that permitted by the limitations of section 27, it follows that the assignee, accorded the right to receive the lease, is accorded the right to receive it free from those acreage limitations.

In opposition to that conclusion it may be suggested that the function of the provision is merely to allow the original holder to alienate his interests, and not to grant to the assignee the privilege of exemption from the limitations of section 27. If that is true, the original holder of a lease covering more than 2560 acres (the amount allowed on one geologic structure by section 27) would have to assign a part of the acreage contained in his lease to each of two or more persons, and could assign the lease itself to no one. But that is not what the statutory provision says. It does not address itself to the right of assignment accorded the original lessee; it addresses itself to the right of the assignee to acquire the lease. With the right to acquire and hold the lease is the right to acquire and hold the full acreage covered by it. With the right to acquire and hold the full acreage is, of necessity, the right to hold it free from the acreage limitations of section 27.

There is this further question which remains unanswered: Does that clause of section 27 which provides that sections 18 and 19 are not limited thereby mean that the specific acreage limitations of sec-

tion 27 are increased to accord with the limitations of sections 18 and 19 where holdings thereunder are concerned, or does it mean that, for the purposes of section 27, acreage held under sections 18 and 19 is merely to be disregarded? The latter of those alternative interpretations has been consistently adopted by the Department, and a lessee under section 18 or 19 has been allowed to hold, at the same time, leases or permits under other sections of the act to the full extent prescribed in section 27. The "relief sections" are deemed to be entirely independent of the remainder of the act. Under that interpretation, it is my opinion that a prospective purchaser of the assets of the Producers and Refiners Corporation is not precluded from acquiring the interests held by that corporation, under section 18 or 19 of the act, free from the acreage limitations of section 27 and free from any consideration of permits or leases already held by that purchaser.

In two decisions the Department has held contrary to the conclusion just reached. Those cases are: *Midlands Oilfields Company* (50 L.D. 620); and *Kanawha Oil and Gas Company* (50 L.D. 639).

The *Kanawha* case held that assignments of prospecting permits, issued under section 19 and covering more than 2560 acres on the same geologic structure, could not be approved for the reason that the limitations of section 27 were applicable. The reasoning of the opinion in that case, except in so far as it relies upon that of the *Midlands* case, is completely refuted by preceding discussion in this opinion.

In the *Midlands* case the Department ruled that a prospective assignee, who already held permits or leases under other sections of the act, was precluded from acquiring or holding the acreage covered by a lease issued under section 18 if his total acreage would then exceed the amount designated in the limitations of section 27. That decision was placed upon the basis that, under the express provisions of section 18, (1) the issuance of leases was limited to a described class of persons found to have equities due to prior expenditures; (2) persons not in undisputed possession of mining claims prior to July 1, 1919, were denied relief; and (3) any person acquiring a claim subsequent to September 1, 1919, from another person, who had been holding in excess of 3,200 acres, was denied any interest in the land. All of these provisions of the act were said to establish the fact that the "relief" was personal to the original claimant and that the assignee could not benefit thereby.

I shall discuss the significance of each of those provisions of section 18 in order.

(1) The act, in designating the persons who may receive relief, does not contain any words to indicate that the benefits granted, including the exemption from the acreage limitations of section 27,

shall be inalienable. It is a designation of the original recipients of the relief and nothing more. The mere fact that it does designate those recipients has no bearing upon the alienability of the benefits received, for it was obviously necessary to designate someone. Had Congress intended a restriction upon the power to assign the lease free from the acreage limitations of section 27, it could easily have provided specifically to that effect. The absence of such a provision, considered in conjunction with the necessity of words of grant to some designated persons, removes all reasonable basis for holding that Congress, by that mere designation, meant to exclude assignees from the benefits granted.

(2) The act provides that only those persons in undisputed possession of mining claims on July 1, 1919, may secure the benefits of section 18. It is to be borne in mind that section 18 applies only to lands withdrawn from appropriation under the placer laws in 1909. Thus the purpose of the provision now under discussion cannot be to exclude mining claims made subsequent to that date. It must be to exclude claimants rather than claims. Thus, at first blush, it may appear that Congress intended, by this provision, to exclude from the benefits of section 18 anyone who secured possession or control of a claim recognized therein at any time subsequent to July 1, 1919. If that be true, then a holding that assignees are excluded becomes reasonable. But that is not true. Congress had no such intent. That Congress intended that the lease and the benefits of the "relief" should be assignable is sufficiently evidenced by the inclusion in section 18 of a provision (the last proviso) to the effect that no lease thereunder shall be granted, or any interest therein inure, to any person for a greater aggregate area than the maximum provided in that section. The maximum granted is 3200 acres, an amount in excess of that permitted on one structure under the limitations of section 27. It thus appears that, through this "inuring" clause, an assignment may be made and may carry with it the exemption from the acreage limitations of section 27.

Thus, the fixing of July 1, 1919, as the date on which a claimant must have had undisputed possession, does not preclude assignments subsequent to that date nor affect the benefits which may be received by the assignee. It merely acts to state the time at which the right to receive a lease under section 18 became fixed, and to designate specifically, for administrative purposes, the claimants in whose name lease might issue.

(3) Section 18 provides:

That no claimant acquiring any interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an

exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange.

In connection with this provision is found the only passage of the Congressional Record which tends to throw light upon the intention of Congress with respect to the question now under consideration. In the statement to the House of Representatives, made by its representatives to the conference on the disagreeing votes of the two Houses, the substitution of the language, quoted above, for other language, formerly agreed upon in the House, is mentioned. That former language was this:

That no claimant acquiring any interest in such lands since September 1, 1919, shall secure a lease thereon under this section.

In explanation of the substitution of new language, it was stated (Cong. Rec., vol. 59, p. 2708):

Section 18 is known as the relief section of the bill, and relates to very valuable producing oil lands which are now involved in litigation. The purpose of the House language stricken out was to prevent the claimant or holder of excess area and acreage from disposing of such excess, which excess, under the terms of the House bill, would revert to the United States to be leased by competitive bidding. The above amendment by the insertion of said language retains the purpose of the House bill, while at the same time it does not prevent one holding or claiming not more than the maximum allowed by section 18 from disposing of any part thereof. It also recognizes an exchange of interest in lands made prior to January 1, 1920, provided the exchange does not reduce or increase the area or acreage held in excess of the allowed maximum, thus not permitting a change in the status quo of the excess holder or claimant. Sales of oil lands have been made by claimants holding less than the maximum allowed. It was thought best not to interfere with such sales, nor with exchanges in settlement of controversies which did not result in reducing the area or acreage held in excess of the maximum allowance.

This provision and the intent of Congress with which it was included do not bolster the conclusion reached in the *Midlands* case. On the contrary, they lead to the conclusion that claims, recognized by section 18, may be assigned and that the exemption from acreage charge may pass with them. If such were not the case there would be no need for the substitution which was made. The purpose of that substitution was declared to be to permit the assignee of any claim, where acreage in excess of 3200 acres was not involved, to acquire the interest under section 18 irrespective of the time when the assignment was made. Thus, the immunity from the acreage limitations of section 27, which allow only 2560 acres on one structure, could pass with the claim. If it could pass with the claim before lease issued (and that might be after the passage of the Leasing Act), there is no reason to hold that it could not pass by assignment of the lease after it was issued, since nowhere in the act is a dis-

inction, for that purpose, found between a claim for a lease and a lease itself.

It is to be noted that the wording and intent of this provision also constitute a further and complete refutation of the pertinence of both of the other bases for the conclusion reached in the *Midlands* case: (1) That there is a grant of "relief" to a designated class only and (2) that that class is to be determined as of July 1, 1919. There is, then, no provision of the statute which directly or by inference requires the conclusion that the exemption from the acreage limitations of section 27 does not pass with the assignment of the permit or lease.

The *Midlands* case contains another and separate argument. Attention was called to the fact that the Leasing Act throughout aims at the suppression of monopoly and that section 18 itself carries forward that purpose by providing that no claimant shall receive leases thereunder covering more than one-half of any geologic structure. From that it was concluded that an assignee could not take free from acreage limitations because, by reason of prior holdings on the same geologic structure, he might then be able to monopolize that structure. That that result might follow cannot be disputed, yet all the force of that argument is lost when it is realized that the Department has consistently held that the original holder of a section 18 or 19 lease may acquire further holdings under sections 13 and 14 or 17 to the full extent of the limitations of section 27. That right on the part of the original holder was expressly recognized and protected in the decision of the *Midlands* case.

The contention that such combined holdings are not permissible must of necessity direct itself toward the practice of disregarding, for purposes of charging acreage under section 27, acreage held under sections 18 or 19. The correctness of the statutory interpretation on which that practice is founded is doubtful. However, it is an interpretation in support of which plausible arguments can be advanced. It is also an interpretation which has stood since the passage of the Leasing Act and under which valuable rights have been created. To alter that interpretation now would be to remove the foundation of vested property rights in reliance upon which large investments have been made. The operations of the Producers and Refiners Corporation exemplify that situation. Acreage held under the "relief sections" has been combined with acreage under other sections of the act for the purpose of securing integrated operation of all of the properties; a pipe line has been constructed by the company in reliance upon its control of the combined holdings; and sales contracts have been executed, performance of which is dependent upon the source of supply contained in the combined holdings. If the corporation were now denied the right to hold the

"relief section" acreage without charge under section 27, untold loss to the corporation would be occasioned. This is only a specific example of the result which would follow from an alteration of the interpretation heretofore given. Under such circumstances, it is my opinion that the Department is not justified in altering that interpretation now.

In so far as the *Midlands* case and the *Kanawha* case conflict with the conclusion hereinbefore reached, they are overruled.

The fourth class of interests held by the corporation includes permits and leases held directly under sections 13 and 14 or 17 of the Leasing Act. These holdings are subject to the acreage limitations of section 27 and will remain so in the hands of the purchaser at the sale unless they can be brought within that exception from the limitations which reads as follows:

* * * 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.

This provision, if applicable, will cover all the interests, of whatever class, held by the Producers and Refiners Corporation.

The pertinent question here is this: Does the exception operate where the decree of the court provides only for the sale of the interest at public auction? It is my opinion that the exception does not operate in such a case. The court has decreed the sale, but it has not decreed that the interest shall pass to any designated person. The property is to go to the highest bidder, and that bidder will acquire the property by purchase as a result of the exercise of his own free will. The exemption, above quoted, is designed to relieve one who finds himself invested with a right to the property by the action of the court, not one who has voluntarily acquired the property.

Approved:

T. A. WALTERS,
First Assistant Secretary.

RESTRICTIONS APPLICABLE TO INDIANS OF THE FIVE CIVILIZED TRIBES

Opinion, March 14, 1934

INDIANS AND INDIAN LANDS—FIVE CIVILIZED TRIBES IN OKLAHOMA—RESTRICTED AND TAX-EXEMPT LANDS—ACT OF JANUARY 27, 1933—STATUTE NOT RETROSPECTIVE.

The Act of January 27, 1933 (47 Stat. 777), in so far as it relates to lands belonging to members of the Five Civilized Tribes in Oklahoma, is not intended to be given retroactive scope or operation, from which it follows that where an allottee of the Five Tribes died prior to April 26, 1931, at

which time his entire allotment was restricted and tax exempt, leaving heirs of one-half or more but less than the full blood, his allotted land passed to his heirs unrestricted and the restrictions were not reimposed by said Act of January 27, 1933.

THE FIVE CIVILIZED TRIBES—RESTRICTED LANDS OF FULL-BLOOD INDIANS—JURISDICTION OF COUNTY COURTS IN OKLAHOMA OVER CONVEYANCES BY FULL-BLOOD HEIRS.

The Act of January 27, 1933, bears no indication that it was intended to be retroactive in operation and hence does not take from the county courts of Oklahoma the jurisdiction theretofore exercised by them over conveyances by full-blood Indian heirs of lands or interests therein inherited by them prior to January 27, 1933.

MARGOLD, Solicitor:

You [the Secretary of the Interior] have requested my opinion upon certain questions arising out of section 1 of the act of January 27, 1933 (47 Stat. 777), which reads:

That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: *Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: And provided further, That all minerals, including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).* [Italics supplied.]

The questions presented arise from the first proviso italicized above and may be stated as follows:

1. Does said proviso reimpose the restrictions upon inherited lands which were restricted and tax exempt in the hands of the original allottee where the heirs are of one-half blood or more but less than the full blood, and if so, would a conveyance by the heirs require the approval of the county court having jurisdiction of the settlement of the estate of the deceased allottee or approval by the Secretary of the Interior?

2. Does the proviso take away from the county courts the jurisdiction to approve conveyances by full blood Indian heirs where

such heirs have inherited the entire interest in lands which were restricted and tax exempt in the hands of the original allottee so that a removal of restrictions by the Secretary of the Interior is necessary before the land can be alienated by the full blood heirs?

The above questions can not well be understood or intelligently answered without a general discussion of the scope of the first proviso to section 1 of the act of January 27, 1933, preceded by a brief review of the status of the lands allotted to members of the Five Civilized Tribes with particular regard to the restrictions against alienation, the ways of removing such restrictions, and the taxability of the lands, under the prior laws.

Under the provisions of section 1 of the act of May 27, 1908 (35 Stat. 312), as amended by the act of May 10, 1928 (45 Stat. 495), the homestead allotments of allottees of the Five Civilized Tribes of one-half or more Indian blood and both homestead and surplus allotments of allottees of three-fourths or more Indian blood are restricted against alienation and encumbrance for a period expiring, in the absence of further action by Congress, on April 26, 1956. During this period, the restrictions may be removed in whole or in part by the Secretary of the Interior (section 1 of the act of May 27, 1908, *supra*), or by the death of the allottee leaving heirs or devisees of less than the full blood (section 9 of the act of May 27, 1908, *supra*, as amended by the act of April 12, 1926 (45 Stat. 495)). As to full-blood heirs or devisees, section 9 of the act of 1908 as amended declared that no conveyance of their interests in the land should be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator. The county court in approving such conveyance acts as a Federal agency; hence these lands in the hands of the full blood heirs and devisees remained restricted lands (*Parker v. Richard*, 250 U.S. 235).

The usual rule is that Indian lands during the period of restrictions are exempt from State taxation. (*United States v. Rickert*, 188 U.S. 432; *Carpenter v. Shaw*, 280 U.S. 363, 366; *United States v. Shock*, 187 Fed. 870.) Prior to April 26, 1931, therefore, all of the restricted lands of the Indians of the Five Civilized Tribes, i.e., the restricted allotments of living allottees and restricted allotments inherited by or devised to full-blood Indians, were protected from State taxation. By section 4 of the act of May 10, 1928, Congress declared that on and after April 26, 1931, all of the restricted lands of these Indians, allotted, inherited, or devised, in excess of 160 acres, shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State in all respects as unrestricted and other lands. Selections of tax-exempt acreage within the pre-

scribed limit were to be made from restricted allotted, inherited or devised lands, with the approval of the Secretary of the Interior, by each Indian owner or the superintendent for him. It is understood that all selections of tax-exempt acreage under the provisions of the act have been made and approved.

The first proviso to section 1 of the act of January 27, 1933, declares that:

Where the entire interest in any tract of restricted tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift or purchase with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the manner provided by law.

It may be observed that the term "restricted Indians", in so far as it relates to Indians of the Five Civilized Tribes, obviously embraces Indians of one-half or more Indian blood. It may also be observed that the proviso applies only to lands which are both restricted and tax-exempt, and unless both elements are present the proviso is without application. At the time of the passage of the act of January 27, 1933, the only lands possessing both of these characteristics were those lands which the Indians had selected as their tax-exempt acreage under the provisions of section 4 of the act of May 10, 1928, *supra*. The tax-exempt selections, as we have seen, were made from two classes of restricted lands: (1) restricted allotments of living allottees, with respect to which the Secretary of the Interior alone has the power to remove the restrictions, and (2) lands inherited by or devised to full-blood Indians in whose hands the lands were subject to the restriction that no conveyance by them should be valid unless approved by the proper local court.

In enacting the proviso under consideration, Congress must be deemed to have legislated in the light of this existing situation and to have had both classes of restricted and tax-exempt land in mind. The declaration that such lands shall remain restricted and tax exempt where the entire interest therein is acquired by restricted Indians can, therefore, have no other meaning than that the existing restrictions, in whatever form they may be, are preserved. Subject, of course, to the limitation that no one person can hold in excess of 160 acres of tax-exempt land, it follows that restricted tax-exempt allotments, the entire interest in which is acquired by an Indian of the Five Civilized Tribes of one-half or more Indian blood, or by any group of such Indians, comes to such Indian or Indians in the same condition and subject to the same restrictions resting upon the land in the hands of the allottee. In other words, the existing restrictions prohibiting alienation or encumbrance unless

the restrictions be removed by the Secretary of the Interior run with the land and bind it for the time stated in the hands of such restricted Indian or Indians.

The same rule applies with respect to the second class of restricted and tax-exempt lands, i.e., lands belonging to full blood heirs or devisees. Indians of the Five Civilized Tribes of one-half or more Indian blood who acquire the entire interest in such lands are bound by the same restriction resting upon the full-blood heirs or devisees, namely, that they cannot convey the same without the approval of the proper local court.

The rules just stated have no application, of course, to lands purchased by restricted Indians with unrestricted moneys.

Turning now to the particular questions presented for opinion: The first question presupposes the case of an allottee who died prior to April 26, 1931, at which time his entire allotment was restricted and tax exempt, leaving heirs of one-half or more but less than the full blood. The heirs of this degree of blood are brought within the restricted class by the act of January 27, 1933, and had the allottee died after that enactment there would be little doubt that the restrictions and the incidental supervision of the Secretary of the Interior would have remained in full force and effect. But the death occurred at a time when there were no restrictions upon heirs of less than the full blood, and hence the land passed to the heirs free from restrictions. The inquiry is whether the restrictions are reimposed by the act of 1933.

The second question deals with the case of an allottee dying under similar circumstances, leaving full-blood heirs. In connection with this question, the Superintendent for the Five Civilized Tribes presents the specific case of Liza Gipson, deceased full-blood Chickasaw. The allottee died July 11, 1929, leaving several full-blood heirs to whom her allotted lands, then restricted and tax exempt, passed under the then existing law, subject to the restriction that a valid conveyance of the lands could only be made with the approval of the proper county court. Certain conveyances of the land having been executed after the passage of the act of January 27, 1933, the question has been raised as to whether that act takes away from the county court and vests in the Secretary of the Interior jurisdiction to approve the conveyance.

Both of these questions must, I think, be answered in the negative. To hold otherwise is to hold that the act of January 27, 1933, is retroactive in scope and operation. Retrospective laws are not favored, and unless the intention that a statute is to have retrospective operation is clearly evidenced in the statute and its purposes, it will be presumed that it was enacted for the future and not for the

past. *White v. United States* (191 U.S. 545); *Cameron v. United States* (231 U.S. 710). This rule is particularly applicable where, as here, retroactive operation of the statute would result not only in divesting the county courts of Oklahoma of a jurisdiction exercised by them under authority of Congress over a long period of years, but to reimpose restrictions and withdraw from the taxing power of the State of Oklahoma a considerable area of land. An intent to accomplish such a far-reaching result doubtless would be plainly expressed. So far from expressing such an intent, the act of January 27, 1933, contains no indication of a purpose to change the status of the lands of these Indians under the prior laws, either by reimposing restrictions theretofore removed or by shifting from the county court to the Secretary of the Interior the jurisdiction to approve conveyances of interests in such lands theretofore vested in full-blood Indians. To the contrary, section 8 of the act contains a provision to the effect that no conveyance of any interest in the land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June, 1914. While the purpose of this provision appears to have been to change the function of the county courts, in approving conveyances, from a ministerial to a judicial act, the recognition thus given to the jurisdiction of those courts in the matter of approving conveyances by full-blood heirs evidences a plain purpose on the part of Congress not to disturb the existing jurisdiction of such courts over lands acquired by full-blood Indians prior to that enactment. In addition to this, the language employed in the proviso under consideration shows that Congress had in mind transactions occurring after the date of the enactment. Apropos of this is the declaration that "Where the entire interest in any tract of restricted and tax-exempt land * * * is acquired * * * by restricted Indians, such lands shall remain restricted and tax exempt." This declaration obviously looks to the future and not to the past and discloses a plain intent on the part of Congress to preserve existing restrictions rather than to reimpose restrictions once removed or change the form of existing restrictions. These considerations lead to the conclusion that the proviso relates only to lands acquired after the date of the enactment and not to prior acquisitions.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

UNIVERSAL HYDRAULIC CORPORATION AND BABCOCK AND WILCOX COMPANY—ASSIGNMENT OF PATENT RIGHTS TO HYDRAULIC EQUIPMENT.

Opinion, March 20, 1934

PATENTS FOR INVENTIONS—RIGHTS OF OFFICERS AND EMPLOYEES OF THE UNITED STATES.

Officers and employees of the Federal Government, except those of the Patent Office, are not, by reason of such service or employment, precluded from exercise of the rights of an owner of a patent.

PATENTS FOR INVENTIONS—OFFICERS AND EMPLOYEES OF THE UNITED STATES—CONTRACT FOR MANUFACTURE AND SALE ON ROYALTY BASIS—RIGHTS OF THE FEDERAL GOVERNMENT.

Subject to existing law, including manufacture and use by the United States free of charge, a patent-owning corporation, composed of Federal officers and employees, may enter into contractual relations with individuals or corporations as to the thing patented, including contracts for its manufacture and sale on a royalty basis.

PATENTS FOR INVENTIONS—STATUTES CITED AND APPLIED.

Section 4886 Revised Statutes, and Acts of July 25, 1910, July 1, 1918, and April 30, 1928, cited and applied.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have asked my opinion on the validity of a form of contract proposed to be made between the Universal Hydraulic Corporation of Denver, Colorado, and the Babcock and Wilcox Company, a corporation of New Jersey with offices at 85 Liberty Street, New York. The contract involves the assignment of patent rights to hydraulic equipment for use in high dams.

The Universal Hydraulic Corporation was organized and all of its stock is owned by Leslie N. McClellan, Philip A. Kinzie, John L. Savage, and Charles M. Day.

Pursuant to an application filed January 31, 1928, the United States Patent Office, on March 11, 1930, issued patent No. 1,705,417 to the above-named stockholders, all of whom are employees in the office of the Chief Engineer of the Bureau of Reclamation at Denver, Colorado. The patentees expressly granted to the United States the right to use this invention on all Government work without charge. The internal differential type of needle valve, covered by this patent, has been installed at Coolidge, Gibson, Echo and Deadwood Dams belonging to the United States. Plans are also being evolved for the use of the patented type of valve at Boulder Dam, Boulder Canyon Project, and at Madden Dam, Panama Canal Zone.

By the act of April 30, 1928 (45 Stat. 467), it is provided:

The Commissioner of Patents is authorized to grant, subject to existing law, to any officer, enlisted man, or employee of the Government, except officers and

employees of the Patent Office, a patent for any invention of the classes mentioned in section 4886 of the Revised Statutes, without the payment of any fee when the head of the department or independent bureau certifies such invention is used or liable to be used in the public interest: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be manufactured and used by or for the Government for governmental purposes without the payment to him of any royalty thereon, which stipulation shall be included in the patent.

The invention here involved is of the class mentioned in section 4886 of the Revised Statutes, and, before the issuance of the patent, the applicants brought themselves within the operation of the quoted act by making and filing the required statement.

In order to understand what will be hereafter stated concerning the contract it is necessary to consider the act of July 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705). That act gives to a patentee the right to sue the United States in the Court of Claims if the invention covered by his patent is used or manufactured by or for the United States without proper license. But the act further provides that:

The benefits of the provisions of this section shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee. This section shall not apply to any device discovered or invented by such employee during the time of his employment or service.

By the action of the patentees in consenting to the use of the patented device by the United States at any time, the United States became vested with the right to manufacture, use or operate the internal differential type needle valves. It is probable that the acts of Congress are sufficient to protect the interests of the United States notwithstanding any contract that might be made between the patentees and any other person. However, the patentees, acting through their corporation, the Universal Hydraulic Corporation, have submitted for approval the contract intended to be made with the Babcock and Wilcox Company for the manufacture and sale of the patented devices on a royalty basis. The contract contains certain stipulations regarding subsequent patents and the interest which each of the parties to the contract shall have in patents now pending in connection with which employees of both corporations have exercised technical skill for invention and development. Nine patents and nine applications for patents are specifically described in the proposed contract.

In the second explanatory recital of the contract, the Universal Hydraulic Corporation represents and warrants that there are no outstanding licenses to make, use, and sell apparatus embodying said inventions in hydraulic apparatus except such rights as the Government of the United States of America may have pursuant to law

and except a license granted by the company to the Hardie-Tynes Manufacturing Company by an agreement dated July 10, 1930.

In paragraph 2 of the contract the Babcock and Wilcox Company agrees to pay the Universal Hydraulic Corporation certain license fees on apparatus sold by the Babcock and Wilcox Company embodying the inventions claimed in one or more of the patents. This paragraph excepts "any and all apparatus sold to the Government of the United States of America embodying any of said inventions in which said Government has rights pursuant to law, which apparatus shall be exempt from royalty." Other similar provisions are found in the contract, all of which tend completely to protect the United States in the use of the patented devices.

I find no objection to the contract from the standpoint of the United States, since the rights vouchsafed to the United States by the acts of Congress above quoted are fully protected.

Approved:

T. A. WALTERS,
First Assistant Secretary.

LOANS FROM FEDERAL SUBSISTENCE HOMESTEADS CORPORATION

Opinion, March 20, 1934

CORPORATIONS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—AUTHORITY OF THE SECRETARY OF THE INTERIOR—STOCK OWNERSHIP.

The Federal Subsistence Homesteads Corporation is a Delaware corporation, organized pursuant to an order of the Secretary of the Interior for the purpose of carrying out the powers vested in the President of the United States and "such agencies as he may establish," by Section 208 of the National Industrial Recovery Act (48 Stat. 195), the Secretary being made sole stockholder of the corporation.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—LOANS TO LOCAL CORPORATIONS—SECURITY—POWER TO VOTE STOCK.

The Federal Subsistence Homesteads Corporation may take as security for a loan any quantity of the stock of a corporation formed by prospective homesteaders, and also the right to vote such stock, without causing the borrower to become a Federal instrumentality.

CORPORATIONS—VOTING OF PLEDGED STOCK BY PLEDGEE.

The right of the pledgee to vote pledged stock is not incompatible with the relation of debtor and creditor, such right being an essential element of the value of the pledge as collateral and recognized by the courts as a proper part of a credit transaction.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—ITS "LOANS" AND "EXPENDITURE OF APPROPRIATED FUNDS."

The transactions provided for by the terms of the authority granted the Federal Subsistence Homesteads Corporation are *bona fide* loans, and any such loan as is proposed would be an "expenditure of appropriated funds."

MARGOLD, *Solicitor*:

My opinion has been requested upon the legal character of the relationship which would be established between the United States and certain corporations as a result of proposed transactions denominated "loans" from the Federal Subsistence Homesteads Corporation to the corporations in question. Inquiry is also made whether or not the proposed advances of money from the Federal Subsistence Homesteads Corporation to these corporations will be "an expenditure of appropriated funds."

The prospective "borrowers" are corporations organized by members of local communities for the development of subsistence homestead projects. All of the stock of each corporation will be owned by those members of the community who are the board of directors of the corporation. It is not proposed that the United States or any agency of the United States shall come into any legal relationship with such a "local corporation" until request shall be made by that corporation to the Federal Subsistence Homesteads Corporation for a "loan" of Federal funds. Thereupon, the Federal Subsistence Homesteads Corporation may, in the terms of authority granted to it by the Secretary of the Interior—

In its discretion, make loans to local corporations where the proceeds of such loans are to be devoted to the development and sale of subsistence homesteads, in amounts up to approximately all, or any part, of the capital requirements of such local corporations on the security represented by the pledge of all of the capital stock of such local corporation to Federal Subsistence Homesteads Corporation, with power to vote said stock on the part of the pledgee.

All "loan agreements" are to provide:

As further security for the repayment of this loan, the board of directors of the Borrower agrees to, and hereby does, transfer and make over unto the Corporation, title to all of the capital stock of the Borrower with full power to vote said stock, as a pledge, however, said capital stock to be returned to the board of directors of the Borrower when the loan, with interest, shall have been fully repaid. It is further agreed by the board of directors of the Borrower, that upon the receipt of said stock of the Borrower, said board of directors shall sign a Declaration of Trust, agreeing to receive and hold said stock of the Borrower, as trustees, in trust for the benefit of the members of the homestead community developed by the Borrower.

The Federal Subsistence Homesteads Corporation is a Delaware corporation, organized pursuant to an order of the Secretary of the Interior for the purpose of carrying out the powers vested in the President of the United States and "such agencies as he may establish" by Section 208 of the National Industrial Recovery Act (48 Stat. 195). The Secretary of the Interior is sole stockholder of the Federal Subsistence Homesteads Corporation. For present purposes, therefore, the interposition of the corporate entity, Federal Sub-

sistence Homesteads Corporation, between the United States and a local corporation, is not important.

The proposed transactions are no more than loans secured in a manner familiar to the financial world. The temporary assumption of voting control by the pledgee is the only element in the scheme which might suggest a different relationship from that of debtor and creditor. But the right to vote pledged stock is "an essential element of its value as collateral". See *Clark v. Forster*, 98 Wash. 241, 167 Pac. 908 (1917). And therefore, the courts recognize such delegation of voting control as a proper part of a credit transaction. *Pauly v. State Loan and Trust Co.*, 165 U.S. 607 (1897); *Burgess v. Seligman*, 107 U.S. 20 (1882); *Granite Brick Co. v. Titus*, 226 Fed. 557 (C.C.A. 4th, 1915); *Hill v. United States*, 234 Fed. 39 (C.C.A. 8th, 1916). And see *Peterson v. Rhode Island & Pacific Ry.*, 205 U.S. 364, 393 (1907); *Owl Fumigating Corp. v. California Cyanide Co.*, 24 F. (2d) 718, 720 (D.Del. 1928); *In re Argus Printing Co.*, 48 N.W. 347, 351-2 (N.Dak. 1891). Certainly no merger of identities is caused by such an association as is proposed. See *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F. (2d) 265 (C.C.A. 2d, 1929); *Berkey v. Third Ave. Ry. Co.* 244 N.Y. 84, 155 N.E. 58 (1926); *Borough of Ambridge v. Philadelphia Co.*, 283 Pa. 5, 129 Atl. 67 (1925). The "local corporation" is not impressed with the Federal character of its creditor.

In the light of what already has been said, it is my opinion that any such "loan" as is proposed would be an "expenditure" of appropriated funds. It is provided by statute that the subsistence homestead fund be disbursed by way of loan. The transactions in question are *bona fide* loans. Doubt as to their character as "expenditures" could arise only from apprehension that the borrower might be considered a Federal instrumentality. I have already expressed my opinion that such would not be the case.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

ABILENE OIL COMPANY v. CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY

Opinion, March 27, 1934

GRANT FOR RIGHT OF WAY—RAILROAD—CHARACTER OF ESTATE—REVERTER.

Upon a grant by the United States of a right of way for railroad purposes over public lands, the company's interest is "neither a mere easement nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted."

GRANT FOR RIGHT OF WAY—REVERSION—INDIAN TITLE ACQUIRED BY THE UNITED STATES.

Where the grant of a right of way to a railroad company across Indian lands creates a possibility of reversion in the Indians, and the Indian title is later extinguished in favor of the United States by treaty, the right of reversion passes to the United States and inures to its benefit.

GRANT OF PUBLIC LAND BY UNITED STATES—PRIOR RIGHT OF WAY GRANT A CHARGE—ESTATE CONVEYED—APPLICATION OF RAILROAD COMPANY FOR LEASE OF OIL AND GAS DEPOSITS BENEATH RIGHT OF WAY—ACT OF MAY 21, 1930.

A grant by the United States purporting to convey a quarter section of public land over which a railroad right of way had previously been granted under the Act of February 18, 1888 (25 Stat. 35), carries with it, in the absence of further exception or reservation, the entire interest left in the United States, so that an application by the railroad company's successor for a lease, under the Act of May 21, 1930 (46 Stat. 373), of the oil and gas deposits under the railroad right of way, may not be granted.

MARGOLD, *Solicitor*:

The Commissioner of the General Land Office has submitted for consideration his opinion that the oil and gas deposits underlying that part of the SW $\frac{1}{4}$ Sec. 34, T. 12 N., R. 3 W., I.M., Oklahoma, and within Oklahoma City, embraced in certain grants of rights of way for railroad purposes to the Choctaw Coal and Railway Company are subject to the operation of the act of May 21, 1930 (46 Stat. 373), and that a pending application of the Choctaw, Oklahoma and Gulf Railroad Company, the successor in interest to the Choctaw Coal and Railway Company, for a lease under said act, may be entertained.

The tract in question consists of a strip of land 300 feet wide, extending from the east to the west boundary of the aforesaid quarter-section.

The Abilene Oil Company, claiming oil and gas rights in the land derived from Oklahoma City, was permitted by the Department to file objections in the nature of a protest against the application, and response thereto has been made by the applicant company.

The facts relating to the status of title appear to be as follows: By act of February 18, 1888 (25 Stat. 35), Congress granted a right of way in the Indian Territory to the Choctaw Coal and Railway Company. Map of definite location of the line of road was filed July 8, and approved July 11, 1889. The map showed the right of way as traversing the SW $\frac{1}{4}$ Sec. 34 in question, and according to the map filed with the record, having a width in that section of 100 feet. The act of August 24, 1894 (28 Stat. 502), authorized reorganization of the company as the Choctaw, Oklahoma and Gulf Railroad Company. Section 2 of the original grant provided that "when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall

be taken." The Chicago, Rock Island & Pacific Railway now operates the right of way as part of its transcontinental line under a lease. By Executive order of April 20, 1889, which, it will be observed, was subsequent to the date of the grant, the SW $\frac{1}{4}$ of Sec. 34 was withdrawn from settlement, filing or entry and reserved for military purposes under the control of the War Department. On June 8, 1891, a license was granted by the Acting Secretary of War to the railroad company, revocable at will, "to enter upon and use for sidings and station purposes land adjoining its right of way", through the reservation on either or both sides of the company's right of way, not exceeding in all 200 feet in width and in length extending across the reservation. The company's blueprint shows that it took under this license a strip 200 feet wide extending across the reservation adjoining the south boundary of the previously granted right of way. On July 26, 1892, the War Department issued a similar license to the railway company to enable it to make advantageous connections with the Atchison, Topeka and Santa Fe Railroad, embracing two tracts of additional land in the reservation of 1.3 and 1.1 acres, respectively. By Executive order of September 28, 1892, the SW $\frac{1}{4}$ of Sec. 34 was transferred to the Interior Department for disposition either under existing law or under subsequent enactments, being no longer required for military purposes.

By the act of August 8, 1894 (28 Stat. 264), the military reservation was granted to Oklahoma City, the scope and effect of which will be hereinafter considered.

The Abilene Oil Company alleges the survey, platting and lotting of the land as required by the grant, the discovery of oil in Oklahoma City in 1928, the present existence therein of approximately 300 wells, the passage of a zoning ordinance limiting and restricting the area in which drilling for oil and/or gas might be done, the inclusion of the area in question in a drilling zone, the claim of the city to the oil and gas rights under the 300-foot strip used as a right of way and its division into two permit areas to each of which there has been attached a small area adjacent to the right of way, the latter for the purpose of drilling. The Abilene Oil Company claims as assignee of a lease from the city, covering a portion of the 300-foot strip, and a 30-foot strip immediately adjacent thereto on the south. It alleges that permission is given to drill two wells on the 30-foot strip and that one of such wells is completed and is now producing. A producing well is also alleged to have been completed on the drilling area attached to the permit for the remainder of the 300-foot strip.

Copies of the text of City Ordinance 3944 and forms of leases are presented in support of the assertion that further additional wells cannot be permitted without violation of the city ordinance, and to

show that the various owners of parcels of land in any drilling permit area are entitled to participate in royalties from the oil and gas produced therefrom in proportion to their acreage interest. It is argued that if the United States should own the oil and gas rights under the rights of way, its proper course is to assert its rights to the royalties under the present leases, rather than grant an oil and gas lease, which would result in prolonged and expensive litigation.

The oil company advances two propositions:

Even if the United States should own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right of way, the application for a permit to drill on said right of way should be denied because all of said right of way is attached to drilling areas and is now sharing in the royalty produced through the wells drilled on said areas as other real property in the drilling zone in Oklahoma City.

The United States do not own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right of way over the property involved.

If the second proposition is sound, it is decisive of the question whether the land is subject to the oil and gas application, and the first need not be considered.

The act of February 18, 1888, granting the right of way 100 feet in width to the Choctaw Coal and Railway Company was a special grant similar to other special grants of railroad rights of way, which have been held to be grants *in praesenti*, effective at the date of the granting act, so that adverse claims initiated subsequent to the granting act, but prior to the filing of the map of definite location or construction of the road, do not affect the rights of the railroad grantee. See *St. Joseph and Denver City Railroad Company v. Baldwin* (103 U.S. 426); *Bybee v. Oregon and California Railroad Co.* (139 U.S. 663); *Northern Pacific Railway Company v. Ely* (197 U.S. 1). For other Federal cases see 50 C.J. Sec. 427. The Supreme Court of Oklahoma has held the grant under consideration was a grant *in praesenti* and that title vested in the grantee at the date of the act. *United States v. Choctaw, O. & G. Co.* (41 Pac. 729); *Churchill v. Choctaw Ry. Co.* (46 Pac. 503).

As to the nature of the estate acquired by the grantee in the right of way, the Supreme Court has held, in accordance with its construction of other grants of rights of way under the public land laws for railroad purposes, that the railroad's interest is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee"; that "in effect, the railroad is the absolute owner of the land." *Choctaw, O. & G. R.R. Co. v. Mackey* (256 U.S. 531, 538). The subsequent reservation for military purposes therefore did not affect the rights of the railroad grantee.

The grant created a possibility of reversion in the Indians, but inasmuch as it is a matter of public history that the Indian title was extinguished as to the area involved here by treaty of January 19, 1889, with the Creeks, and act of March 1, 1889 (25 Stat. 757), we may assume that the right of reversion passed to the United States.

The interest of the United States in the SW $\frac{1}{4}$ of Sec. 34 on August 8, 1894, the date of the grant to Oklahoma City, was a fee simple absolute in all thereof saving the 100-foot right of way, in which it had a mere possibility of a reversion as above defined. The permits issued by the Secretary of War for the use of the adjacent lands by the railroad were not definite or permanent relinquishments of the property, and conferred no right of user after the War Department had lost its right to use the land for military purposes (36 Op. Atty. Gen. 500). The railroad company, if so using the land after its transfer to the Interior Department, did so by sufferance.

The question is therefore presented, to what extent did the grant to the city divest the United States of its interest and estate in the SW $\frac{1}{4}$ Sec. 34. This question will first be considered as to the parcels of land within the permits issued by the Secretary of War, and second, as to the interest of the United States in the right of way acquired under the act of 1888. The question is confined to these areas mentioned, for it is not contended, either by the applicant or the Commissioner, that an absolute fee simple title did not vest in the city for the remainder of the quarter-section.

The first section of the act of 1894 reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the abandoned military reservation at Oklahoma City, in Oklahoma Territory, comprising the southwest quarter of section thirty-four, township twelve north, of range three west, is hereby granted to said Oklahoma City in trust for the use and benefit of its public free schools, to be used and applied for the benefit of all children of said city of scholastic age without distinction of race, except such portions of said reservation as are reserved for the purposes and uses hereinafter described.

Reading the language in its natural and ordinary meaning, it would seem that the word "except" therein, qualifies and creates an exception from the phrase immediately preceding it, namely, "to be used and applied for the benefit of all children of said city of scholastic age without distinction of race", and not the words "hereby granted". In other words, it was the intent to carve, not out of the grant, but out of the trust for public schools, "certain portions of the reservation as are reserved for the purposes and uses hereinafter described". If any doubt arises from the language thus far quoted, as to whether there was any reservation or exception in favor of the United States, it seems clearly dispelled by the description of the reservations in the second section of the act, which reads as follows:

That not less than ten acres of said reservation shall be set apart and used by said city for the location of public buildings and for a public park. That within ninety days after the passage of this Act the Southern Kansas Railway Company shall have the right to purchase from said city, adjoining said company's present right of way, for depot grounds and other railroad purposes, not to exceed six acres of said reservation, the value thereof and the price to be paid therefor to be fixed by the appraisers to be appointed by the Secretary of the Interior within said ninety days. That the permits heretofore granted to the Choctaw Coal and Railroad Company by the Secretary of War for lands across and upon said reservation, shall remain in force until such time as the land so granted shall cease to be used for railroad purposes, when the same shall pass to said city.

In this section there is no room for the construction that a reservation or a reversion in title was made in favor of the grantor.

There are three reservations, namely; (1) not less than ten acres for public buildings and a public park. This plainly is not a reservation of title, but a reservation from the benefit of the trust for the use of public schools. (2) The Southern Kansas Railway Company is given the right to purchase not to exceed six acres adjacent to its right of way "*from said city*". This also is plainly no reservation of title, but a right in the railroad to obtain title from the grantee. (3) "The permits heretofore granted * * * the Secretary of War * * * shall remain in force, until the land so granted (under permits) shall cease to be used for railroad purposes, *when the same shall pass to the city.*" (Emphasis added.)

Considering the precarious tenure under which the railroad held possession of the permit areas at the time of the grant to the city, it does not seem that the last reservation had any other purpose than as expressed in the act to provide that the permits should remain in force, conditioned upon the continuous use of the land for railroad purposes. It was to protect the railroad from ouster by the city. There is nothing incompatible with the grant of title in fee to the city, as expressed in the first section, with the reservation of such possessory right in favor of the railroad company. While the words "when the same" (meaning the land) shall pass to the city, if taken alone, might import a retention of fee in the grantor, yet when the entire intent is gathered from the four corners of the statute, it seems plain that what is meant is, that the use and possession should pass to the city upon the cessation of use for railroad purposes. It might be argued that by changing the tenure of the permit and adding the attributes of perpetuity and exclusiveness to the railroad's estate, thereby a limited or base fee was vested in the railroad company similar to like grants under general public land laws. Assuming that were true, it does not

help the position of the applicant company. The words creating an estate over in the city in the nature of conditional limitation destroyed any possibility of the United States having the fee again. There was, therefore, no interest left in the United States, subject to grant under the act of May 21, 1930, *supra*, in the permit areas.

With respect to the 100-foot strip in the right of way under the grant of 1888, as previously stated, a possibility of reversion of title to the United States was created by operation of law. The Department held in *E. A. Crandall* (43 L.D. 536) that the issuance of patent for land traversed by a right of way granted under the act of March 3, 1875 (18 Stat. 482), carries no interest in the right of way, and upon abandonment or forfeiture thereof, the legal title reverts to the United States. This doctrine is affirmed in the cases of *Windsor Reservoir and Canal Company* (51 L.D. 27, 305); *A. Otis Birch and M. Estelle Birch* (On rehearing) (53 L.D. 340). In the last case cited, the right to require competitive bids between a railroad applicant for lease under the act of May 21, 1930, *supra*, and abutting owners, respecting the royalties they would agree to pay for the extraction of oil and gas under a railroad right of way, was upheld, as against the claim of a patentee of adjacent land under the mining law.

Reviewing the previous decisions of the courts and the Department, it was there held that the prior right of way was as much eliminated from the mineral patent as it would have been if excepted therein by description; that the owner of the right of way had no right to the minerals therein by virtue of its grant, and that the land in the right of way was not subject to mining location, though mineral land; that the acts of February 25, 1909 (35 Stat. 647), and March 8, 1922 (42 Stat. 414), purporting to vest title in the holders of the land traversed by the right of way, in the event of forfeiture or abandonment thereof,—the last named act reserving all minerals to the United States,—were predicated on the assumption that upon extinguishment of the right of way, the United States resumed full title; that the act of May 21, 1930, was an extension of the rights of the railroad grantee by granting him mining rights.

It will be observed, however, that the doctrine that entry or patent to the land over which the right of way passes carries no rights in the possibility of reverter, rests upon the principles announced by the Supreme Court, that land embraced in a valid right of way grant is no longer subject to sale or disposal under the mineral or other public land laws, and therefore the Department is without authority to permit the acquisition of rights by others

in such rights of way. It does not follow from this, as the Commissioner concedes, that if any interest, contingent or expectant, continues in the United States, Congress may not dispose of it. In fact it has exercised such authority by providing in the acts last above cited that upon abandonment or forfeiture of the grant the title shall inure to the holders of the land traversed by the right of way. The Commissioner is of the opinion that if the possibility of reverter in the right of way was intended to be granted, express mention of it would have been made of it in the grant. He applies the rule that legislative grants should be construed in favor of the public, and whatever is not granted in clear and explicit language is withheld. But the grant here in question purported to convey the entire SW $\frac{1}{4}$, and was broad enough to comprehend any interest the United States had in the land. The test should rather be whether the deed of grant manifested any intention to exclude the possibility of reverter in the right of way. *Rowana Petroleum Corporation v. Sutter et al.* (28 Fed. 2d, 159, 162). It is not irrelevant to consider that at the time this grant was made there was no knowledge or well-grounded belief that the land was valuable for oil, and a reversion of title was doubtless regarded as remote, if not improbable. The intention of Congress is not to be gauged by subsequent events. So far as the grant to the city purported to convey the title and estate of the railroad grantee, it was without effect. The city took the land subject to the right of way. *Stalker v. Oregon Short Line Railroad Company* (225 U.S. 142); *Rio Grande Western Railway v. Stringham* (239 U.S. 44). But this result arises by operation of law and not by the terms of the grant. In the latter there is not a word or phrase which could be used as a basis for the contention that the United States excepted any land or reserved any rights in itself.

It is the judgment of the Department that the grant to the city divested the United States of all the interest it had in the land. The rule of construction invoked by the Commissioner does not justify the withholding of that which satisfactorily appears to have been conveyed in the grant. *Russell v. Sebastian* (233 U.S. 195). It follows that the act of May 21, 1930, *supra*, has no application, and the application of the Choctaw, Oklahoma and Gulf Railroad Company should be denied.

Approved:

T. A. WALTERS,

First Assistant Secretary.

SIMULTANEOUS APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS

[Circular No. 1320]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., March 29, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

The rules with regard to preference rights under applications filed simultaneously stated in the case of *Bumpers v. Holloway* (48 L.D. 269), and the cases there cited with approval, have not been found satisfactory in their application to oil and gas prospecting permit cases. Accordingly, these rules will not be followed in the future, but instead, the following instructions will govern your action in the disposition of conflicting applications for oil and gas prospecting permits:

In case two or more applications are received in the same mail, or are presented at your counter so nearly at the same time as may be considered simultaneous, or when one or more applications are received by the same mail and one or more are presented at the counter at the time those are received by mail, which applications conflict in whole or in part, and in which no preference rights are claimed, the applications so received will be considered as filed simultaneously and the right of priority of filing will be determined by a public drawing in the manner provided under paragraph 4 of the instructions of May 22, 1914 (43 L.D. 254).

The drawing will be held on the seventh day after the day the applications were filed unless such day falls on a holiday, in which case the drawing will be held on the following day. No notice to the applicants that a drawing will be held or the date thereof will be required.

You will issue your official receipt for the fees paid by each applicant, but will return by your official check the fees paid by the unsuccessful applicants, noting on the abstract of moneys returned or applied opposite the check number, the word "drawing." Also note on the oil and gas applications the word "drawing", and the date, amount and number of the check.

At the completion of a drawing, furnish this office a list of the applications involved therein showing: (1) date of drawing, (2) description of the land involved, (3) names of successful applicants

and serial numbers of applications, and (4) names of unsuccessful applicants and serial numbers of their applications.

FRED W. JOHNSON,
Commissioner.

Approved, March 29, 1934.

T. A. WALTERS,
First Assistant Secretary.

WASHINGTON PULP AND PAPER CORPORATION—INDIAN TIMBER SALE CONTRACTS—ACT OF MARCH 4, 1933.

Opinion, March 30, 1934.

INTERPRETATION OF STATUTES—ACT OF CONGRESS—CONSTITUTIONALITY.

Where an act of Congress is open to two constructions, one of which raises a serious constitutional question, and the other of which avoids such question, the settled rule of statutory construction requires adoption of the latter construction.

CONTRACTS—TIMBER ON INDIAN LANDS—ACT OF MARCH 4, 1933—DUE PROCESS REQUIREMENT OF FIFTH AMENDMENT TO CONSTITUTION.

A paper and pulp company's contract with Indians to purchase timber from them contained a provision affording the company administrative recourse against economically unreasonable stumpage prices, by price reduction, which provision formed a substantial consideration for the company's contractual promises. *Quaere*: Whether a later statute if construed to deprive the company of such administrative recourse for a price reduction would not violate the "due process" clause of the Fifth Amendment to the Federal Constitution.

INDIAN TIMBER LANDS—CONTRACTS WITH INDIANS—ACT OF MARCH 4, 1933—CON- STRUCTION OF STATUTES.

The Act of March 4, 1933 (47 Stat. 1568), which merely authorizes and directs the Secretary of the Interior, with the consent of the Indians and the purchasers, to modify timber sale contracts, cannot properly be construed to modify, *by its own operation and without the consent of the purchaser*, a contract provision for price reduction.

STATUTES—EFFECT TO BE GIVEN.

Where the language of a statute giving authority and direction to modify a contract does not purport to establish the *exclusive* means for effecting the end sought, another method of modification, provided by the contract itself, is not prohibited.

INDIAN TIMBER LANDS—ACT OF MARCH 4, 1933—CONSTRUCTION OF STATUTES— LEGISLATIVE INTENT.

Consideration of the background and legislative history of the Act of March 4, 1933, and the language of the act itself, leads to the conclusion that the act should not be construed so as to require consent of the Indians involved

to a modification of a contract which, by its own terms, may be modified without the Indians' consent.

PRIOR OPINION OVERRULED.

The Solicitor's opinion of August 8, 1933 (M-27499), in so far as it is inconsistent herewith, is overruled.

MARGOLD, Solicitor:

On March 13 you [the Secretary of the Interior] referred to me for my consideration and opinion the Washington Pulp and Paper Corporation's application for reduction of the stumpage prices in the Makah tribal timber sale contract covering the Wa-ach timber unit.

Allowance of the reduction applied for has been forestalled by the Solicitor's opinion of August 8, 1933 (M-27499). In that opinion the Act of March 4, 1933 (47 Stat. 1568), was construed and given application in determining the legality of various modifications of existing timber sale contracts proposed or allowed subsequent to March 4, 1933. Included among these modifications was one of applicant's contracts. On April 12, 1933, the applicant had applied for a reduction of the stumpage prices in its contract, and on July 7, 1933, the Commissioner of Indian Affairs had proposed to act favorably upon the application. The proposed action was in accordance with the method for stumpage price modifications provided in the contract itself. This contract method does not require consent of the Indians to price reductions effected thereby, and consent of the Indians to the proposed reduction of July 7, 1933, had not been obtained. The Act of March 4, 1933, in so far as pertinent here, provides:

That the Secretary of the Interior, with the consent of the Indians involved, expressed through a regularly called general council, and of the purchasers, is hereby authorized and directed to modify the terms of now existing and uncompleted contracts of sale of Indian tribal timber: * * *

This act was construed in the Solicitor's opinion of August 8, 1933, to add to the existing law—

(1) The power to modify, with the consent of the Indians and of the purchasers, inelastic terms of the contracts, where no provision for change is included in the contracts or Regulations; and

(2) The requirement of the consent of the Indians to modifications permitted under the contracts or incorporated Regulations.

The act was construed to authorize any contract modification and to make the consent of the Indians a condition to any contract modification. "Any type of modification of a term of the contract can be made, but the consent of the Indians is a condition thereto." Consequently, the proposed modification of stumpage prices in applicant's contract was declared to be illegal.

Applicant, by its letter of February 12, 1934, to the Commissioner of Indian Affairs, has petitioned for further consideration of its ap-

plication of April 12, 1933, on the ground that the Act of March 4, 1933, should not be construed to require consent of the Indians to a stumpage price modification effected pursuant to express contract provision therefor.

The opinion rendered herein requires, therefore, consideration of the statutory construction embodied in the Solicitor's opinion of August 8, 1933, with the object of determining whether the Act of March 4, 1933, was therein correctly construed and applied to applicant's contract.

Such consideration leads to the conclusion that the construction and application of the act to applicant's contract, made in the Solicitor's opinion of August 8, 1933, raises a serious question as to the act's constitutionality. If the act admits of another construction which avoids the constitutional question, then under the applicable rule of statutory interpretation such other construction should be adopted. Consideration of the background and legislative history of the act and the language of the act itself leads to the conclusions that it does admit of another construction, and that this other construction not only avoids the constitutional question but also, without regard to the constitutional question, is the only proper construction of the act which can be made with reference to applicant's contract. These conclusions require the adoption of this other construction.

I

Applicant's contract was executed prior to March 4, 1933, and pursuant to the Act of June 25, 1910 (36 Stat. 855-857). This 1910 act provides as follows:

Sec. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.

The provision of applicant's contract under which a reduction of stumpage prices is sought reads as follows:

Upon the presentation by the Purchaser of detailed information, supported by affidavits by a certified public accountant and by the Purchaser, showing that the logging of the said Unit is being conducted at a loss, investigation will be made by forest officers under the directions of the Commissioner of Indian Affairs, for the purpose of ascertaining whether, under existing market conditions, the Purchaser is able, with efficient management, to earn a reasonable profit on the operation. If such investigation shall show to the satisfaction of the Commissioner of Indian Affairs that the operation will not, under efficient management, earn a reasonable profit, he may, in his discretion, relieve the Purchaser from any portion or all of the increase in price over the original contract stumpage price for such period as he shall consider necessary to pro-

tect the Purchaser from serious loss on account of adverse market conditions; Provided, that none of the stumpage rates will ever be reduced below the prices specified in the contract for the period ending March 31, 1928; and the Commissioner shall have authority to reimpose any part or all of the increase in prices at any time upon giving notice to the Purchaser, subject to review by the Secretary of the Interior.

This contract provision gives applicant an administrative recourse against economically unreasonable stumpage prices. True, the provision does not give a right to a price reduction; but it does allow applicant to petition the Commissioner of Indian Affairs for a price reduction, and affords an opportunity for a price reduction by that officer. It is of value and, therefore, forms a substantial consideration for applicant's contractual promises. Applicant is, however, deprived of its value by the Act of March 4, 1933, as construed and applied in the Solicitor's opinion of August 8, 1933. In that opinion the proposed price modification effected pursuant to the contract provision was declared to be illegal; and the applicant was thereby substantially injured. To deny this is to ignore realities.

Acting pursuant to the contract provision, the applicant applied for a reduction of stumpage prices; and the Commissioner of Indian Affairs, having found that the contract prices were too high to allow applicant a reasonable profit, proposed on July 7, 1933, to make a reduction. This proposed modification of prices was, however, declared to be illegal by the Solicitor's opinion of August 8, 1933, and applicant had to continue paying the stumpage prices which had been found by the Commissioner of Indian Affairs to be too high. Subsequently applicant sought modification by the statutory method, but failed to get the consent of the Indians involved. The automatic price increase provision of the contract (against the possible unfairness of which the provision for reduction was undoubtedly inserted) is still operative, and the stumpage prices found by the Commissioner of Indian Affairs to be economically unreasonable will on April 1, 1934, be increased twelve per centum.

To construe the Act of March 4, 1933, so as to deprive applicant of the administrative recourse which is one of applicant's contract rights, is to raise a serious question as to the act's constitutionality. It is very questionable whether the statute so construed meets the due process requirements of the Fifth Amendment to the Federal Constitution.

It is a well established rule of statutory construction that a statute should not be given a construction which raises a serious question as to its constitutionality, if it admits of another construction which avoids the question.

In the leading case of *United States v. Delaware and Hudson Company*, 213 U.S. 366, 407, 408 (1909), the Supreme Court of the

United States announced this rule of statutory construction to be that—

where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

This rule was accepted and applied in *Addy Company v. United States*, 264 U.S. 239, 245 (1924), and *Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298, 307 (1924). In the more recent case of *Missouri Pacific Railway Company v. Boone*, 270 U.S. 466, 471 (1926) the rule was recognized as well settled:

The action, if so construed (as contended for) would, at least, raise a grave and doubtful constitutional question. Under the settled practice, a construction which does so will not be adopted, where some other is open to us.

If, therefore, the Act of March 4, 1933, admits of a construction which avoids the constitutional question indicated above, then such construction must be adopted.

II

Examination of the background and legislative history of the Act of March 4, 1933, shows that the primary legislative intent was to authorize modifications of those Indian timber sale contracts which did not specifically provide for price modifications. It does not reveal any intent to hedge modifications provided for by contract with the requirement of the Indians' consent thereto.

Most of the Indian timber sale contracts do not contain the provision for reduction of stumpage prices which is contained in applicant's contract. Most of the Indian timber sale contracts do contain provisions for periodic and automatic increases of stumpage prices. When the economic depression overtook many purchasers with contracts under which the stumpage prices were high and were automatically becoming higher and under which there were no contract provisions for price reductions, then, because of the depressed lumber market, logging operations on many Indian timber units ceased. With the cessation of logging the income to the Indians from the sale of their timber ceased.

The situation thus created was one in which contract modifications would work to the mutual benefit of the parties concerned. The purchasers, of course, would gain by any reduction. The Indians would gain by reductions of stumpage prices great enough to enable the purchasers to resume operations, since the contracts so modified would realize more income for the Indians than would cancellation of the existing contracts and execution of new ones in the depressed buyers' market.

Since price reductions in those contracts without provision therefor would be to the advantage of the Indians, the Secretary of the Interior, in order to determine his authority in the premises, requested from the Comptroller General his decision on the following points:

(1) Has this Department authority to reduce the stumpage prices on contracts for the purchase of Indian timber where it appears that such reduction would be to the advantage of the Indians entitled to the proceeds from such sales, where the contract does not specifically provide that the Commissioner of Indian Affairs or the Secretary of the Interior may reduce prices?

(2) If the Department is not authorized to reduce prices as appears to it just and necessary, would the consent of the Indians of any tribe, as expressed by the majority vote of an assembled council, operate to authorize a revision of contracts, upon the theory that all parties to the contract or having any beneficial interest in it have agreed to a revision?

The Comptroller General in his decision of December 17, 1931, answered both questions in the negative, stating that the authority in question could derive only from express legislation. His opinion was limited to consideration of the questions submitted to him; it did not purport to deal with those contracts which include provisions for reduction of prices.

Finally, the necessary legislative authority was granted by Congress in its Act of March 4, 1933.

It is true that some statements of Congressmen appearing in the legislative history of the act are general, to the effect that the bill then being debated required consent of the Indians involved to any modification of Indian timber sale contracts. But these statements were made with reference to the modifications which the pending bill authorized and directed. Examination of the Congressional Record not only shows that the legislative debates on this act were primarily concerned with those contracts which did not provide for price reductions and with the proposed authority to modify those contracts, but also shows that there was no legislative intent to require consent of the Indians to modifications of stumpage prices effected pursuant to express contract provision therefor. Congress was concerned with creating authority to modify, not with conditioning authority already existing.

It should also be noted that the memorandum of the Commissioner of Indian Affairs, which was incorporated into the reports of both legislative committees on Indian Affairs and which formed the basis of much of the legislative debates, was concerned only with the situation created by those contracts, which made no provision for price reductions. This memorandum specifically refers to and quotes from the Comptroller General's decision of December 17, 1931, in explaining the necessity of legislation for relief from the situation created by high contract stumpage prices and the depressed lumber

market. The limited scope of this Comptroller General's decision has been indicated above.

The background and legislative history of the act, as indicated above, are not inconsistent with a statutory construction which leaves contract modifications effected pursuant to contract provision therefor unhampered by the act's required conditions.

Although the language of the Act of March 4, 1933, is broad in scope, it does not purport to establish the conditioned authority and direction given therein as the exclusive means of modifying Indian timber sale contracts. It undoubtedly includes within its purview contracts which by their own provisions provide for modifications of stumpage prices. It cannot be doubted, I believe, that stumpage price modifications of such contracts effected by the statutory means would be valid. The statute does not, however, make its authority and direction exclusive. No such exclusiveness is expressed in the language of the act; nor is it implied. With reference to those contracts which contain provisions for reduction of stumpage prices, the act is to be construed as furnishing an additional means of modification.

Different construction of the statute would do violence to its plain purport. It authorizes and directs the Secretary of the Interior, with the consent of the Indians involved and the purchasers, to modify then existing contracts. The act is not self-operating. It does not purport, by its own operation, to modify the contracts in any respect. Yet, if construed to require consent of the Indians to any modification and thereby to alter the price reduction provision in applicant's contract, then the act itself operates to modify the contract. In all probability no purchaser would consent to such a modification of his contract. In my opinion the act, which merely authorizes and directs the Secretary of the Interior, with the consent of the Indians and the purchasers, to modify Indian timber sale contracts, cannot properly be construed to modify, by its own operation and without the consent of the purchaser, a contract provision for price reduction.

For the reasons herein set forth, it is my opinion that the Commissioner of Indian Affairs may consider the Washington Pulp and Paper Corporation's application for reduction of the stumpage prices in its Makah tribal timber contract and may reduce said stumpage prices pursuant to the pertinent contract provision, notwithstanding the required conditions of the Act of March 4, 1933. The Solicitor's opinion of August 8, 1933 (M-27499), in so far as it is inconsistent herewith, is hereby overruled.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

SOIL EROSION SERVICE—CONTRACTUAL AUTHORITY OF THE UNITED STATES—PURCHASE OR PROCUREMENT WITHOUT COMPETITIVE BIDDING.

Opinion, March 31, 1934

UNITED STATES—SUPPLIES AND SERVICES—PROCUREMENT WITHOUT COMPETITIVE BIDDING.

Services and supplies may be procured on behalf of an establishment of the United States Government without competitive bidding in instances where special skill and experience are more important than a low price and it is believed these cannot be assured by competitive bidding.

SOIL EROSION SERVICE—AUTHORITY FOR PURCHASE OF SUPPLIES—PURCHASE WITHOUT COMPETITIVE BIDDING—CONTRACT WITH STATE INSTITUTION.

The Soil Erosion Service of the United States has authority to enter into an agreement with a State administrative institution for the supplying of material needed in connection with the checking of soil erosion.

SOIL EROSION SERVICE—CONTRACTUAL AUTHORITY—AGREEMENT WITH STATE INSTITUTION.

An agreement between the Soil Erosion Service of the United States and a State forest commission whereby, for a consideration, the latter is to produce and supply trees for the former, possesses the essential elements of a valid contract.

MARGOLD, Solicitor:

There was submitted for my opinion the question whether the Soil Erosion Service has authority to enter into contract with the State Forest Commission of South Carolina for the production of trees for the use of the Soil Erosion Service in connection with the Tyger River Soil Erosion Control Project in South Carolina, under the terms and conditions set forth in the memorandum of agreement accompanying the request. It was further requested that I submit a suggested form of contract covering the substance of the said agreement.

The State Forest Commission agrees to make available the unplanted portion of its nursery facilities to produce such planting stock as the Tyger River Soil Erosion Control Project may desire and for which seeds may be available. The said Forest Commission further agrees to supervise the work, buy the necessary materials, and raise the planting stock suitable for planting, and to provide that stock for the South Tyger River Erosion Control Project at the cost of production in accordance with an attached budget, which is limited to the expenditure by the Soil Erosion Service of \$10,000, and which presupposes the use of Civilian Conservation Corps labor in the preparation of beds, sowing of seeds, weeding, care of nursery, and delivery.

Apparently, no actual expenditure of money by the State Forest Commission is contemplated, but it is to prepare specifications for the necessary equipment, material and supplies, whereupon the Soil Erosion Service will prepare bids and make the purchases not to exceed the total of \$10,000. However, there is a paragraph in the proposed agreement which seems to recognize the possibility of contingent circumstances which might cause the total cost of production to exceed \$10,000. Such excess cost, if any, is to be borne by the Forest Commission. No payment for trees is to be made by the Soil Erosion Service until trees have been delivered to the full amount paid in by the Soil Erosion Service at the rate of \$2.00 per thousand. After that condition shall have been met, the Soil Erosion Service agrees to pay for the trees delivered in the spring of 1935 at a price per thousand which will represent in the total the difference between the amount of bills honored and the total cost of production. As I understand this provision, the Soil Erosion Service will receive 5,000,000 trees for \$10,000, if it expends that amount. After that number has been received, the rate per thousand will be proportionate to the total cost of production.

It is further provided that title to all material and equipment purchased by the Soil Erosion Service, as above recited, will rest with the State Forest Commission at the conclusion of the project, after the cost of same has been liquidated through delivery of trees in accordance with the terms of the agreement. It is also provided that if additional trees be needed by the said project after the spring of 1935, they will be provided by the said State Forest Commission at production cost only, including no costs for permanent improvements.

Apparently, the main question concerning which an opinion is desired is whether these services and supplies may be procured by contract rather than by competitive bidding in the manner provided by section 3709, Revised Statutes (Tit. 41, Sec. 5, U.S. Code). That section, as contained in the United States Code, reads as follows:

Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

The Attorney General (10 Op.A.G., 262), speaking of this requirement, said:

But although this policy is certainly desirable in all cases, there are yet some to which it can not well be applied. Such are contracts for services which

require special skill and experience. In these cases it may be of more importance to the Government to secure ability and knowledge competent to the work to be done than to have that work done cheaply. It would not do, for instance, when the Government needs a lawyer to aid in the trial of one of her lawsuits, to advertise for proposals from gentlemen of the bar of the terms on which they would agree to be retained. To accept the cheapest offer in such a case would probably be much the dearest bargain in the end. In all contracts for service which presupposes trained skill and experience, the public officer who employs the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgment, possess the required qualifications.

Again, in 17 Op. A.G. 84, it was held that the provisions of section 3709, Revised Statutes, were not applicable where competition as to the article needed is impossible.

The Acting Comptroller of the Treasury (2 Comp. Dec. 185), in considering the services of a specialist in scientific research, engaged by contract, said:

Inasmuch as it clearly appears that the essential part of the services to be performed in connection with these timber tests is of a scientific character, for which the personal services of Professor Johnson are necessary, I am of the opinion that in expending this money, so far as his expenditures are concerned, no advertisement as provided in section 3709 is required.

This is a cooperative arrangement between the State authorities and the Soil Erosion Service to meet the special needs of the soil erosion program in the State of South Carolina. The trees are to be produced under conditions thought to be most likely to provide suitable supplies for planting in that section, under supervision of experts specially selected on account of training and experience in that science. I see no legal objection to the agreement in this respect.

An unusual item in the agreement is the provision whereby the permanent improvements, consisting of the drilling and casing of a well, engine for pumping, lumber for screens, and other equipment required in the enterprise, are to be left as a part of the nursery and become the property of the State Forest Commission. I find no legal objection to this arrangement, as it merely serves as recompense to the Forest Commission for carrying out its part of the agreement. Presumably, administrative judgment has been exercised and the conclusion reached that the arrangement will provide a dependable supply of suitable trees at a reasonable cost to the Soil Erosion Service.

The agreement could be drawn in a more stereotyped and legalistic form, but as it is supposed correctly to represent the intention of the parties, it is perhaps best to leave it as it is drawn rather than run the risk of misinterpretation in changing it.

There is, however, a statutory provision which must be inserted in all contracts. See Section 22, Title 41, U.S. Code. This provision may be added to the form submitted, as follows:

It is understood and agreed that no Member of or Delegate to Congress shall be admitted to any share or part of this agreement, or to any benefit to arise hereupon.

I understand that proper authority to contract and instructions in connection therewith are being prepared for the Soil Erosion Service pursuant to the requirements of Section 19 and other provisions of Title 41, U.S. Code.

Approved:

T. A. WALTERS,

First Assistant Secretary.

ELECTRICAL CONSULTING ENGINEER, INDIAN IRRIGATION SERVICE

Opinion, April 4, 1934

INDIAN SERVICE—IRRIGATION ENGINEERS—SALARY—ACT OF FEBRUARY 28, 1929—PUBLIC WORKS FUNDS, NATIONAL INDUSTRIAL RECOVERY ADMINISTRATION.

The limitation on salary of the consulting engineer of the Indian Irrigation Service, provided by the Act of February 28, 1929 (45 Stat. 1406), is without application to salaries paid from funds allotted for construction work by the Administrator of Public Works from funds made available under the terms of the National Industrial Recovery Act.

INDIAN SERVICE—ENGINEERS—ACT OF FEBRUARY 28, 1929—EMPLOYMENT UNDER PUBLIC WORKS FUND.

The restrictions imposed by the special act of Congress of February 28, 1929 (45 Stat. 1406), authorizing the Secretary of the Interior to employ engineers and economists for consultation purposes on important reclamation work, apply only to employment authorized by that act, and do not bar the establishment of new or additional positions in the service and payment therefor from funds allotted from the Public Works fund.

INDIAN SERVICE—RECLAMATION—PUBLIC WORKS FUND, NATIONAL INDUSTRIAL RECOVERY ADMINISTRATION—REQUIREMENTS.

The employment of consulting engineers in the Indian Reclamation Service, where compensated from the Public Works fund of the National Industrial Recovery Administration, must be in conformity with the Executive order of November 18, 1923, or the Classification Act of 1923 as amended.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have submitted to me for opinion a question propounded by the Commissioner of Indian Affairs concerning the salary of an electrical consulting engineer. The allotment of Public Works funds has permitted a great increase in

needed electrical work of the Indian Irrigation Service. For several years it has employed a consulting engineer at a salary of \$35 per day, limiting the expenditure to \$5,000 per annum in accordance with the terms of the act of February 28, 1929 (45 Stat. 1404). During the time from July 1, 1933, to January 1, 1934, the salary paid to the consulting engineer amounted to \$2,808.75. If the limitation of the act of February 28, 1929, applies, there is left a balance of \$2,191.25 for salary of the consulting engineer from January 1 to July 1, 1934, an amount sufficient only for 62½ days of employment.

The funds being expended by the Indian Office for the employment of the consulting engineer are those obtained by allotments made pursuant to the National Industrial Recovery Act. The Indian Office desires authority to pay its consulting engineer more than \$5,000 during the fiscal year 1934.

Therefore the question arises whether the limitation on salary, provided by the act of February 28, 1929, applies if the funds from which the salary is paid are allotted for construction work by the Administrator of Public Works from funds made available under the terms of the National Industrial Recovery Act.

The act of February 28, 1929 (45 Stat. 1406), authorizes the Secretary of the Interior to employ for consultation purposes on important reclamation work five consulting engineers, geologists and economists at rates of compensation to be fixed by him but not to exceed \$50 per day, provided that the total compensation paid to any engineer, geologist or economist during any fiscal year shall not exceed \$5,000.

Section 201, subdivisions (b) and (c) of the National Industrial Recovery Act, provides:

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

The provisions of subsections (b) and (c) above quoted have been interpreted by Executive Orders Nos. 6440 and 6554 and by the decisions of the Comptroller General. The Comptroller General states, in his opinion dated February 20, 1934, A-52844, that:

Executive Order No. 6440, dated November 18, 1933, the provisions of which were extended to other emergency agencies by Executive Order No. 6554 of January 10, 1934, vested the authority and imposed the duty and responsibility of fixing salary rates in accordance with its provisions in the respective heads of the agencies or establishments concerned. And the de-

cisions of this office hereinbefore mentioned were intended to require that the heads of the regular departments or establishments, in fixing the rates of compensation of officers and employees to be paid from funds allocated under the provisions of the National Industrial Recovery Act, to fix such rates in accordance with either the regular classification schedule or the schedule prescribed in Executive Order No. 6440 of November 18, 1933.

Where the personnel of a regular establishment of the Government to which emergency funds have been allotted is subject to the Classification Act, as amended, and the allotment has been made for performance of work similar to that performed by the regular force, the head of the regular establishment has an election in fixing rates of compensation for the emergency positions either under the regular classification schedule, or pursuant to the Executive Order.

Consequently, if the duties of the position under an emergency allotment are to be the same as the duties of a regular position in the same establishment which has been regularly classified in accordance with the Classification Act, as amended, the head of such establishment may fix the compensation for the emergency position at the appropriate rate under the regular classification schedule by the established procedure for creating an additional position, 9 Comp. Gen. 101, or may fix the compensation at the corresponding rate scheduled in the Executive Order of November 18, 1933—subject in either instance to the percentage reduction applicable to regular employees under the act of March 20, 1933, 48 Stat. 12.

Where the duties of the emergency position are not to be the same as the duties of a regular position previously classified under the Classification Act as amended, then such emergency position may be regularly classified in accordance with the Classification Act as amended or else the compensation thereof may be fixed by the head of the department or establishment concerned in accordance with the provisions of Executive Order No. 6440 of November 18, 1933.

The provisions of Executive Order No. 6440 are applicable only to positions at the seat of Government and in the field of a character which, if in the regular service would be subject to classification under the Classification Act as amended, and therefore, do not apply to laborers, mechanics.

Consideration of the statutes, Executive orders, and decisions of the Comptroller General leads me to the conclusion that the restrictions imposed by the special act of February 28, 1929, apply only to employment authorized by that act. When the limitation of expenditure has been reached thereunder, no further employment may be made under that act. This, however, is no bar to the establishment of new or additional positions in the service and the payment therefor from funds allotted from the Public Works fund. Such additional positions would be entirely independent of the act of February 28, 1929, which could not be invoked either to authorize the payment of \$50 per day, or to limit the number of employees or the total amount that may be paid to such employees within the fiscal year. The new employment, however, must be in conformity with the Executive order of November 18, 1933, or the Classification Act of 1923, as amended.

The highest rate of compensation that may be paid under the Classification Act is \$9,000 per annum or \$25 per day, subject to deduction required by existing law.

Therefore, it is my opinion that a new position or new positions may be established at an appropriate basic rate subject to the deduction provided by section 2, title 2 of the act of March 20, 1933, as amended, and that compensation therefor may be made from funds under the National Industrial Recovery Act.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CONTRACT WITH CITY OF SAN DIEGO IN CONNECTION WITH ALL-AMERICAN CANAL

Opinion, April 5, 1934

WATERS AND WATER RIGHTS—BOULDER CANYON PROJECT ACT—AUTHORITY OF SECRETARY OF THE INTERIOR.

Nowhere in the Boulder Canyon Project Act (45 Stat. 1057) is there any specific limitation upon the discretion of the Secretary of the Interior in determining the use to which the All-American Canal shall be put other than the specific direction that the water carried therein shall be for the reclamation of public lands and for other beneficial uses exclusively within the United States.

WATERS AND WATER RIGHTS—CONSTRUCTION OF STATUTES—BOULDER CANYON PROJECT ACT.

Use by the city of San Diego, California, of water obtained from the All-American Canal, will be, in the language of the Boulder Canyon Project Act, a beneficial use and exclusively within the United States, and accordingly, a contract made by the Secretary of the Interior with the city of San Diego, whereby the carrying capacity of said canal is to be increased, the work to be performed by the United States with provision made for repayment of the cost by the city, is permissible under the terms of the said act.

WATERS AND WATER RIGHTS—ALL-AMERICAN CANAL—BOULDER CANYON PROJECT ACT.

Authority to contract to deliver water from a canal to be constructed of necessity carries with it authority to contract for a canal capacity sufficient to carry the water to be delivered in addition to any other water to be carried, if said canal is to carry other water.

WATERS AND WATER RIGHTS—BOULDER CANYON PROJECT ACT—REIMBURSEMENT OF THE UNITED STATES.

Since the Boulder Canyon Project Act provides that reimbursement to the Government for outlay for the canal and appurtenances provided by the act shall be "in the manner provided in the Reclamation law," payment in advance by the city of San Diego is not required but, instead, the plan followed in the Reclamation Service, namely, payment without interest extending over a period not to exceed 40 years, is acceptable.

MARGOLD, *Solicitor*:

On February 15, 1933, a contract was made between the United States and the city of San Diego, California, whereby the United States agreed to store in the reservoir created by the Boulder Dam in the Colorado River, for the beneficial consumptive use of the city, 112,000 acre-feet of water per annum and to release the water from time to time as required by the city and deliver it at a point in the Colorado River immediately above the Imperial Dam.

On February 20, 1934, the city filed an application to have the United States construct for its benefit and at its cost, under the provisions of the Boulder Canyon Project Act (45 Stat. 1057), carrying capacity in the All-American Canal for 155 cubic second-feet of water. It is the desire of the city that the water, for which it contracted on February 15, 1933, be carried through that canal to its western terminus, a point from which the city can more easily transport the water to its ultimate destination.

You have asked whether, in my opinion, the Secretary of the Interior has authority to make the contract with the city of San Diego, for increased capacity in the All-American Canal, with a provision for the repayment of the cost of such additional construction in 40 annual installments without interest, or whether the contract must require the city to pay in advance the money necessary to cover the cost of the increased capacity in the canal.

It is my opinion that the terms of the Boulder Canyon Project Act, *supra*, give sufficient authority for the execution of this contract with a provision for repayment by the city in 40 annual installments without interest.

Nowhere in the act is there any specific limitation upon the discretion of the Secretary in determining the use to which the All-American Canal shall be put other than the specific direction that the water carried therein shall be for the reclamation of public lands and other beneficial uses exclusively within the United States. Use of this water by the city of San Diego is a beneficial use and will be exclusively within the United States. In section 5 of the act it is provided:

That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, * * *

The reservoir there referred to is that created at the Boulder Dam, and the canal is the All-American Canal. It is my opinion that, under such statutory provisions, the Secretary of the Interior is fully authorized to enter into a contract with the city of San Diego for the delivery of the water from the Boulder Dam Reservoir, for which

it has already contracted, at any point on the All-American Canal. The western terminus of that canal is such a point.

The authority to contract for the delivery of the water on the canal must, of necessity, carry with it the authority to contract with the city for capacity in the canal sufficient to carry the water to be delivered in addition to any other water to be carried.

Such a situation was under consideration when, on December 1, 1932, the Secretary of the Interior entered into a contract with the Imperial Irrigation District, whereby the United States agreed to construct the Imperial Dam and the All-American Canal and appurtenant structures at a total cost to the district not to exceed \$38,500,000; which is to be repaid to the United States by the district in not more than 40 annual installments. In Article 21 of that contract the United States expressly reserved the right to increase the capacity of the works and contract for such increased capacity with other agencies, each such agency to assume such proportion of the total cost of said works, to be used jointly by such agency and the district, as the Secretary of the Interior may determine to be equitable and just. In such case the district's financial obligation under the contract shall be adjusted accordingly. It was thus recognized by the administrative officers that contracts could be made by the United States with other agencies for enlargement of, and for an interest in, the irrigation works for use jointly with the Imperial Irrigation District, and that the cost to the district would be adjusted on a fair basis; and it was also provided that any agency thus contracting would be required to bear its proportionate share of the cost of operation and maintenance of the works.

Upon what terms is the Secretary authorized to contract for the payment by the city for that excess capacity in the canal?

Section 1 of the Boulder Canyon Project Act provides, among other things, for the delivery of stored water for reclamation of public lands and other beneficial uses *exclusively within the United States*, and the Secretary is authorized to construct, operate, and maintain a main canal (the All-American Canal) and appurtenant structures located entirely within the United States, connecting the Laguna Dam, or other suitable diversion dam, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the Reclamation law.

In subsection (b) of section 4 of the act there is the following provision:

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision

for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

These provisions of the act indicate the general authority of the Secretary and also prescribe the manner in which he may contract for reimbursement of the funds expended to create the necessary capacity in the canal. The plan of reimbursement is to be that provided in the Reclamation law, namely, payment without interest extending over a period not to exceed 40 years.

There is no reason to suppose that Congress intended to place a municipality, such as the city of San Diego, in a position different from that of any other agency which might properly contract to take delivery of water at a point on the canal, or that Congress intended to deny to such a municipality the opportunity to make repayment, on its proportionate amount of the construction cost of the canal, over a 40-year period without interest. Nothing in the Boulder Canyon Project Act requires such a supposition; its terms are sufficiently broad to indicate precisely the contrary intent on the part of Congress.

That plan, which allows the city to make payment in 40 annual installments without interest, is similar to that provided by law in connection with the furnishing of water rights to towns on irrigation projects or in the immediate vicinity thereof. In section 4 of the act of April 16, 1906 (34 Stat. 116), it is provided:

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.

The act of February 25, 1920 (41 Stat. 451), is an authorization to the Secretary of the Interior to sell water from a Federal irrigation project system. It provides in part:

That the Secretary of the Interior, in connection with the operations under the reclamation law, is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: * * *

It also provides certain limitations upon this grant of authority which give preferential rights to water service for the irrigation of lands on the project.

The application by the city of San Diego does not call for delivery of water, as the city and county have previously purchased water from the United States, but asks for capacity in the All-American Canal so that it will be possible for the United States to convey the water purchased by them from storage in Boulder Reservoir from the Imperial Dam to the western terminus of the All-American Canal. To contract for construction of capacity in the All-American Canal, and for the repayment of cost as provided in the Reclamation law, would be to follow closely the plan provided by Congress for towns and cities where water can be delivered conveniently from an irrigation project.

As a result of these considerations, it is my opinion that the Secretary of the Interior can make a valid contract with the city of San Diego, California, under the terms of the Boulder Canyon Project Act, by which the United States will construct, for the benefit of the city, excess capacity throughout the entire length of the All-American Canal for the carriage of 155 cubic feet per second of water, and that the contract may provide that repayment of the cost of such construction shall be made by the city of San Diego in accordance with the terms of the Reclamation law, namely, over a period not to exceed 40 years, without interest.

Approved:

HAROLD L. ICKES

Secretary of the Interior.

FISHING RIGHTS OF YAKIMA INDIANS AT CELILO FALLS, OREGON

Opinion, April 5, 1934

INDIANS—YAKIMA TRIBES—FISHING AND GAME RIGHTS—AUTHORITY OF STATE AND FEDERAL GOVERNMENTS, RESPECTIVELY.

The power to preserve fish and game within its borders is inherent in the sovereignty of a State (citing *Geer v. Connecticut*, 161 U.S. 519; *Ward v. Racehorse*, 163 U.S. 504, 507).

INDIANS—RIGHTS OF STATES—FISHING RIGHTS.

The power of each State to regulate fishing in its rivers includes authority to restrict the devices and types of tackle which fishermen generally employ.

INDIANS—YAKIMA TRIBES—FISHING RIGHTS—CONSTRUCTION OF STATUTES.

A regulation of fishing, imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intentment or operation a denial to a privileged Indian community of its right to fish, is not violative of a provision of a treaty with the Indians (see 12 Stat. 951; 45 Stat.

1158) under which they are guaranteed "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

INDIANS—FISHING RIGHTS—TREATY—CONSTRUCTION OF STATUTES.

A reasonable construction of a provision of a treaty with Indians guaranteeing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory", does not include authority to construct what is known as a willow weir or willow dam in the channel of the Columbia River, for the purpose of holding the salmon run, and in disregard of the State laws and regulations.

INDIANS—YAKIMA TRIBES—STATE LAWS AND REGULATIONS—LIABILITY OF INDIANS.

A Yakima Indian is not exempt from the general laws of the State of Oregon requiring a license in order to sell fish caught in the Columbia River and to pay a poundage tax on such sales, when sold at any place within the jurisdiction of the State.

MARGOLD, *Solicitor*:

Certain questions propounded by the Commissioner of Indian Affairs with reference to fishing rights claimed by Yakima Indians at Celilo Falls, Oregon, have been referred to the Solicitor for opinion. The questions are:

1. Whether, under their treaty, the Yakima Indians have a right to construct what is known as a "willow weir" across the Columbia River for the purpose of holding the salmon run, and
2. Whether the Indians must comply with the Oregon State law requiring them to secure a license for the purpose of selling fish caught by them in the Columbia River and to pay a poundage tax on such sales.

Near Celilo Falls, on the Oregon shore of the Columbia River, is a small Yakima village called Celilo. For many generations the Columbia River at this point has been a usual and accustomed fishing place of the few Indians who have made their homes at Celilo and of other members of the tribe. Celilo is not within the Yakima Reservation but is upon a seven-acre tract owned by the United States. In 1929, Congress placed this tract under the control of the Secretary of the Interior "for the use and benefit of certain Indians now using and occupying the land as a fishing camp site." (45 Stat. 1158.)

The treaty between the United States and the Yakama (usually designated Yakima) Nation of Indians was concluded January 9, 1855. (12 Stat. 951.) Article 3 of that treaty provides that "the exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The nature of the fishing privilege thus reserved at usual and accustomed places outside the Yakima Reservation has been adjudicated by the Supreme Court of the United States.

It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (*Geer v. Connecticut*, 161 U.S. 519; *Ward v. Racehorse*, 163 U.S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

* * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of "taking fish at all usual and accustomed places") "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." *Kennedy v. Becker*, 241 U.S. 556, 562, 562-564 (1916).

In accord are the cases of *United States v. Winans*, 198 U.S. 317 (1905); *People v. Chosa*, 252 Mich. 154, 233 N.W. 205 (1931). It follows that a regulation of fishing imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intentment or operation a denial to the privileged Indian community of its right to fish, is lawful, and not a treaty violation. This principle permits a State to restrict the devices and types of tackle which fishermen generally, including the privileged Indian community, may employ in the waters within its jurisdiction. (*Kennedy v. Becker*, *supra*; *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805 (1916); *State v. Morrin*, 136 Wis. 552, 117 N.W. 1006 (1908). The Columbia River is under the concurrent jurisdiction of the

States of Oregon and Washington (10 Stat. 90; 11 Stat. 383), and the power of each State to regulate fishing in the river is established. *McGowan v. Columbia Packers' Assn.*, 245 U.S. 352 (1917); *Nielson v. Oregon*, 212 U.S. 315 (1908).

The first question propounded by the Commissioner of Indian Affairs concerns the use of a "willow weir", a device long employed by the Indians to obstruct a stream in such wise that the salmon run is directed through a particular channel. The Commercial Fisheries Code of Oregon makes it "unlawful for any person or persons to operate or maintain * * * any fish traps, weir * * * or any device * * * used in catching salmon * * * without first having obtained * * * a license therefor." Ore. Code Ann. (1930) Sec. 40-503. See also Secs. 40-309 ff. All funds derived from license fees are employed under the direction of the State Fish Commission in the preservation, propagation and protection of fish, the maintenance of hatcheries and related enterprises. Sec. 40-105. The classification of fishing devices is entrusted to the State Fish Commission. Sec. 40-115. It does not appear that any regulation promulgated by the State Fish Commission discriminates against Indian fishermen. Nor is it claimed that license to employ any device has been refused to Indian fishermen arbitrarily.

Therefore, answering question 1, it is my opinion that the Treaty of 1855 does not reserve to the Yakima Indians the privilege of constructing a "willow weir" in the channel of the Columbia River at Celilo Falls in disregard of the State laws and regulations above mentioned.

The second question concerns the right of the State to require the Indians to secure a license for the selling of fish and to require that they pay a poundage tax upon such sales. Such requirements are imposed by the Commercial Fisheries Code and operate equally upon all persons. Secs. 40-501, 40-515. The privilege reserved in the Treaty of 1855 is expressly defined as a "right of taking fish." It can not be construed as an exemption from the general laws of the State taxing and regulating the sale of fish. It does not appear that a license has been required for or a tax imposed upon the sale of fish by the Indians upon their reservation or at any other place under the jurisdiction of the United States. Answering question 2, it is my opinion that no Indian may lawfully sell fish at any place within the jurisdiction of the State of Oregon unless he shall have obtained a license for that purpose and shall pay such tax as the State may impose upon vendors. Of course, any discriminatory treatment of Indian vendors in the administration of these regulations would be unlawful.

DEEP ROCK OIL CORPORATION

Opinion, April 19, 1934

INDIAN LANDS—OIL AND GAS LEASE—RENTAL AND ROYALTY—CONSTRUCTION.

An oil and gas lease made under authority of section 2 of the Act of May 27, 1908 (35 Stat. 312), contained provisions that it should run for five years from date of approval, which was November 3, 1920, "and as much longer thereafter as oil or gas is found in paying quantities;" that the lessee should pay as royalty on each gas-producing well \$300 per annum in advance, to be calculated from the date of commencement of utilization; and that, if the gas well should prove unprofitable commercially, and the lessee desired to retain certain gas-producing privileges, he should pay a rental of \$100 per annum, in advance, calculated from the date of discovery of gas, on each gas-producing well. *Held*, That no gas well having produced commercially since the year 1926, the mere payment by the lessee of \$100 annually, under the clause of the lease which makes provision for retention of gas-producing privileges in an unprofitable well, would not operate to extend the lease beyond the fixed or primary period of five years, an extension of the lease requiring, as a prerequisite, production of oil or gas in paying quantities.

FAHY, *Acting Solicitor*:

You [the Secretary of the Interior] have requested my opinion upon a question arising out of an oil and gas lease owned by the Deep Rock Oil Corporation on land allotted to Lannie and Lewis Long, deceased full-blood Creek Indians.

The lease was made and approved under authority of section 2 of the act of May 27, 1908 (35 Stat. 312). The period of the lease, as set forth in the granting clause, is five years from the date of approval—November 3, 1920—"and as much longer thereafter as oil or gas is found in paying quantities." Section 2 of the lease provides for the payment to the lessor as royalty on oil of 12½ percent of the gross proceeds from sales. With respect to gas wells, section 2 of the lease further provides:

And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease: Provided, further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the

lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from the date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payments is to be made, supported by sworn statements. (Italics supplied.)

The five-year period of the lease expired on November 3, 1925. No oil had been found. A gas well had been completed April 30, 1925, with an initial capacity of 3,000,000 cubic feet daily. Small quantities of gas were sold from the well during the year 1926 and for that year the lessee paid the fixed royalty of \$300. No further sales of gas were made and the well appears to have been shut in since that time. For the year 1926-27 and succeeding years, the lessee has paid annually \$100 under that part of section 2 above, giving the lessee the privilege of making such payment for the retention of gas-producing privileges in a gas-producing well the gas from which is not marketed or not utilized otherwise than for operations under the lease. The Superintendent for the Five Civilized Tribes has refused to accept these payments in satisfaction of the lessee's obligations under the lease. He expresses the view that where there is but a single gas well on the premises, the payment of \$100 for retention of gas-producing privileges will not extend the lease beyond the fixed or primary period of five years. He contends that such a well will continue the lease after expiration of the fixed or primary period only where the lessee makes payment of the fixed royalty provided for in the lease for a utilized gas well. The lessee having failed, after notice, to make payment in accordance with this contention, the Superintendent recommends that the lease be canceled.

The question presented is whether the gas well drilled and completed by the lessee in April, 1925, and the payments made by the lessee thereon, operated to extend the lease beyond the fixed period of five years.

The lease contains no provision under which it may be extended beyond the fixed or primary period by a mere money payment, and no such payment alone can operate to extend that period. See *United States v. Brown*, 15 Fed. 2d, 565. The \$100 payment tendered by the lessee represents, under the terms of the lease, the consideration for retention of gas-producing privileges in an unprofitable well, the gas from which is not marketed nor utilized other than for operations under the lease. The provision made for such

payment, like many others contained in the lease contract, is operative only while the lease is alive, without having any bearing whatsoever upon the duration of the lease. The duration of the lease is governed solely by the granting clause, and that clause fixes the period of the lease at five years from the date of approval by the Secretary of the Interior "and as much longer thereafter as oil or gas is found in paying quantities." The five-year period expired in 1925, and, if the lease has been continued in force since that time, it is by reason of the provision "as much longer thereafter as oil or gas is found in paying quantities." That provision is a familiar one in oil and gas leases and is usually construed to mean not only that oil or gas must be discovered but that one or the other must be actually produced in paying quantities, otherwise, the lease expires by its own limitations. *Murdock-West Co. v. Logan*, 69 Ohio St. 514, 69 N.E. 984; *Detlor et al. v. Holland*, 57 Ohio St. 492, 49 N.E. 690; *Gas Co. v. Tiffin*, 59 Ohio St. 420, 54 N.E. 77; *Cassel v. Crothers*, 193 Pa. 359, 44 Atl. 446; *Anthis v. Sullivan Oil & Gas Co.* (Okla.) 203 Pac. 187; *Collins v. Mt. Pleasant Oil & Gas Co.* (Kans.) 118 Pac. 54; *United States v. Brown, supra*; *Union Gas & Oil Co. v. Adkins*, 278 Fed. 854, 856. Where, however, gas alone is discovered under a lease providing, not for the payment of a percentage of the gross proceeds from sales of oil or gas, but a fixed sum as a periodic rental for each gas well, there is respectable authority for holding that the "thereafter" clause is complied with by the completion of a well capable of producing gas, even though the product is not marketed or utilized. See *Roach v. Junction Oil & Gas Co.*, 72 Okl. 213, 179 Pac. 934; *Summerville v. Apollo Gas Co.*, 207 Pa. 334, 56 Atl. 876; *Smith v. McGill*, 12 Fed. 2d, 32. The lease involved in the case last cited was identical with that under consideration. Shortly prior to the expiration of the fixed period of the lease, the lessee completed a well with a daily production of 750,000 cubic feet. After marketing the gas for a few months, the gas ceased to flow through the pipe line because of lack of pressure. The lessee then drilled the well deeper and struck oil in paying quantities. During the period the lease was not producing,—a period of about three months—the lessee tendered payment of the fixed royalty of \$300, but the lessor declined to accept the same and brought the suit to cancel the lease on the ground that the lease expired upon the cessation of production by its own terms. The court ruled that the finding of gas in paying quantities within the fixed period of the lease vested the lessee with a limited estate in the leased premises for further operations in accordance with the terms of the lease, and that such estate was not lost by a temporary suspension in marketing gas while the lessee was engaged in drilling the well deeper in an effort to find

production in the lower sands. While such a temporary suspension of production was held not to effect a termination of the lease, the court recognized that the limited estate vested in the lessee by finding gas in paying quantities "might be lost by abandonment, manifested by neglecting to produce oil or gas or to pursue the work of production or further development." See also *Eastern Oil Company v. Coulehan*, 65 W.Va. 531, 64 S.E. 836; *Roach v. Junction Oil & Gas Co.*, *supra*; *United States v. Brown*, *supra*. In the latter case, it was held that the failure of a lessee under a lease like that under consideration to undertake development after disconnecting a gas well for a period of ten months was unreasonable and sufficient in itself to defeat a lease conditioned on oil or gas being found in paying quantities.

Save for the year 1926, when some gas was sold from the well drilled by the Deep Rock Oil Corporation, that company has made no offer of payment of the prescribed royalty for a well producing gas in paying quantities. The payments of \$100 were tendered under a provision in the lease relating to unprofitable wells and constitutes in effect an admission by the lessee that the well was not producing gas in paying quantities. For a period of nearly eight years there has been no production whatever from the lease. No effort has been made by the lessee to market the gas nor has it spent a single dollar in further development work. The rule of temporary suspension announced in *Smith v. McGill*, *supra*, obviously has no application to such a case, and as it is an undisputed fact that production ceased at some time during the year 1926-27, it is my opinion, upon authority of the cases hereinbefore cited, that the lease then terminated by its own limitations.

The holding over by the lessee after termination of the lease can be regarded at the most as creating a tenancy at will (See *Cassell v. Crothers*, *supra*; *Continental Oil Co. et al. v. Osage Oil and Refining Co. et al.*, 69 Fed. 2d, 19). The holding over by the lessee having operated to deprive the lessors of the valuable privilege of leasing the lands to others, they are equitably entitled to retain the payments made by the lessee as a consideration for its continued occupation of the premises. Tenancies at will, under the laws of the State of Oklahoma (Sec. 7344, Compiled Okla. Stats. 1921) may be terminated upon thirty days' notice in writing. A proper regard for the interests of the Indian lessors suggests that such notice be given without further delay.

Approved: April 19, 1934,

OSCAR L. CHAPMAN,

Assistant Secretary.

HAROLD PAUL

Decided April 19, 1934

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

The expressions "have actually resided" and "actual permanent residence", as used in sections 2291 and 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), contemplate the performance of actual residence as distinguished from constructive residence.

HOMESTEAD—"ACTUAL RESIDENCE" CONSTRUED—MILITARY SERVICE.

"Actual residence," under the homestead laws, means physical occupation of the premises; it means precisely the same thing as actual inhabitancy for seven months each year, subject to proper credit for military service.

HOMESTEAD—HOMESTEADER SINGLE OR MARRIED—PERSONAL PRESENCE—PRESUMPTIVE RESIDENCE—TEMPORARY ABSENCES.

Where an entryman is a single person without family, the physical occupation and personal presence must be that of himself; but this Department has repeatedly held that the home of an entryman is presumptively where his family resides, and absence from the entry of the entryman for the purpose of maintaining his family, though in some instances covering several unbroken years, is excusable and does not break the continuity of residence where his family continued to reside upon the homestead.

WALTERS, *First Assistant Secretary*:

This is an appeal by Harold Paul from a decision of the Commissioner of the General Land Office of October 11, 1933, wherein appellant's final proof on his homestead entry, Los Angeles 049617, was held not acceptable and rejected on the ground that the entryman did not show that he had *personally* established and maintained residence on the land for the required time.

The entry was made July 21, 1931. Final proof was offered November 4, 1932. The entryman was entitled to credit for two years' constructive residence because of military service. It was necessary, therefore, that he show that he established residence and maintained it for seven months during one year.

The statements in the final proof and supplemental showing of the entryman bearing on his compliance with the residence requirements are as follows:

At the time of entry and at all times since, entryman has been a member of the police force of Los Angeles. On September 1, 1931, he and his wife went upon the land with a load of lumber, built a habitable one-room frame house 16 by 16 feet, cleared brush and lived in a tent until completion of the house, when they moved into the house. The entryman's stay on the land at this time lasted seven days, after which he returned to his duties in Los Angeles, but his wife remained on the entry and made it her continuous place of abode until May 15, 1932, being absent only for short periods of a week or less to obtain medical treatment and obtain supplies. The

entryman repaired to the land and stayed thereon at week-ends and during holidays and vacation. Prior to final proof, five or six acres were cleared and a well sunk 135 feet at a cost of \$200, which well is dry.

The entryman states that it was necessary to keep on working to supply his wife with necessities and to make improvements on the homestead; that he had household goods at the time of final proof at his address in Los Angeles.

The ground assigned by the Commissioner for rejecting the final proof upon the facts appearing is not sound and imposes a condition of personal performance of residence requirements by a man with a family that the homestead act does not require, and is contrary to long-established rulings in analogous cases by the Department.

The expressions "have actually resided" and "actual permanent residence", as used in sections 2291 and 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), contemplate the performance of actual residence as distinguished from constructive residence. "Actual residence", under the homestead laws, means physical occupation of the premises. It means precisely the same thing as actual inhabitancy for seven months each year, subject, of course, to proper credit for military service. There must be a settled and fixed abode, and that to the exclusion of a home elsewhere. *Hazel L. Hartley Johnson* (On rehearing, 51 L.D. 513); *Josephine M. Locher* (44 L.D. 134). Obviously, as in the cases just cited, where the entryman is a single person without family, the physical occupation and personal presence must be that of himself; but this Department has repeatedly held that the home of an entryman is presumptively where his family resides, and absence from the entry of the entryman for the purpose of maintaining his family, though in some instances covering several unbroken years, is excusable and does not break the continuity of residence where his family continued to reside upon the homestead. See *Stroud v. De Wolf* (4 L.D. 394); *Gates v. Gates* (7 L.D. 35); *Spalding v. Colfer* (8 L.D. 615); *Thrasher v. Mahoney* (8 L.D. 627); *Edward C. Ballew* (8 L.D. 508); *Morris v. Sawin* (9 L.D. 52).

In a report of an investigation of the entry May 17, 1933, a special agent found the entryman's statements as to residence were corroborated by neighbors. He also stated that entryman was interviewed, who stated that he purchased the house at 9015 Hooper Avenue, Los Angeles, in January, 1926, and that his wife furnished the homestead house from the Hooper house, and lived therein up to the time the entry was made; and that he, personally, while employed on the police force of the city, continued to live in this house except when he went to the entry now and then at week-ends. These statements

of the agent, of course, if impugning good faith or showing failure to comply with the residence requirements, do not warrant rejection of the proof, unless established after due notice and hearing.

The mere fact, however, that the entryman retained his ownership of his former home, kept it furnished and used it as his dwelling place while engaged in his duties as a policeman which necessitated his personal presence in or near the city, does not *prima facie* show *mala fides*. The Department in a great number of cases has applied the rule that the entryman must maintain a residence on the homestead to the exclusion of a home elsewhere, but an examination of the facts in these cases will show that in the case of an entryman who was married, his family during the homestead period actually resided elsewhere than upon the homestead. See *Bray v. Colby* (2 L.D. 78, 81); *West v. Owen* (4 L.D. 412); *Van Gordon v. Ems* (6 L.D. 422); *Anderson v. Tannehill et al.* (10 L.D. 388); *Benjamin Chaney* (42 L.D. 510); *George W. Harpst* (36 L.D. 166). Keeping a house in town, to which the family return from time to time, *does not in itself* prove want of good faith. *Higgins v. Wells* (3 L.D. 21). In this case the Department said:

The homestead law is a practical law, and is so devised that it may have a practical enforcement. The law itself provides its own evidence of good faith in improvement, cultivation, and residence; if these exist as facts, the law is satisfied. If the things done on the land are sufficient to warrant good faith, we must infer good faith; and we may not go off the land and find a fact elsewhere, from which we may infer bad faith. For example, if a claimant has a hundred dollars' worth of furniture on his homestead, and two hundred dollars' worth in a house that he had occupied before he took the homestead, it would be absurd to infer bad faith from the latter fact. So, if he owns a house in a town, wherein he lived before entering his homestead, and which he retains and visits periodically for purposes of business or pleasure, his good faith is not thereby impeached. The extra furniture and the extra land are not forbidden by anything in either the letter or spirit of the homestead law.

The law requires that the entryman should personally establish residence (*Puette v. Greer*, 33 L.D. 417), and he must have the concurrent intent to maintain it as long as the law requires. *Whaley v. Northern P. Ry.* (167 Fed. 664); *United States v. Anderson* (238 Fed. 648). *Gibbs v. Kenny* (16 L.D. 22). If his final proof is sufficient, it is immaterial what course the entryman takes after it is submitted, in regard to residing on the entry, and if he elects to abide elsewhere, that cannot be construed as an abandonment of the land. *McNamara v. Orr. et al.* (18 L.D. 504, 508); *Peter Graughan* (6 L.D. 224).

In accordance with the views above expressed, the Commissioner's decision is

Reversed.

RELIEF IN DESERT-LAND ENTRIES—ACT OF FEBRUARY 14, 1934

[Circular No. 1323]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., April 24, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is directed to the act of February 14, 1934 (Public No. 89, 73d Congress), entitled "An Act To amend an Act approved 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 (38 Stat. 1161), as amended by the Act of March 21, 1918 (40 Stat. 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, 1925, 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 irrigable 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 25 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 filing of such election to pay to the register the additional amount of 75 cents 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, 1925, 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 February 14, 1934, are entitled to the relief granted by the act of March 4, 1915, as amended, or by the provisions of this act. Desert-land entries made since March 4, 1915, and prior to July 1, 1925, and pending February 14, 1934, 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 February 14, 1934.

The showing as to the right to such relief must be the same as that required by paragraph 35 of the current desert-land Circular No. 474 (50 L.D. 443, 466), revised December 18, 1928. 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 the said Circular No. 474, and, where necessary, opportunity given applicants to supply data to cure defects, referred to the Special Agent in Charge, Division of Investigations, for investigation and report. All reports by the Special Agent in Charge upon applications for relief under the provisions of this act should be made to the Commissioner of the General Land Office through the Director, Division of Investigations.

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 25 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 that if he fails within the time allowed to make said initial payment of 25 cents per acre, the entry will be canceled; that he will be allowed one year from the date of the filing of such election to pay the register the additional amount of 75 cents 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 25 cents per acre and file said election within the 90-day period, the register will report such facts to the Commissioner, together with evidence of service of notice, whereupon the approved application for relief and the entry will be canceled and the case closed without further notice. Copies of all such letters closing the case will be forwarded by this office to the Special Agent in Charge of the District where the land is located.

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 to other desert-land cases and in substantially the following form:

DEPARTMENT OF THE INTERIOR,

U.S. 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 February 14, 1934.

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 75 cents 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 February 14, 1934, that said additional payment of 75 cents 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.

Where relief has been granted in desert-land entries under the original act of 1929 and prior to February 14, 1934, date of passage of act amendatory thereof, and such entries are intact upon the records of this office and all of the payments required to be made by said original act of 1929 have not been completed prior to the date of said amendatory act, in all such cases the total amount to be collected of such entrymen as a condition precedent to the patenting of their entries will be at the rate of \$1 per acre, instead of \$2.

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.

FRED W. JOHNSON,
Commissioner.

Approved: April 24, 1934..

T. A. WALTERS,
First Assistant Secretary.

[PUBLIC—No. 89—73D. CONGRESS]

[S. 157]

AN ACT

To amend an Act approved 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 (38 Stat. 1161), as amended by the Act of March 21, 1918 (40 Stat. 458)."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved 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 (38 Stat. 1161), as amended by the Act of March 21, 1918 (40 Stat. 458)", be amended to read as follows:

"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, 1925, 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 irrigable 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 25 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 filing of such election to pay to the register the additional amount of 75 cents 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."

Approved, February 14, 1934.

GRAND COULEE DAM, COLUMBIA RIVER: CONTRACT FOR CONSTRUCTION

Opinion, May 2, 1934

RECLAMATION PROJECT—GRAND COULEE DAM, WASHINGTON—CONTRACT FOR CONSTRUCTION WHERE FUNDS NOT AVAILABLE FOR COMPLETION—VALIDITY.

In the construction of public works, a contract by the Government for an entire structure is valid, even though funds are not at the time available for its completion, if in the contract it is provided that in the event the necessary allotment or appropriation of funds for completion of the structure should not be made, the Government is to be released from all liability due to such failure of allotment or appropriation.

FAHY, Acting Solicitor:

You [the Secretary of the Interior] have requested my opinion on a certain legal question arising from the contemplated construction of the Grand Coulee Dam in the Columbia River at a point north of Almira, Washington.

There was allotted by the Administrator of Public Works \$63,000,000 for the dam and power plant, but later the funds were reduced in amount to \$15,000,000, as it was believed the larger sum could not be quickly encumbered. The contract has been let for stripping the dam site and the design of the dam is so far completed that advertisements can issue for bids on its construction. The estimated cost of the structure is \$29,325,000.

The Commissioner of the Bureau of Reclamation requests that he be advised whether or not the Bureau may lawfully enter into a contract for the construction of the entire dam, although this must entail a cost in excess of the amount now allotted for construction purposes.

An inhibitory statute designed to prevent the execution of contracts for public improvements when funds are not available is found at Section 184 of Title 18, United States Code, which provides:

Officer contracting beyond specific appropriation.—Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than \$2,000 and imprisoned not more than two years. (R.S. Sec. 5503; Mar. 4, 1909, c. 321, Sec. 98, 35 Stat. 1106.)

Another statute is found at Section 12, Title 41, United States Code, and is quoted in full.

No contract to exceed appropriation.—No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. (R.S. Sec. 3733.)

As to the first section quoted, it is a criminal statute demanding strict construction in favor of the one charged with breach thereof. If conditions exist which will remove the proposed contracts from the second quoted section, then the first is likewise inoperative.

The second section creates a ban upon contracts between the United States Government and other parties when such contracts purport to bind the Government to pay out more money than has been appropriated for the specific purpose. The instant contracts would in terms bind the Government for sums in excess of an administrative allotment made from funds appropriated by Congress; or, if a proper saving clause were added, would bind the Government to the extent of money appropriated and allotted, binding beyond the original allotment only as further allotments were made from appropriated funds. In the latter case, the contract by its terms would not be within the statutory ban, and such a saving clause should be included in the contract.

The Director of the Bureau of Reclamation states:

In the construction of dams and similar structures by contract, the Bureau of Reclamation has always contracted for the entire structure, even though funds were not available for completion.

The obligation which will be created by the contract when made will be for the full amount of \$29,325,000, even though there is now available only \$15,000,000. If money should not be available for any reason to pay the contractor on estimates as the construction progresses, he could stop work and demand damages from the United States for a breach of the contract. To protect the Government when advertising for bids for such a structure, it has been the practice to include the following article in the specifications:

Failure of Congress to appropriate funds: If the operations of this contract extend beyond the current fiscal year, it is understood that the contract is made contingent upon Congress making the necessary appropriation for expenditure thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the contractor hereby releases the Government from all liability due to the failure of Congress to make such appropriation.

The form of the provision is not fully applicable to the conditions existing on the Grand Coulee project because the allotment as well as the appropriation of funds is involved. It is my opinion that the paragraph should be amended to read as follows:

"Failure of the Administrator of Public Works to allot or of Congress to appropriate funds.—It is understood that the contract is made contingent upon the Administrator of Public Works allotting and/or upon Congress making the necessary appropriation for expenditure thereunder in excess of the amount already allotted by said Administrator. In case such allotment and/or appropriation as may be necessary to carry out this contract is not made, the contractor hereby releases the Government from all liability due to the failure of the said Administrator to allot and/or Congress to make such appropriation.

If the latter article were included in the specifications and should become a part of the contract the United States would be saved harmless from damage claims by the contractor if during the period of construction there was lack of available funds, and the above-quoted statutory provisions would be inapplicable.

Approved:

T. A. WALTERS,

First Assistant Secretary.

JOSEPH CHERAMI

Decided May 5, 1934

PRIVATE LAND CLAIM—PATENT—AUTHORITY TO ISSUE.

Following an adjudication under section 4 of the Act of March 3, 1807 (2 Stat. 440), duly approved by Congress, confirming a private land claim within the former Territory of Orleans (now State of Louisiana), and the

land having been duly surveyed, patent from the United States may properly issue in the name of the claimant, his heirs, devisees and assigns; the patent to contain appropriate recitals that it is issued solely as a muniment of the title which vested in the claimant.

PRIVATE LAND CLAIM—PATENT—DELIVERY.

Upon issuance of a land patent in the name of the original claimant, his heirs, devisees and assigns, the Commissioner of the General Land Office may deliver such patent to persons who have made affidavit that they are the sole heirs of the original claimant and that no succession of the estate of the claimant has ever been made by them or their predecessors.

WALTERS, *First Assistant Secretary*:

This is an appeal from a decision of the Commissioner of the General Land Office denying a petition of certain persons, who claim to be the heirs of Joseph Cherami, for the issuance of a patent on a private land claim of Joseph Cherami for land in T. 18 S., R. 21 E., La. M., Louisiana.

It is not disputed that on January 9, 1812, the Commissioners of the Eastern District of the Territory of Orleans communicated to the House of Representatives their decision No. 445, confirming the land claim of Joseph Cherami, which is now the subject of controversy. 2 American State Papers (Duff Green ed.) 360. Section 4 of the Act of March 3, 1807 (2 Stat. 440), under authority of which the Commissioners acted, vested in the Commissioners full power to decide upon all claims of the type asserted by Cherami, and further provided that the "decisions of the Commissioners when in favor of the claimant shall be final, against the United States." Contained in the record here on appeal are plats of survey, approved January 14, 1832, and January 23, 1858, which show that the claim in question was duly surveyed and found to embrace lots 1 and 2, Sec. 4, T. 18 S., R. 21 E., La. M.

Upon these facts the Commissioner of the General Land Office states as a conclusion of law that "the confirmation by the above Commissioners was final as against the United States * * * and when the survey of Joseph Cherami was approved in 1832, the legal title to such land passed from the United States". This conclusion is amply supported by decisions of the Supreme Court of the United States. *Del Pozo v. Wilson Cypress Co.*, 269 U.S. 82 (1925); *Joplin v. Chacere*, 192 U.S. 94 (1904); *Langdeau v. Hanes*, 21 Wall. 521 (U.S. 1874). Nevertheless, the General Land Office has refused to issue a patent to the appellants, on the ground that there has been no sufficient showing that they are the persons entitled to such a patent.

In their petition on appeal the appellants say:

That under the jurisprudence of the State of Louisiana it is necessary that these petitioners have a patent from the United States in order to evidence their interest and claim to the land herein involved and herein above

described, in order to litigate against the present illegal possessors of the said land.

The appellants should not be prejudiced in their prospective attempt to establish any rights they may have in the premises by the failure of this Department to issue a formal muniment of the title of Joseph Cherami. A patent issued in the name of Joseph Cherami, his heirs, devisees, and assigns, will afford such a record of title in this case without prejudice to the right of any claimant. See Section 2448 R.S. (U.S.C., tit. 43, sec. 1152).

It remains to be decided whether such a patent should be delivered to the appellants. They have made affidavit that they are the sole heirs of Joseph Cherami, and that no succession of the estate of Joseph Cherami has ever been taken by the said heirs or their predecessors. On the other hand, the record shows that adverse possessors hold certain parts of the land under some claim of right. The record further shows that notice of this appeal was mailed to those adverse claimants; however, they have not in any way recognized or become parties to this proceeding. Whether to deliver a patent to the appellants under such circumstances, is a matter within departmental discretion (3 Op. Atty. Gen. 653). The interests of all parties concerned can be safeguarded by a recording of the patent on the proper records of the parish within which the land is situated. Thereafter, the patent will be delivered to the appellants.

This case will be remanded, therefore, with instructions that a patent, designating the surveyed area in question, issue in the name of "Joseph Cherami, his heirs, devisees, and assigns". The patent shall contain appropriate recitals that it is issued solely as a muniment of that title which vested in Joseph Cherami by virtue of decision No. 445 of the Commissioners of the Eastern District of the Territory of Orleans and the subsequent approved survey of the land so confirmed. The attorney for the appellants shall be notified that the patent will be forwarded to the proper recording officer of the parish within which the land is situated, when notice is received by the General Land Office that a sum of money, sufficient to cover the cost of recording, has been deposited with the said recording officer. The said attorney shall also be advised that after the patent shall have been thus recorded it will be delivered to him as the duly designated representative of the appellants.

LANDS OF PAPAGO INDIANS—CHARACTER OF LAND AS MINERAL OR NONMINERAL AS AFFECTING INDIAN RIGHT OF OCCUPANCY

Opinion, May 7, 1934

INDIAN LANDS—PAPAGOS—CHARACTER OF LANDS AS MINERAL OR NONMINERAL—RIGHT OF SURFACE OCCUPANCY UNAFFECTED.

The Indian right of surface occupancy within the exterior boundaries of the Papago Indian Reservation, Arizona, is quite independent of the mineral or nonmineral character of the land.

INDIAN LANDS—EXECUTIVE ORDER OF JANUARY 14, 1916—RIGHT OF INDIANS TO OCCUPANCY—BASIS OF RIGHT.

The presence, in an administrative recommendation (see 45 L. D. 537), of an observation that "ample protection will be given the Indians in the occupation and use of their mineral lands," is no sufficient basis for an inference that the Department has ruled or should now rule that Indian surface rights are restricted to nonmineral lands.

MARGOLD, *Solicitor*:

The following question, propounded by the Commissioner of Indian Affairs, has been referred to me for opinion:

What effect, if any, has the mineral or nonmineral character of land within the Papago Indian Reservation upon the Indian right of surface occupancy?

Decision upon this question is essentially supplemental to a Solicitor's opinion, dated March 7, 1934 (see page 359), in which surface and mineral rights within the Papago Reservation were considered. In the last paragraph of that opinion appears the conclusion "that in 1853 the United States acquired title to the land in question subject to an Indian right to occupancy of an area not exactly determined". Earlier in the opinion it was pointed out that under Spanish and Mexican law mineral deposits constituted a tenement distinct from the surface which covered them. It was not intended to suggest in any way that the Indian right of surface occupancy is limited to "nonmineral" lands. Indeed, no formal classification of the land seems ever to have been made.

When the United States acquired the Papago country as a part of the Gadsden Purchase, the area now included within the Papago Reservation was in the possession of the Papago Indians. The fact of immemorial Indian occupancy of this entire area is not disputed. The courts have consistently recognized such possession as vesting a legally protected possessory interest in the Indians. "The Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent." See *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). No reason appears for denying such recognition with respect to Indian country acquired from Spain

or Mexico. See *Chouteau v. Molony*, 16 How. 203 (1853). Nor does any basis appear for limitation of Indian right of surface occupancy to nonmineral lands when the factual immemorial possession upon which their right is based has continuously embraced the entire controverted area, quite irrespective of the mineral or nonmineral character of any tract.

The Indian right of surface occupancy was confirmed by Executive Order of February 1, 1917. That order reserved "all surveyed and all unsurveyed lands" within the controverted area for the benefit of the Indians, excepting only the "minerals therein contained". (Emphasis added.) A similar general reservation with the same limited exception of minerals appears in the Act of February 21, 1931 (46 Stat. 1202), which extended the reservation to its present area. It must be clear, therefore, that the Indian right of occupancy within the exterior boundaries of the Papago Reservation is quite independent of the mineral or nonmineral character of any land.

It has been contended that a regulation of this Department, approved April 19, 1916 (45 L.D. 537), recognizes a restriction of Indian surface rights to those lands which are nonmineral in character. In fact, that regulation does no more than to declare that certain general mining regulations, with minor modifications, shall be applicable to mining operations within the reservation as permitted by Executive Order of January 14, 1916—an order superseded by the presently effective Executive Order of February 1, 1917. The regulation is in form a recommendation by the Commissioner of Indian Affairs, approved by the First Assistant Secretary of the Interior. In his recommendation the Commissioner remarked that "ample protection will be given the Indians in the occupation and use of their nonmineral lands"

No such dictum in an administrative recommendation may be used as a basis for any inference that this Department has ruled or should now rule that Indian surface rights are restricted to nonmineral lands. The Indian right of surface occupancy extends over the entire reservation, and the Executive Order and statute which created the present reservation so declared. Any situation in which there exists the possibility of a progressive abridgment of those surface rights, without the consent of the Indians and without compensation to them, is anomalous and "paradoxical." See statement of Senator Wheeler in Vol. 17, Hearings Before Subcommittee of Committee on Indian Affairs of the United States Senate (1929-1932) at pages 8413, 8414.

Approved: May 7, 1934.

OSCAR L. CHAPMAN,

Assistant Secretary.

FEDERAL SOIL EROSION SERVICE

Opinion, May 16, 1934

FEDERAL SOIL EROSION SERVICE—PUBLIC WORKS FUNDS—ALLOTMENTS—MAY BE USED ON PRIVATE AS WELL AS PUBLIC LANDS.

The Federal Soil Erosion Service, a national administrative agency created under authority of section 202 of Article II of the National Industrial Recovery Act (48 Stat. 195, 201), received an allotment of Public Works funds by resolution dated July 17, 1933, such resolution specifically authorizing soil erosion projects on privately owned lands, and this allotment was followed by another which did not specify whether it was to be used on private lands, but referred to the resolution of July 17, 1933, and designated the work to be done with the additional allotment as "certain additional projects." *Held*, That both allotments could be employed on erosion projects on privately owned lands.

NATIONAL INDUSTRIAL RECOVERY ACT—SOIL EROSION—AUTHORITY TO CONSTRUCT PROJECTS.

Under the authority contained in section 202 of Article II of the National Industrial Recovery Act, to prepare a comprehensive program of public works which shall embrace "conservation and development of natural resources, including prevention of soil or coastal erosion, * * * and * * * flood control," the Federal Soil Erosion Service, an administrative agency duly created to effect the purposes of the act, is authorized to conduct projects for the prevention of soil erosion on private as well as public lands.

SOIL EROSION SERVICE—BENEFITS NOT RESTRICTED TO PUBLIC LANDS—LEGISLATIVE INTENT.

The fact that benefits will enure to private farms as the result of the prevention of soil erosion and other work of the Federal Soil Erosion Service affords no basis for confining its operation to public lands, for the evidence clearly indicates that Congress intended no such limitation.

SOIL EROSION SERVICE—WORK ON PRIVATE LANDS JUSTIFIED FOR THE PURPOSES OF INVESTIGATION AND DEMONSTRATION.

The work of the Federal Soil Erosion Service is in conformity with the practice of the Department of Agriculture since the time of that Department's establishment.

SOIL EROSION PREVENTION—WORK ON PRIVATE LANDS JUSTIFIED FOR THE PURPOSE OF ELIMINATING A NATIONAL FARMING HAZARD.

Floods, pests, etc., have long been considered national problems, and Congress has frequently authorized work on private lands for their control. The inclusion of soil and coastal erosion prevention in the same paragraph—Sec. 202(b)—with flood control work, indicates that Congress viewed soil erosion and floods as similar problems.

SOIL EROSION PREVENTION—WORK ON PRIVATE LANDS JUSTIFIED AS FLOOD CONTROL MEASURE.

From an early date the importance of maintaining a vegetative cover has been recognized as necessary to flood control. There can be no reasonable doubt that section 202(b) authorizes measures necessary to maintain a vegetative cover on private lands for purposes of flood control.

SOIL EROSION PREVENTION WORK ON PRIVATE LANDS JUSTIFIED AS A MEASURE TO PROMOTE WATER PURIFICATION.

Section 202(b) directs the Administrator to include in the program of public works projects for the "purification of waters." All the projects of the Soil Erosion Service on private lands, save a minor one, are located within the drainage basins of navigable rivers, and there can be no doubt that one of the major contributing causes of the pollution of our public streams is the depositing of erosional debris.

PUBLIC WORKS PROJECTS—FINANCING—NOT LIMITED TO PUBLIC LANDS—COOPERATIVE AGREEMENTS—SCOPE OF AUTHORITY OF ADMINISTRATOR.

The scheme of construction and financing of projects on private lands set forth in the cooperative agreements is authorized by the National Industrial Recovery Act, section 203(a) conferring authority upon the President * * * through the Administrator, * * * to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202.

FAHY, *Assistant Solicitor*:

You [the Secretary of the Interior] have requested my opinion as to whether the Federal Soil Erosion Service is authorized to conduct soil erosion control projects on privately owned lands.

The Service has selected large areas in 22 watersheds for its work. These areas present all the problems arising from differences in soils, their slope and composition and any other factor that may affect their susceptibility to erosion. In privately owned areas the Service proposes to make cooperative agreements with the farmers under which the farmers will allow access to the land, supply any available labor and materials, and agree to adopt such farming practices as may tend to eliminate soil erosion. The Service will agree to supervise the work, demonstrate the methods, and supply such materials, equipment and labor for the initiation of the necessary preventive measures as the farmer can not supply himself. The Service intends to cease its work after these measures are initiated and demonstrated and their effectiveness checked by investigations, but the farmer will agree to continue the practices thus initiated for a period of five years dating from the formation of the agreement. It is hoped that, once effective preventive measures have been discovered, demonstrated and initiated, the farmers will appreciate their value sufficiently to continue them voluntarily in the future. The Director of the Service estimates that the contribution of the farmers with regard to labor and materials is generally equivalent to 70 per centum, and in all cases at least 50 per centum of the cost of each project.

The Soil Erosion Service was originally allotted \$5,000,000 from the Public Works funds. The resolution making the allotment specifically authorized such projects on privately owned lands. The Service has recently received an additional allotment of \$5,000,000.

The resolution making this allotment does not specify whether the money is to be used on private lands, but does refer to the resolution of July 17, 1933, and designates the work to be done with the additional allotment as "certain additional projects." There can be no doubt, therefore, that the Service is authorized by the terms of the allotments to conduct projects on private lands. The sole question is whether the National Industrial Recovery Act, Title II, authorizes such work to be done by a Federal agency, financed entirely with Federal moneys.

I am of the opinion that the Soil Erosion Service is authorized to conduct projects on private lands. Section 202, Title II, of the National Industrial Recovery Act, directs the inclusion of projects for the

"* * * (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control, and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: *Provided*, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army: * * *

The conservation of all natural resources, whether privately or publicly owned, is unquestionably a public purpose. In view of the repeated instances of legislation designed to conserve such assets, the term "natural resources" should reasonably be construed to include private lands, in the absence of restrictive words in the statute. The language of the act is broad and unqualified. The fact that benefits will inure to private farms affords no basis for writing into section 202 (b) a limitation confining its operation to public lands, for the evidence indicates that Congress intended erosion prevention work for the benefit of private lands.

First: The problem of soil erosion within the contemplation of Congress was mainly, though not entirely, the danger of erosion on agricultural lands. Agricultural lands are of course almost entirely privately owned in this country. A warning of the evils of soil erosion on farm lands was sounded by the Bureau of Soils as early as 1911. See W. J. McGee, "Soil Erosion", United States Department of Agriculture, Bureau of Soils, Bulletin No. 71 (1911). Although Congress did nothing at the time, small beginnings were made by the Bureau of Chemistry and Soils in connection with its soil surveys, and at various agricultural experimental stations. See

report of the Committee appointed in the Department of Agriculture to study problems of soil erosion, dated March 25, 1929, and reprinted in Senate Hearings on Agriculture Appropriation Bill for 1932, pp. 255, 261, at pp. 256, 257. Congress took the first major step to solve the problem in the Agriculture Appropriation Bill for 1930. Representative Buchanan, Minority Leader of the subcommittee at the time, made a personal study of the problem in 1928 and was so impressed with its importance that he caused to be introduced extensive testimony of expert witnesses on the subject and persuaded the Congress to take action. The testimony at the Congressional hearings indicates clearly that the problem considered was the danger of erosion on private farm lands. (See House Hearings, Agricultural Appropriation Bill, 1930, p. 310 *et seq.*) :

MR. BUCHANAN. * * * We think that the Nation needs a general policy of water and soil conservation, and the purpose of my developing the facts here to-day is to lay a foundation to procure an adequate appropriation for the department, in cooperation with the States where possible, to conduct experiments on different soil types throughout the agricultural sections of the United States for the purpose of keeping this water from running off, conserving it for the immediate benefit of the farmer, for the purpose of keeping it from washing away the soil and depleting it and ruining it forever, and thereby conserving it and having the effect of preventing the overflow into streams and rivers. It is a problem, the solution of which branches out and results in so many benefits to agricultural interests from different angles, that it becomes vital, and we neglect our duty if we do not attend to it now.

* * * * *

I want to know something about the rapidity of erosion, the amount of soil that is washed off per acre, for the record. I want to know something about the percentage in the older agricultural sections, the land acreage that has been ruined by erosion, totally or partially ruined.

* * * * *

MR. BENNETT. This erosion is not confined to the East. They have it in California very extensively. The soil man of the University of California says many farmers in California are operating on subsoil.

MR. DICKINSON. When the subsoil is removed, what do they operate on then?

MR. BENNETT. They will then have the bedrock. The land will be destroyed when the subsoil goes, and the subsoil once exposed, goes faster than the soil went. That is why we are upon the threshold of more disastrous erosion than we have had in the past.

MR. DICKINSON. It is easily eroded?

MR. BENNETT. Yes, and this eroded land is much more infertile. In 1879 we spent \$28,000,000 for fertilizers and in 1919, \$326,000,000 for fertilizers.

* * * * *

MR. SUMMERS. This is a matter I have been greatly interested in since I was a small boy on an Indiana farm. * * * The solution, it seems to me, should be pointed out in a practical way to the farmers in the different sections and their attention brought to the real devastation that has been taking place because it is only through them that the real conservation can take place. The

Government and the States can only hope to point the way to show the farmer the importance of the task ahead of him and give him an idea as to the best way of accomplishing that task, in my opinion.

* * * * *

Mr. BENNETT. On the basis of measured discharges of suspended soil matter by the rivers to tidewater, together with minimum estimates of material washed out of fields and stranded on lower slopes, in stream channels, over rich alluvial soils, and in reservoirs and irrigation ditches, at least 1,500,000,000 tons of soil are washed out of our fields and pastures every year.

* * * * *

It has been estimated that during the past decade 30,000,000 acres of farm and pasture land have been abandoned in this country. Much of this land was impoverished soil, that is, land made unprofitable by reason of the washing off of the more fertile topsoil.

The value of the plant food contained in the soil matter yearly washed out of the fields, on the basis of the cheapest fertilizer carriers of phosphorous, nitrogen, and potash, is something over \$2,000,000,000. A considerable part of this, certainly not less than \$200,000,000, is a direct annual loss to the farmers of the country. The wastage includes an accumulating loss to the Nation. Stream channels are being choked with erosional debris, bottom lands are made more swampy by increased overflows and less productive by deposition of comparatively unproductive sand and gravel, and reservoirs and irrigation ditches are being filled.

* * * * *

It is difficult to estimate accurately the losses caused by soil erosion because the soils of the country vary so greatly in character and resistance to erosion within narrow limits. The wastage does not proceed according to any plan of averages. The flat lands and certain stable types of soil are more resistant to washing than the sloping areas and numerous unstable soils. Probably 60 per cent of the land now being farmed is suffering from erosion; half of this is suffering so greatly that many of the farmers operating on these types of soil are going backwards financially instead of holding their own. * * *

Accompanying the removal of the soil large amounts of rainfall are being lost. At the Spur Station where 40.7 tons of soil material were lost per acre per year as an average of three years' measurements on bare ground, the average yearly loss of water amounted to 44 per cent of the total precipitation, whereas on buffalo-grass sod only 16 per cent of the rainfall was lost. Last year and this year on the level terraced fields no water was lost by run-off and the yields of both cotton and alfalfa were largely increased. * * *

Soil erosion is the most grave problem confronting land usage in this country and least is being done to control it. One rainy period last fall, in the Missouri Valley did more damage to the land of thousands of fields than can be remedied by a decade of crop rotations, and since that time there have been worse rains. * * *

The farmers must be shown precisely how and where to terrace their lands and to stop gullies in their infancy, and precisely what grasses and trees and vines to plant and where to plant them. County farm agents, leading farmers, business men, bankers, chambers of commerce, railroads, and the press would have to give unceasing assistance to well-conceived practical programs of soil conservation, directed by men determined to stop the wastage. Until this is done and done effectively over immense areas I can not conceive of any such thing as permanent flood control.

* * * * *

Here is by far the biggest field for helping the farmer with the physical side of his agricultural operations that confronts the Nation, and to date least has been done about it. Our efforts have been largely devoted to repairing the diminishing productivity of the land by restocking the soil with nitrogen and humus from soil-improving crops and artificial manures, and of correcting other deficiencies, by adding other materials, such as phosphorus, potassium, lime, and even sulphur. We have been adding little drops of the very things that we have watched flow off to the rivers, the wastes of coastal marshes, and to the sea, in amounts almost beyond our powers of comprehension.

* * * * *

There can be but one outcome of such neglect, and that we do not want and must not have. We have had such vast resources that we have thought it inconceivable that there could be any real menace to our agricultural lands. Actually, this is not only possible, but already many millions of acres have been laid waste and many other millions severely impoverished. In a little while, under the present system, the bulk of our rolling lands will have been ruined or so severely impoverished that they can maintain only a peasant type of farming.

Representative Buchanan waited until the consideration of the appropriation bill on the floor of the House before suggesting an amendment.

Mr. BUCHANAN. Mr. Chairman, I offer the following amendment: * * *

"To enable the Secretary of Agriculture to make investigation, not otherwise provided for, of the causes of soil erosion and the possibility of increasing the absorption of rainfall by the soil in the United States, and to devise means to be employed in the preservation of soil, the prevention or control of destructive erosion and the conservation of rainfall by terracing or other means, independently or in cooperation with other branches of the Government, State agencies, counties, farm organizations, associations of business men, or individuals, \$160,000. * * *

Mr. DICKINSON of Iowa. Mr. Chairman, this matter was thoroughly discussed before the committee. The committee is absolutely convinced of the merit of the erosion work, and so far as I am concerned, and I think I can speak for the rest of the committee, we do not expect to oppose it.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Texas.

The amendment was agreed to.

The money appropriated by Congress for soil erosion investigations was undoubtedly originally intended for the benefit of agricultural lands. Indeed, the Forest Service had long been authorized to conduct similar work on forest and range lands. The act of May 22, 1928 (45 Stat. 701), which codified and extended the prior authority for experimental work by the Forest Service, expressly specified the problem of soil erosion in section 1. Pursuant to the authorization of that act, the Forest Service submitted and has continued to submit estimates for erosion work under the heading of range investigations and other headings as well. See House Hearings on Agriculture Appropriation Bill for 1930, pp. 276, 279; House Hearings on Agriculture Appropriation Bill for 1931, p.

353; House Hearings on Agriculture Appropriation Bill for 1932, pp. 297, 298.

The appropriation for 1930 authorizing soil erosion investigations, however, authorized cooperation with the various departments of the Federal Government. The Forest Service took the opportunity to extend its soil erosion work and received an allotment of \$30,000 for this purpose from the Bureau of Chemistry and Soils. That this allotment was not within the contemplation of the Congress was indicated from the remarks of Representative Dickinson, Chairman of the Subcommittee, during the House Hearings on the Agriculture Appropriation Bill for 1931:

Mr. DICKINSON. The first impression that I get from your breakdown here is that your allocation to the Forest Service is duplicating other work that is being done in the Forest Service already by forest experiment stations, and so forth. I am not sure that I am in full accord with the allocation of \$30,000 to the Forest Service, if that money is to be used for the type of work that you suggest.

* * * * *

It is my recollection that we are already increasing the appropriation to the forest research laboratory at Berkeley by some \$30,000, a part of which at least is to go to research work on cover.

Mr. CLAPP. No part of the increase recommended under the forest-management item is intended for that.

Mr. DICKINSON. If it is a cover-crop research, cover crop has to do with erosion, does it not?

Mr. BUCHANAN. It is a preventive of course; a good preventive.

Mr. DICKINSON. I am simply making that suggestion. It does seem to me that you are scattering your efforts by reason of this allocation of your funds.

I have to suggest with reference to this \$30,000 appropriation that one of the suggestions in the justification of the Forest Service is that "fire is the greatest menace to keeping forest lands productive and to the maintenance of forest and brush cover for protection against erosion and for stream regulation."

That all hooks up in here. I am simply making this as a suggestion.

The Committee having apparently acquiesced in the view that erosion on range lands was an important aspect of the problem, the Forest Service continued to receive allotments for such work in the future, and the Department of Agriculture thereafter presented its estimates for soil erosion investigations accordingly. See House Hearings on Agriculture Appropriation Bill for 1932, pp. 367, 384, 386; Senate Hearings on Agriculture Appropriation Bill for 1932, pp. 162, 166.

While the Congress had apparently been convinced that work on range lands was important, it was perfectly plain that the danger of soil erosion on private farm lands continued to be considered a major national concern. At the request of Senator McNary (see Senate Hearings on Agriculture Appropriation Bill for 1932, p. 166), the officials of the Department of Agriculture produced several reports on the national problem. The first, prepared in 1929, outlined

the general nature of the problem both as to agricultural lands and as to forest and range lands, and set forth a provisional program for work on both kinds of lands. This report was accompanied by two separate supplemental reports prepared in 1931. The first of these dealt with the work of the Bureau of Chemistry and Soils and the Bureau of Public Roads on agricultural lands. The second, prepared by the Forest Service, explained the separate and necessary work program for forest and range land. These reports are set forth in full in the Senate Hearings on Agriculture Appropriation Bill for 1932, pp. 255, 269.

It is interesting to note that despite the enlargement of the program for soil erosion investigations to include range lands, the allotment of large sums of money to the Forest Service for such work did not receive complete approval.

Mr. BUCHANAN. It seems like the Bureau of Chemistry allotted you too much money. How much are you saving this year out of your allotment of this fund?

Mr. STUART. \$7,000 of the 1932 fund will be withheld from expenditure.

Mr. BUCHANAN. And how much do you estimate you are going to save above that next year?

Mr. STUART. \$3,840.

Mr. BUCHANAN. It looks to me like they will cut your allotment next year, then?

Mr. STUART. The amount shown for the Forest Service is the net figure, \$89,160.

Second: The work of the Federal Soil Erosion Service is closely analogous to various activities which the Congress has long authorized for the benefit of agriculture. It has long been a major function of the Department of Agriculture, first, to conduct investigations with regard to problems affecting agriculture, and, second, to make available the results of such investigations through demonstration work by the Extension Service. The work of the Service conforms to this model.

The Service has selected areas in 22 watersheds for its work. These areas present all the problems arising from differences in soils, their slope and composition and any other factor that may affect their susceptibility to erosion. In privately owned areas the Service proposes to make cooperative agreements with the farmers under which the farmers will allow access to the land, supply any available labor and materials, and agree to adopt such farming practices as may tend to eliminate soil erosion. The Service will agree to supervise the work, demonstrate the methods, and supply such materials, equipment and labor for the initiation of the necessary preventive measures as the farmer can not supply himself. The Service intends to cease its work after these measures are initiated and demonstrated and their effectiveness checked by investigations, but the

farmer will agree to continue the practices thus initiated for a period of five years dating from the formation of the agreement. It is hoped that, once effective preventive measures have been discovered, demonstrated and initiated, the farmers will appreciate their value sufficiently to continue them voluntarily in the future.

From the date of its creation, the Department of Agriculture has rendered just such assistance to the farming industry. Section 3 of the act of May 15, 1862, establishing the United States Department of Agriculture, provides:

Sec. 3. And be it further enacted, That it shall be the duty of the Commissioner of Agriculture to acquire and preserve in his Department all information concerning agriculture which he can obtain by means of books and correspondence and by practical and scientific experiments (accurate records of which experiments shall be kept in his office), by the collection of statistics, and by any other appropriate means within his power; to collect, as he may be able, new and valuable seeds and plants; to test by cultivation the value of such of them as may require such tests; to propagate such as may be worthy of propagation, and to distribute them among agriculturists * * *.

And soil erosion investigations are only one of many similar investigations authorized by Congress. See, for example, the act of July 7, 1932 (47 Stat. 609, 621); 7 U.S.C., secs. 423, 424, 425, 426, 426a and 426b (1933 Supp.). These acts do not specifically mention work on private lands, but the Department of Agriculture has consistently construed them to authorize cooperative agreements with private persons. Such agreements frequently provide for payment to private persons for the use of their land, provisions of plant and like aids to private individuals, Federal supervision, and in general the conducting of experimental work on private lands. It is true that these acts generally confer authority upon the Secretary to cooperate with States and private individuals, but this authority is no broader than that conferred by section 201 (a) of the National Industrial Recovery Act. Section 201 (a) provides:

* * * to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure * * *.

The soil erosion investigations have heretofore been conducted on much smaller areas than those selected by the Federal Soil Erosion Service. While such small areas may be adequate to test the consequences of unchecked soil erosion, it is difficult to see how any adequate test can be made of the effectiveness of prevention measures unless the work is carried out on an entire watershed. Surely such extensive areas must be used to test the effect of prevention measures on the raising of the ground level of the water. Moreover, such

areas must plainly include entire watersheds in order to measure the effect of soil erosion work as a measure of flood control by the reduction of the water run-off and silt deposit. Such tests are in fact being made on every one of the Federal soil erosion projects, save a minor one in California.

Assuming, *arguendo*, that the work on these projects extends to areas not needed for experimental purposes, the work would seem plainly of the kind of demonstrational service long conducted by the Federal and State Government. Since 1890 Congress has authorized "Cooperative agricultural work" in connection with the land grant colleges, consisting of "the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in said colleges in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications and otherwise"; (7 U.S.C. Sec. 342); see 7 U.S.C. Secs. 341, 348.

While the Federal Soil Erosion Service is offering more extensive assistance in the matter of providing farm implements and manual labor, this can hardly serve to distinguish its work from the demonstrational work long conducted by extension service.

It is thus apparent that the work of the Soil Erosion Service is in strict conformity with the practice of the Department of Agriculture from the beginning. In large measures the Service is merely making available to the farmers the result of the investigations already reported by the Bureau of Chemistry and Soils. Where such investigations are as yet insufficient, the Service is also making the necessary investigations. This view of the nature of the Soil Erosion Service projects is confirmed by reference to the reports submitted by the Department of Agriculture to the Subcommittees at the Hearings on the 1932 Appropriation Bill. The 22 watersheds selected are only a few more areas than the number recommended before the Congressional committees. It is true that the program heretofore outlined was mainly a program of investigation. But this was intended to be only a beginning. The Department of Agriculture made it plain that when the best practical measures were determined, it was the purpose of the Department to carry the details of the results to the farmers themselves to extensive demonstrational work. In a report submitted to the House Committee in the hearings on the Agriculture Appropriation Bill for 1932, entitled "The National Program of Soil and Water Conservation", the Department made the following statement:

* * * When the best practical measures have been determined, it is the purpose to carry the details of such results to the farmers concerned, through the medium of the Federal and State educational and extension services, and by

bulletins, circulars, newspaper articles and, also, by lectures throughout the region and through visits to the experiment stations on the part of farmers, merchants, bankers, and other business men, as well as students of high schools, agricultural schools and colleges.

And Senator McNary, Chairman of the Senate Subcommittee, urged the Department to prepare a national program (see Senate Hearings on Agriculture Appropriation Bill for 1932, p. 166), and declared on the floor of the Senate that as soon as the program was developed he intended to seek a general legislative authorization for soil erosion work on a Nation-wide scale. (See 74 Congressional Record, pp. 2938, 2939.) While the legislative record does not reveal any connection between the program previously outlined and that authorized by the National Industrial Recovery Act, the previous work and plans of the Department of Agriculture furnish an excellent precedent for the program of the Soil Erosion Service.

Third: There is ample authority to conduct work for the prevention of soil erosion not merely in selected areas, for the purpose of demonstrations, but in any area where the Administrator deems it necessary.

Congress has not confined its assistance to the farming industry merely to investigations and demonstrational work. It has frequently recognized certain farming hazards as a national problem and authorized extensive work to combat such dangers wherever they existed. Legislation authorizing extensive campaigns to suppress the Mediterranean fruit fly, the cotton boll weevil, the pink bollworm, and the white pine blister rust are familiar instances. The Clark-McNary Act, extending Federal protection for the prevention of fire in private forests, should also be noted.

There is ample evidence in the National Industrial Recovery Act that Congress views the problems of soil erosion in this light. It is significant that "the prevention of soil and coastal erosion" is included in the same paragraph, section 202 (b), with "flood control" measures as a method of conserving and developing natural resources. Flood control, like pest eradication and the prevention of forest fires, has long been regarded as a major Federal responsibility. Such work redounds to the immediate benefit of special classes of private individuals. Such work may or may not be conducted on private lands, but this question is immaterial if the benefit inures directly to the private landowners. The fact that pest eradication is necessary to protect the spread of the pests to other lands does not distinguish it from soil erosion prevention, for it is obvious that the evils of erosion may be aggravated by the failure to check the water run-off on distant lands in the same watershed.

The conclusion reached on the basis of the language of the scheme of section 202 (b) of the National Industrial Recovery Act is con-

firmed by an examination of the companion act of March 31, 1933 (S. 598, Public No. 5). This act specifically authorizes "such kinds of cooperative work as are now provided for by acts of Congress in preventing and controlling forest fires and the attacks of forest tree pests and diseases, and such work as is necessary in the public interest to control floods." It seems plain that in the establishment of a program of public works the Congress has treated alike flood control, pest eradication and the prevention of soil erosion.

Fourth: If the Congress had intended to limit the operations of section 202 (b) to public lands, it would have used plain and unequivocal language to express its intention. The records do not indicate that the problem was raised in connection with the National Industrial Recovery Act, but it was considered at length in connection with the companion act of March 31, 1933 (S. 598, 48 Stat. 22). As introduced, S. 598 (H.R. 3905) provided for the establishment of a "Civilian Conservation Corps" and authorized the President to utilize this corps,

* * * in the execution of this Act in the maintenance, construction, or carrying on of works of a public nature, for which sufficient funds are not available, such as forestation on National and State lands, prevention of soil erosion, flood prevention, and construction, maintenance, or repair of roads and trails on the public domain, the national parks, national forests, and other Government reservations: *Provided*, That the foregoing enumeration shall not be construed as a limitation of the kind of projects which may be undertaken hereunder: *Provided further*, That such projects shall be self-liquidating in so far as practicable.

The President was also authorized to enter into cooperative agreements with States, municipalities, or any other public bodies.

During the course of the Committee hearings, Mr. R. Y. Stuart, then Chief United States Forest Service, objected that the limitation of the forestry work to public lands was inconsistent with the long-established practice of the Forest Service:

A point I should like to raise with the committee is the desirability of amending the act as introduced to provide for the use of such labor as is provided under the bill on such private lands on which work can be done under cooperative arrangement with the Federal Government. The Forestry Service is authorized to cooperate now with the various States in forestry protection. * * * It is authorized to cooperate with the various States in other ways that are helpful in the public interest, but applicable to private lands, such protection as the extermination of the gypsy moth, the white-pine blister rust, and other pests. Those pests on private lands may threaten public lands.

There is also in operation a cooperative arrangement between the Federal Government and the various States in these fields, but the funds have been inadequate. At the present time only 54 percent of the forest lands in the United States are under forest protection. I would hope that this bill might be so worded, not only as to forest protection, as to disease control, as to insect control, under a cooperative arrangement between the Federal Govern-

ment and the States and private parties, to the public benefit, in which this labor might be used. There are other projects that would make practicable the use of labor on national forest lands in the East and limited quantity of State lands. * * *

Mr. STUART. We have this situation, Mr. Chairman: What happens on private lands, particularly forest and range lands, is also true of agriculture. It may have a very serious effect upon lands farther down the watershed, where the waters leave the watershed. The recognition of that principle by Congress in the passage of the Weeks law in 1911 led to a policy of public-land acquisition in the eastern part of the United States, under which lands have been acquired at the headwaters of navigable streams. [Joint Hearings before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, 73d Congress, 1st session, on S. 598.]

Mr. Stuart suggested an amendment to permit the President to contract for work on private lands. Labor leaders, however, objected to any use whatsoever of the "Civilian Corps" that might depress the labor market. The administration had anticipated such objections. A "Memorandum for the President" of March 15, 1933, signed by the Secretaries of War, the Interior, Agriculture, and Labor, reads in part:

* * * it is highly desirable that they should be specifically confined to forestry and soil erosion projects in the Bill.

* * * It will also relieve the minds of those who fear the depressing effect on the wage levels of free labor, due to the wide use of this recruited army, and also those who feel that works which should be done by contract by free labor will be progressively urged as suitable for the Conservation Corps, thus further limiting the opportunity to secure normal work and wages."

The objections of labor moved the Committees to recommend an amendment which strictly confined all activities to enumerated projects, which were in turn strictly confined to public lands. See 77 Cong. Record, 861, 876-877.

In the debates in the Senate it was objected that authority would have to be conferred for work on private lands in order to provide for adequate flood control and reforestation. See 77 Cong. Record, 871-872. The bill was finally amended to provide a limited authority for this purpose. See 77 Cong. Record, 916. The amendment was included in the bill as enacted by the Congress and reads:

"* * * *Provided*, That the President may in his discretion extend the provisions of this Act to lands owned by counties and municipalities and lands in private ownership, but only for the purpose of doing thereon such kinds of cooperative work as are now provided for by Acts of Congress in preventing and controlling forest fires and the attacks of forest tree pests and diseases and such work as is necessary in the public interest to control floods."

S. 598 was a companion measure of the National Industrial Recovery Act. Its legislative history indicates plainly that Congress addressed itself to the problem you have raised and that it adopted clear and unmistakable language to express its intention to restrict

work on private lands. In view of the established policy of the Congress to extend Federal aid in analogous cases, S. 598 must be viewed as an intentional exception designed to satisfy the demands of labor leaders. Indeed, there is ample evidence that the Congress understood that the restrictions placed in S. 598 would be removed in a bill unobjectionable to labor, the then forthcoming National Industrial Recovery Act. The following excerpts from the debate in the Senate on S. 598 are illuminating:

Mr. FESS. Mr. President, I should like to ask a question of the Senator from Massachusetts. On yesterday and also today I have had several inquiries from the area affected by the Ohio River flood, and have been asked whether the first section of the bill is broad enough to make any application to flood-control construction work on a river such as the Ohio.

Mr. WALSH. It is not broad enough. The work that is to be done under this bill is confined strictly and absolutely to the public domain owned by the several States and by the Federal Government. If there is any public domain along the Ohio River, the President could undertake flood-control work there.

Mr. FESS. There is no land owned by the State or the Federal Government on that river.

Mr. WALSH. I understand the President has in mind a general public works bill that will probably propose flood-control work such as the Senator has in mind.

Mr. BARBOUR. I should like to ask the Senator a question along the same line as that propounded by the Senator from Ohio (Mr. Fess) in relation to the Ohio River. Does the Senator feel that in the measure of which he spoke and which he indicated the President was going to recommend later, providing for public works, there will probably be included some provision in relation to coastal erosion due to storms and that sort of thing along the coast?

Mr. WALSH. I am of the opinion, from the casual reference which the President made to a proposed public works bill, that it would include work of the character suggested by the Senator from New Jersey.

Fifth: All of the work of the Soil Erosion Service is fully justified as a "flood control" measure. From an early date the importance of maintaining a vegetative cover has been recognized as a necessary flood control measure. An adequate vegetative cover will substantially reduce the water run-off and the silt deposit perhaps as much as 50 per centum. In this connection it is important to note that the costly reservoirs which have been constructed to divert the water flow from rivers lose their value as they are filled with silt deposits. For an extended analysis of this problem see "Relation of Forestry to the Control of Floods in the Mississippi Valley." (H.R.Doc. No. 573, 70th Congress, 2d Session.)

Congress has recognized the importance of maintaining a vegetative cover. The act of March 1, 1911 (36 Stat. 962), for example, provides for the purchase of lands within the watershed of navigable rivers, the control of which will promote or protect the navigation of streams. See also the act of June 7, 1924 (43 Stat. 654), author-

izing and directing the Secretary of Agriculture to cooperate with the various States in the procurement, production, and distribution of forest-tree seeds and plants, for the purpose of establishing wind breaks, shelter belts, and farm wood lots upon denuded or non-forested lands.

There can be no reasonable doubt that section 202 (b) authorizes measures necessary to maintain a vegetative cover on private lands for purposes of flood control. One of the chief objections to the restrictions contained in the act of March 31, 1933 (S. 598), as reported out of Committee, was that such measure would lose much of its effectiveness if confined to public lands (see 77 Congressional Record, 871), and the bill was finally amended to provide for work on private lands wherever necessary "in the public interest to control floods." The absence of any restriction in section 202 (b) coming after the contemporaneous decision of Congress that such flood control measures could not feasibly be limited to public lands, is almost conclusive evidence that no such restriction was intended.

The necessity of maintaining a vegetative cover on agricultural lands is plainly as pressing as the need for such work on forest and range lands. There can be no doubt that the relation of soil erosion on farm lands to floods was one of the major concerns of Congress in authorizing investigations of the soil erosion problem. (See House Hearings on Agriculture Appropriation Bill for 1930, pages 326-328; Senate Hearings on Agriculture Appropriation Bill for 1932, pages 256-265.)

In the act of May 15, 1928 (45 Stat. 534, 538), the Secretary of War was directed to report to Congress on the question of the "benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream." No report has yet been published, but an unpublished report concerning the Missouri River basin significantly notes that the value of soil erosion work on agricultural lands must depend on the voluntary cooperation of the farmers. (Silt Investigations in Missouri Basin, Appendix XV, Vol. 1, p. 29.)

Sixth: All but one of the projects of the Soil Erosion Service are fully justified as measures to check the pollution of streams. Section 202 (b) directs the Administrator to include in the program of public works projects for the "purification of waters." All the projects of the Soil Erosion Service on private lands, save a minor one in California, are located within the drainage basins of navigable rivers, and there can be no doubt that one of the major contributing causes of the pollution of our public streams is the depositing of erosional debris.

Seventh: The scheme of construction and financing of the projects on private lands set forth in the cooperative agreements is author-

ized by the National Industrial Recovery Act. Section 203 (a) provides:

With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; * * *

Were it necessary to go so far, this section should be construed to authorize the Administrator to finance the entire cost of the project. From the outset, the Administrator has construed this section according to its plain meaning and intent to confer authority to conduct projects authorized by section 202 at Federal expense. It is true that Congress has ordinarily required, or has authorized the Departments in charge to require, that the States or individuals benefited must match the Federal grant as a price of its aid for flood control, pest eradication and like work. See, for example, the act of February 10, 1925 (43 Stat. 830); the act of February 9, 1927 (44 Stat. 1065). But it is impossible to believe that Congress intended to reduce its contributions under the National Industrial Recovery Act to 30 per centum. Section 203(a), (1), expressly authorizes the Administrator himself to construct or finance projects authorized by section 202 without requiring such contributions, and the reason for this departure from past precedent is clear. The National Industrial Recovery Act was adopted as an emergency measure, designed to increase purchasing power quickly. Congress obviously deemed it unwise to delay its program until the States or private individuals were ready to contribute a substantial share of the cost, and, therefore, authorized the Administrator to undertake the entire burden, if necessary.

But we need not go so far to sustain the validity of the arrangement in question here. It may be admitted that when the benefits inure in large part to individuals, the plain language of the statute should be restricted in interpretation to authorize Federal grants only in the proportion that Congress has heretofore established as the measure of Federal responsibility. As already noted above, the Soil Erosion Service has entered into cooperative agreements with the farmers, whereby the latter agree to furnish any available labor and materials. The Director of the Service estimates that such contributions of the farmers are the equivalent of as much as 70 per centum, and in all cases at least 50 per centum of the cost of any of the projects conducted on private lands.

For the reasons set forth above, I am of the opinion that the proposed projects of the Federal Soil Erosion Service may lawfully be conducted on private lands.

Approved: May 16, 1934:

HAROLD L. ICKES,

Secretary of the Interior.

TOWL ET AL. v. KELLY AND BLANKENSHIP

Decided May 10, 1934

PUBLIC LANDS—RIPARIAN RIGHTS—FEDERAL AND STATE LAW.

Public land reserved by the United States, until disposed of by it, and in the absence of express legislation by Congress, is governed by the common law with respect to riparian rights and the effect of erosion and submergence, and not by the law of the State (*Widdcombe v. Rosemiller*, 118 Fed. 295).

PUBLIC LANDS—RIPARIAN RIGHTS—NAVIGABLE WATERS—ACCRETION—IDENTIFICATION BY SURVEY—TITLE.

Where surveyed public lands of the United States bordering upon a navigable stream, and to which the United States has not parted with title, are eroded in their entirety by the action of the stream, and later restored by accretion, title to the lands so restored is in the United States, and not in the owners of the remote nonriparian lands, which lands for a time were the shore lands.

PUBLIC LANDS—SURVEY—RIPARIAN RIGHTS—ACCRETION—TITLE.

Following Federal survey, certain undisposed of subdivisions of United States public lands in Nebraska bordering upon the Missouri River, were washed away by that river, either as the result of erosion or avulsion, and later restored, augmented by other land, the result of accretion. *Held*, That title to the surveyed lands so restored or uncovered and to the lands added thereto by accretion is in the United States and not in the owners of the back lands which were for a time the shore lands.

WALTERS, *First Assistant Secretary.*

On June 2, 1932, Frank Herbert Kelly made homestead entry for lots 7, 8 and 9, Sec. 30, T. 21 N., R. 12 E., 6th P. M., Nebraska, containing 102.95 acres.

On April 12, 1933, Claude J. Blankenship filed application to make homestead entry for lots 1, 2, 3, and 4 of said Sec. 30, containing 140.20 acres.

Roy N. Towl, now mayor of Omaha, Nebraska, filed protest on behalf of himself and others against disposal of the aforesaid tracts as public land of the United States. He alleged that lots 1, 2, 3 and 4 of said section were entirely washed away by the Missouri River after the original survey thereof; that they subsequently reformed by process of accretion and, with other lands in front thereof, became the property of owners of the back lots, to which they became attached, by accretion. The protest was dismissed by the

Commissioner of the General Land Office by his decision of October 17, 1932, and, by request of the protestants, the record has been submitted to the Department for consideration as upon appeal.

It appears that the land in said township was originally surveyed in 1857, lots 1, 3 and 4 then having a northern frontage on the Missouri River. Lot 2 was south and back of lot 1. These lots were all in the N $\frac{1}{2}$ of said section and lots 2, 3 and 4 extend to the central east-west dividing line of the section. The tracts just back of these lots were disposed of in 1860 and 1862, and, so far as indicated, they were then nonriparian.

On August 17, 1881, John T. Kendal made homestead entry for lots 1, 2 and 3 of said section, which entry remained of record until March 2, 1923, when it was canceled for failure to make proof within the statutory period. The information in the record indicates that said entryman built a cabin on his homestead, but on account of the encroachment of the river and the cutting away of the lands, he was compelled to move his house the first year after he made entry, and that during the second year he again moved his house, and during the third or fourth year he was compelled to move his house off the land. These facts justify the conclusion that the lots were extant in 1867 and were not entirely washed away until 1885 or later. Lot 4 was not included in the Kendal entry, but nothing in the record indicates it had been washed away when the tract immediately back thereof was disposed of in the year 1860.

It further appears from the reports of investigators on the ground that the river in the vicinity of these lands has made great changes since the date of the original survey in 1857. From these reports it appears that lots 1, 2, 3 and 4 were extant to 1876, when by reason of a ditch dug to deflect the river current, the river began to erode this land, though the lots appear to be extant in 1881 at the date of Kendal's entry. There is some evidence that the lots were all washed away about 1887, though a map submitted by the protestants, dated 1890 and published in 1893, shows parts of all of these lots as then being in existence. There is no showing whether the complete disappearance in 1887 was by erosion or by avulsion. There is evidence in the report of the surveyor made in 1928-1930 that the river made several avulsive changes, moving a half mile at each change, commencing in the early 1890's.

In the years 1928-1930, a resurvey was made, plat of which was accepted by the Assistant Commissioner of the General Land Office on March 20, 1931, which reestablished the lines of said lots 1, 2, 3 and 4, and also included in front thereof new lots 7, 8 and 9, on the theory that the new area had been added by accretion to the undisposed Government lots, or had been uncovered by abandon-

ment of the river bed through an avulsive change in the river at that point.

The protestants have concerned themselves about the dividing line between the States of Nebraska and Iowa, but in this opinion the Department is concerned only with property rights of the particular tracts of land.

On the basis of the legal view hereafter developed, it is immaterial to determine if these lots were ever wholly washed away, and if so, whether by imperceptible erosion or avulsion and it further being immaterial that the back lots might have been riparian at a date subsequent to their original disposal. The view taken of the law in this case is based on this factual situation, namely, that lots 1, 2, 3 and 4 were extant in 1867, the date of the admission of Nebraska to statehood, and that none of the back lots, when disposed of, was riparian, and that said back lots were conveyed originally with reference to surveyed lines.

There are decisions which hold that if nonriparian land becomes riparian by imperceptible erosion of intervening land and subsequently the water recedes and land is formed by accretion extending over the original boundaries of the intervening tract, such accreted land becomes, nevertheless, a part of the remote tract. Such is the view expressed in *Yearsley v. Gipple* (104 Neb. 88; 175 N. W. 641) and is the view in Kansas, Iowa and Missouri. The Department of the Interior does not hold this view of the law, but because the land in dispute lies in Nebraska it is necessary first to dispose of the *Yearsley* case, *supra*.

In the case of *Wildecambe v. Rosemiller* (118 Fed. 295), it was held that land reserved by the Government, until disposed of by it, was governed by the common law with respect to riparian rights and the effect of erosion and submergence, and not by the law of the State. The court there declined to follow the rules established by the Missouri courts, relating to the disappearance and reappearance of an island within the area of the original island located in a navigable river. It was conceded that the State had the right to establish and maintain its own rules of property with respect to land ceded to it or its citizens, but it was denied that such local rules controlled the question while the land was the property of the Government, it then being held subject to the recognized laws and rules of the United States and, in the absence of express legislation by Congress, subject to common law rules. See also *Wilcox v. Jackson* (13 Pet. 498). This rule was approved and applied by the Land Department in the *Rust-Owen Lumber Co.* case (50 L. D. 678). It remains to be determined what is the common law rule or previously applied Federal rule in this unusual situation.

There is a direct conflict in the cases on the topic, but the rule now stated and adopted as this Department's holding and advanced as the better rule, is that where land, once remote, becomes riparian by erosion and subsequently the water recedes, uncovering all the once remote and also the original riparian tract, the once remote tract is restored only to the extent of its old limits. *Ocean City Asso. v. Shriver* (46 Atl. 690 and note in 51 L. R. A. 425; *Gilbert v. Eldridge* (47 Minn. 210, 13 L. R. A. 511); *Mulry v. Norton* (100 N. Y. 424); *Crandall v. Allen* (118 Mo. 403); *Allard v. Curran* (168 N. W. 761); *Erickson v. Horlyk* (205 N. W. 613). *Contra: Welles v. Bailey* (55 Conn. 292, 10 Atl. 565); *Peucker v. Canter* (62 Kan. 363, 63 Pac. 617); *Yearsley v. Gipple*, *supra*.

Because of a very even division of authorities and because the land in question lies within the boundaries of a State holding a contrary view, an extensive search of authorities has been made.

The generally stated and accepted rule as to original riparian owners, omitting the question of remote owners, is stated in *Nebraska v. Iowa* (143 U. S. 359), where the court quoted from *New Orleans v. United States* (10 Pet. 662) as follows:

The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain. (See also *Jones v. Soutard*, 24 How. 41; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepherd*, 4 Wall. 502; *St. Clair County v. Lovington*, 23 Wall. 46; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178.)

The origin of the rule dates back to the rule of common law as developed in England and as first expounded by Lord Hale in his treatise on *De Jure Maris*, *Hangrave Law Tracts*, page 15. Hale there said:

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding upon firm land the same can be known, though the sea leave the land again, or if it be by art or industry regained, the subject doth not lose his propriety though the inundation continue 40 years. If the marks remain or continue or extent can be reasonably certain, the case is clear. [Emphasis added.]

He cited an anonymous case dated 1573, *Dyer*, 326b.

In *Rex v. Yarborough* (1 Eng. Ruling Cases, 458), first argued in 1824 and finally disposed of in the House of Lords in 1828, it was held that land, not suddenly derelict but formed by alluvium imperceptible in progress, belonged to the owner of adjacent lands, on

the theory that the deposit became valuable by the labor of the person who occupied and used it. In *Attorney General v. McCarthy*, 1 Irish Reports, 260 (1911), the court scouted somewhat Lord Hale's idea that marks were conclusive, saying that the real question was whether the accretion or recession was imperceptible in its progress. The facts in that case were that the marks coincided with the water line.

Attorney General of Southern Nigeria et al. v. Holt & Co., Ltd., et al., 64 Law Journal, Privy Council, 103 (1915) was a case of a deed by measurements, which tract of land was in fact bounded by the sea. The court there suggested that one of the considerations in such a case was that access to the sea should not be interfered with by accretions.

The above-cited English cases suggest three reasons for the holding as applied to original riparian owners, though an examination of the *McCarthy* case suggests that that reason was a test rather than a reason. No English case is found in which is involved the immediate question of the rights of an originally remote owner.

In a leading American decision, again not involving remote owners (*Jefferis v. East Omaha Land Co.*, 134 U. S. 178), the court surveyed many of the earlier Supreme Court cases, including the *New Orleans* case, *supra*, and found that these cases, involving lands bounded by water, were supported on two grounds, (1) that such owners should be entitled to accretions because they must bear the losses of encroachment, and (2) that as a matter of public policy all lands ought to have an owner, and it is most convenient that insensible additions to the shore should follow title to the shore. All of these cases were ones wherein one of the boundaries was a watercourse, and, as indicated by all the discussion in *Nebraska v. Iowa*, *supra*, the controlling factor was that the watercourse was accepted and meant to be a boundary, and imperceptible change did not change that intent. These cases relate to the general doctrine of accretion and are in point in this discussion only so far as they indicate the reason for the Department's holding.

Because the *Yearsley* case, *supra*, is directly in point and directly contrary to this Department's holding, it is further discussed here. That case took exception to the rule adhered to by the Department, on the ground that a riparian owner in every instance follows the stream as his boundary, in spite of other known boundaries, and in spite of the fact that his original boundary was not the stream. No reasons were given for the holding other than citing cases of similar holding and suggesting that contrary cases were in fact cases of submergence and recession, rather than erosion and accretion. The other cases there cited likewise give no reason, merely categorically stating the rule and relying on the case of *Welles v.*

Bailey, supra. In the latter case a statement was made that if non-riparian land becomes riparian by erosion of intervening land and then accretive action starts, the remote lot would continue to have the river as its boundary, even beyond its original boundary. This statement was purely a supposition and dictum, though the reason suggested was that by the encroachment of the water the original lines become lost and incapable of relocation. See Farnham on Waters and Water Rights, page 2498. Farnham, at page 2497, goes on to say:

In case land on the shore is washed away so that land which was formerly nonriparian becomes such, the boundaries between the shore owner and his nonriparian neighbor are not changed; and, in case the land is subsequently reformed, the new land will be divided between them according to the old boundary line. In such case the doctrine of opposite boundary does not apply, nor does the doctrine of accretion. The nonriparian owner has no right to accretions. The title of the former riparian owner existing in front of him, he has no riparian rights, and, therefore, he is not entitled to accretions.

The Department's holding is in line with the quotation from Farnham, *supra*, and calls for a statement of underlying principles and for answers to possible objections, for though, as suggested by Farnham in section 848, this situation might be dealt with as a case involving submergence, yet it is clearly tenable when treated as one of erosion and accretion.

Lord Hale, in his work, made the significant observation that if land can be identified by measure, proprietorship should not be divested by reason of encroachment of water. The principle operating in the cases of original riparian lands in the United States seems to be that that which was intended to be the boundary should remain so (*Nebraska v. Iowa, supra*), on the theory that a natural boundary such as a river is presumed to be a fixed line; *Fowler v. Wood* (73 Kan. 511, 85 Pac. 763); Farnham on Waters and Water Rights, page 2495. If that is the true principle, then if a conveyance is by section lines, those lines should prevail, because they were so intended. The fact that at some time water encroaches beyond those lines does not obliterate them, since they can be easily reestablished when dry land is reformed. (*Allard v. Curran, supra.*)

The reason suggested in the *Welles* case for the dictum above quoted, and one of the possible objections to the Department's holding, is that title to the intervening eroded property disappears when it becomes part of the bed of a navigable stream. That objection applies with equal force to the remote as to the original riparian land and logically has no bearing on the title when land does reappear. In any event, the reasoning in the *Allard* case, *supra*, meets and overcomes the suggested basis of the *Welles* dictum.

The objection particularly has no bearing in Nebraska, where it was held that title to the bed of navigable waters was not owned by the State, but by the riparian owners to the thread of the stream. (*Kinhead v. Turgeon et al.*—On Rehearing—109 N. W. 744.) Following the ruling of this case, the United States, as the riparian owner of tracts 1, 2, 3, and 4, had title as riparian owner to the bed of the stream from the date of 1867, when Nebraska was admitted to statehood.

The objection seemingly raised in the *Yearsley* case, *supra*, was that to hold as the Department does was to deprive a riparian owner of certain rights, principally access to the water. This case overlooks the reasons for permitting a riparian owner to take accretions in any instance; namely, because the watercourse was by intent one of his boundaries. Further, it must be remembered that this access to water was acquired by a fortuitous event and was not his by original conveyance. The question then is whether it is better to deprive him of access to water, or forever to deprive the intervening owner of his property.

The United States Supreme Court cases, dealing with accretion, cite two other possible reasons, but neither argues against the Department's holding. The first reason, that he who bears a possible loss should also have the benefit of a possible gain, certainly argues favorably to the position of the original riparian owner. Having suffered a complete loss of the surface of his land, he ought to have the enjoyment upon its reappearance. The second, that it is policy to have land owned, is answered, of course, that the original riparian owner continues to own it and, if valuable, will not let it remain unused.

There is authority in the Federal cases to substantiate the Department's position. In *Stockley v. Cissna* (119 Fed. 812), the court said that because the surface of land was washed off, title was not lost beyond recovery, but was regained by the original owner "when by reliction or accretion the water disappears and the land emerges." Particularly fine discussions of the principles and authorities are presented in *Ocean City v. Shriven*, *supra*, and *Allard v. Curran*, *supra*, both decisions making clear the point that the principle invoked is a matter of determination of boundaries, and when such are determined without reference to a watercourse and can be ascertained by measure, such measure continues to prevail, despite the vagaries of a stream.

There is evidence in the record to show that many, if not all, the changes affecting this property were avulsive ones. If this is true, the generally accepted rule that sudden and perceptible changes do not deprive riparian owners of their land, though it be submerged, would apply. *St. Louis v. Rutz* (138 U. S. 226). The title to none of the land in question would be affected. In view of the foregoing

discussion on rights acquired by accretion, and in view of the generally accepted rule as to the effect of avulsive changes, the Department feels that it is immaterial to decide what was the nature of the changes in this case, for in neither event would the title to this land be affected.

Lots 7, 8 and 9 were laid out in the resurvey of 1928-1930, in land formed in that area between the shore line and the thread of the stream as it ran at the time of the original survey in 1857. The title to these lots is governed by somewhat different rules than govern lots 1, 2, 3 and 4, and the remote lands here involved. When lots 1, 2, 3 and 4 were surveyed, their northern boundary was the Missouri River and they were in fact riparian lands, their intended boundary being that river, subject to the State rule as to the ownership of the river bed. (*Kinkead v. Turges*, *supra*.) As to them the rules of riparian land must be applied, as distinguished from the rules applied to lands not riparian when the survey was made. The rule as to riparian land relating to accretions is stated in *Nebraska v. Iowa*, *supra*, and in the *New Orleans* case, *supra*. Following that rule, the United States acquired title to such land as formed by accretion on the original riparian lots. It is noted that the claims to such accretions are laid only to the thread of the stream as it existed in 1857; consequently no conflict can arise as to lands then on the opposite shore.

If the changes in the course of the river are treated as avulsive, the title to lots 7, 8 and 9 is, nevertheless, not changed. This is true because lots 1, 2, 3 and 4 were originally bounded on the north by the Missouri River. The *Kinkead* case decided that titles to lands bordering on a navigable stream extended to the thread of the stream. The ordinary rule as to navigable streams is that the State takes title to the beds upon coming to statehood (50 L. D. 180), but should the State see fit to relinquish that title in favor of riparian owners, as was done in the *Kinkead* case, there is no reason why it cannot. (*Scott v. Lattig* (227 U. S. 229).) The land to the thread of the stream being conceded by the State to belong to the Government, its title would not be affected should the land be uncovered by an avulsive change in the course of the river.

The rules applied to lots 7, 8 and 9 are not in conflict with the rules applied to lots 1, 2, 3 and 4 and the remote land. Simply restated without citing authorities, the rules governing all these lands are that the intended boundary is controlling, subject to such rights as are incident to that boundary when created. As to the remote land and lots 1, 2, 3 and 4, the intended boundaries between them were the section lines, and inasmuch as these are capable of being restored by survey, even after once being covered by water, they are controlling. As to the northern boundary of lots 1, 2, 3 and 4, the

intended boundary was the Missouri River, subject to rights acquired by accretion, because the intended boundary was the river and subject to the rights to the bed of the stream as created by the relinquishment by the State of its title.

The departmental ruling before stated, as applied to the particular and unusual facts in this case, is submitted as correct, and the title to all of lots 1, 2, 3, 4, 7, 8 and 9 is in the Government.

The protest, accordingly, is

Dismissed.

LEE S. MILLER

Decided May 10, 1934

STOCK-RAISING HOMESTEAD—SUPPLEMENTAL TO FOREST HOMESTEAD—QUALIFICATION—AREA.

One who perfects a forest homestead under the Act of June 11, 1906, for less than the allowed acreage, is not thereby disqualified from later making a stock-raising homestead entry of additional lands to the aggregate permitted, and such later entry should be considered and treated as an original and not an additional entry, and accordingly not subject to the conditions and limitations of an additional entry.

ACT OF MARCH 4, 1923—APPLICATION AND SCOPE—ENLARGED AND STOCK-RAISING HOMESTEAD LANDS IN NATIONAL FORESTS.

The Act of March 4, 1923, is not exclusive in operation and has relation to additional entries outside of national forests when the original entry is of forest lands of the character subject to designation under the enlarged or stock-raising homestead act; and said act does not prohibit the making of original stock-raising homestead entries based upon the additional homestead rights provided for in section 6 of the Act of March 2, 1889, and the Act of April 28, 1904.

WALTERS, First Assistant Secretary.

On May 29, 1919, Lee S. Miller perfected a forest homestead entry, under the act of June 11, 1906 (34 Stat. 233), for 45.09 acres in T. 15 N., R. 8 E., G. and S. R. M., Arizona, and patent was issued to him for said land on March 1, 1920.

On June 5, 1933, Miller was allowed to make an original stock-raising homestead entry for 600 acres in T. 8 S., R. 13 E., G. and S. R. M. He paid the purchase price for an excess area of five acres.

By decision of November 8, 1933, the Commissioner of the General Land Office held Miller's stock-raising homestead entry for cancellation, stating:

The act of March 4, 1923 (42 Stat. 1445), permits persons holding existing or perfected homestead entries for lands within national forests of a character subject to designation which the applicant owns and resides upon to make additional entries for such a quantity of land outside the national forest

and within 20 miles of the original entry as will not exceed 320 acres if under section 1 of said act, or 640 acres under section 2 thereof.

The applicant's only right to make entry under the stock-raising act is under the act of March 4, 1923; therefore, he is not qualified to make an original entry under the Makela decision, nor to make an entry for lands more than 20 miles from the original patented entry.

The claimant, through his attorneys, has appealed.

In the Makela decision (46 L. D. 509), cited by the Commissioner, the Department said:

It follows that a person who has made and perfected a homestead entry for 160 acres in a State not affected by the enlarged homestead acts has exhausted his right to make further entry under any of the homestead laws; but if such entry embraced less than 160 acres, leaving him qualified to make an additional entry for approximately 40 acres under section 6 of the act of March 2, 1889 (25 Stat. 854), he can exercise that right by making an entry under the stock-raising law for not to exceed 520 acres; and if a person has entered 280 acres under either of the enlarged homestead acts, and is qualified to make an additional entry under one of those acts for 40 acres, he is qualified to make an entry under the stock-raising law for 360 acres. Such entries, being made under section 1 of the act, would be original stock-raising entries, and in no sense additional entries within the meaning of the various provisions of the law. If it is kept in mind that the first entry under the stock-raising act is not an additional entry under that law, no matter how many prior entries under other homestead laws have been made, the provisions as to making additional entries will be more readily understood.

In the opinion of the Department, it was not the intention of Congress to limit the making of *original* entries under the act to land within 20 miles of former *perfected* entries under other laws.

The making and perfection of a homestead entry for 45 acres under the act of June 11, 1906, did not exhaust this claimant's rights to entry under that law. He could have made an additional entry in the forest under the act of April 28, 1904 (33 Stat. 527). *Samuel T. B. Himes* (43 L. D. 388). And he could have made an additional entry under said act of April 28, 1904, for land outside of the forest. *Milton L. Hinds* (49 L. D. 263). If after perfecting his forest homestead for less than 160 acres he was qualified to make an additional entry for land outside the forest under the said act of 1904, he was also qualified to make an additional entry outside of the forest under section 6 of the act of March 2, 1889, *supra*. Being thus qualified, under the Makela decision he had the right to make an original stock-raising homestead entry for approximately 600 acres.

The cited act of March 4, 1923, has no application here. That act provides for additional entries under the enlarged and stock-raising homestead laws,—entries for lands outside of national forests additional to unperfected or perfected homestead entries for lands within national forests. Said act is not exclusive and does not prohibit the making of original stock-raising homestead entries based upon

the additional homestead rights provided for in the cited acts of 1904 and 1889. In this connection see Circular No. 886 (49 L. D. 506). In the opinion of the Department, the entry involved is valid. The decision appealed from is

Reversed.

MONTANA-DAKOTA UTILITIES COMPANY

Decided May 16, 1934

RIGHTS OF WAY OVER PUBLIC LANDS—GAS PIPE LINE—APPLICATION—SEC. 28, ACT OF FEBRUARY 25, 1920—STIPULATION.

A requirement that an applicant for a right of way for an oil or gas pipe line shall, as a condition precedent to the granting thereof, enter into a stipulation expressly consenting and agreeing to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches without discrimination as between Government lands and lands of others, and in such ratable proportions as may be satisfactory to the Secretary of the Interior, does not transcend the scope of section 28 of the Act of February 25, 1920 (41 Stat. 437, 448), governing applications of this character.

RIGHTS OF WAY OVER PUBLIC LANDS—PIPE LINES—SEC. 28, ACT OF FEBRUARY 25, 1920—AUTHORITY OF SECRETARY OF THE INTERIOR—STATUTORY CONSTRUCTION.

The authority granted the Secretary of the Interior by section 28 of the Act of February 25, 1920, to promulgate regulations to govern the use of rights of way through public lands for pipe-line purposes includes regulation of the pipe lines, the right of way being granted for "pipe-line purposes", and the only use of the right of way contemplated by the statute being use for a pipe line.

PIPE LINES—ACT OF FEBRUARY 25, 1920—COMMON CARRIERS—INTERPRETATION OF STATUTES.

The inclusion in the Act of February 25, 1920, of the express condition that the pipe lines provided for must be operated as common carriers does not exclude, by implication, other control over the pipe lines, but was intended merely to direct the exercise of the discretion of the Secretary of the Interior on one particular feature, leaving him freedom of discretion over the other elements of regulation as to the use of the pipe line.

SECRETARY OF THE INTERIOR—POWERS—SECTION 32, ACT OF FEBRUARY 25, 1920—STIPULATION.

Under section 32 of the Act of February 25, 1920, the Secretary of the Interior is authorized to do any and all things necessary to carry out and accomplish the purposes of the act. *Held*, a stipulation which requires that an applicant for a pipe-line right of way across public lands shall agree to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches, without discrimination as between Government lands and lands of others, and in such ratable proportions as may be satisfactory to the Secretary of the Interior, is within the purview of this statute.

REGULATIONS AND CASES CITED AND APPLIED. Regulations of February 21, 1921 (53 L. D. 277), and case of *Wilbur v. Texas Company* (40 Fed. 2d, 787; 282 U. S. 843), cited and applied.

WALTERS, *First Assistant Secretary*.

Under date of April 24, 1933, the Commissioner of the General Land Office held for rejection three applications (Pierre 025995, Billings 031412, Bismarck 024202) for right of way for gas pipe lines, filed under the Act of February 25, 1920 (41 Stat. 437), by the Montana-Dakota Utilities Company, formerly the Montana-Dakota Power Company. Those rejections were to be finally effective only upon the failure of the applicant satisfactorily to meet certain conditions within a specified period of time which was thereafter extended. One of those conditions was common to all three of the applications and, by letter from applicant's attorneys under date of July 22, 1933, was made the only ground of appeal to the Department.

The pipe lines of the applicant are already constructed and in use. They constitute the only means for the transportation of gas from the Glendive-Baker anticline in Montana. It appears that the applicant, with its corporate affiliates, dominates the available markets for the gas as well as the means of transportation to those markets. The applicant secures the gas supply for its markets from its own wells on the structure and, under contract, from certain independent producers. Most, if not all, of those wells are on privately owned lands. Yet the Government owns a large area of productive gas lands on the same structure. It appears that the wells on the Government lands, for the most part, stand idle for lack of market or transportation facilities, while the gas beneath them is drained through the producing wells on privately owned land, from which the applicant takes its supply.

Cognizant of that situation, the Commissioner required that the applicant enter into the following stipulation as a condition precedent to the granting of the pipe line right of way:

The granting of the right-of-way shall be subject to the express condition that the exercise thereof will not interfere in any way with the administration of the act of February 25, 1920 (41 Stat. 437), and any and all other similar act or acts; or with prospecting, developing, and producing operations in pursuance thereof; and that the grantee hereby expressly agrees and consents to these conditions and provisions and to each of them; and further expressly consents and agrees to bury such part of its pipe line as traverses the public lands of the United States within thirty days after receipt of written notice from properly accredited agent of the Secretary of the Interior in such a manner that it will in no way interfere with the enjoyment of surface rights by the United States, its permittees or lessees; and further expressly consents and agrees to purchase all of the gas in the vicinity of its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another; but if unable to purchase and/or transport all of the gas produced, then the grantee shall purchase and/or transport gas from

each person and producer ratably in proportion to the average daily potential production.

That such pipe lines shall be constructed, operated, and maintained as common carriers, and in addition, that the use of any such pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and, or, Federal laws, including laws prohibiting waste.

It was from that requirement that the applicant appealed, objecting only to the part of the stipulation which constitutes an agreement to purchase

all of the gas in the vicinity of its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another; but if unable to purchase and/or transport all of the gas produced, then the grantee shall purchase and/or transport gas from each person and producer ratably in proportion to the average daily potential production.

Two grounds have been assigned for the appeal:

1. The terms of the stipulation are such as to cause it to constitute an unreasonable restriction upon the applicant; and
2. The stipulation is not in accord with the provisions of Section 28 of the Act of February 25, 1920 (41 Stat. 437), under which the applications are made.

In connection with the first ground of appeal, the applicant has attacked the form and the substance of the stipulation required by the Commissioner. That stipulation should be modified in such a manner as to limit it in terms to its purpose. That purpose is to insure the receipt by the Government, through its permittees and lessees, of its fair and equitable share of the available market for gas produced from the field or fields served by these pipe lines and to protect the interest of the public by preventing loss through drainage of gas from Government lands by the operation of the wells from which the applicant produces, purchases or transports gas. Thus, the stipulation should be, and hereby is, modified to constitute only an agreement to purchase and/or transport gas available on Government lands.

In the interest of precision, as well as simplicity, the stipulation is further modified in such manner as to cause it to read:

and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches, without discrimination as between Government lands and lands of others and in such ratable proportions as may be satisfactory to the Secretary of the Interior.

The phrase "purchase and/or transport" is used advisedly. The interest of the Government goes only to the extent of requiring, for Government lands, a fair share of that production which serves to satisfy the available market for gas produced from the field or fields served by the pipe line of the applicant. Consequently, it is immaterial whether the applicant purchases all the gas falling

within that share of production which belongs to Government lands, or merely transports, without purchasing, all such gas to an available market, or purchases part and transports part. Whether one or another of those alternatives should be followed at any particular time must, of necessity, depend upon the circumstances surrounding the marketing of gas at that time.

On this appeal, the applicant contended that the stipulation, as required by the Commissioner, should

be so modified as to permit applicant in purchasing gas to establish from time to time a fair field price therefor and uniform conditions under which it will purchase gas and so as to permit applicant to classify all purchases of gas as to quality, quantity and atmospheric pressure and as to volume and distance of wells from pipe line, and as to length of term, date of execution and delivery requirements of purchasing contracts, so that applicant in purchasing gas under such varying conditions for various uniform classified prices will not be deemed guilty of discrimination in making such purchases.

on the ground that the stipulation

is so indefinite and uncertain as to be incapable of concrete definition and in its present form is so worded that the applicant does not feel that it can execute the same and observe its provisions without violating existing contracts, jeopardizing the investment of its bondholders and stockholders, and imperiling the conduct and operation of its business.

Under that contention the applicant argued that its economic existence will be threatened by any agreement to set fixed prices over definite periods without regard for the nature and accessibility of the gas to be purchased, to accept all gas produced of whatever quality, and to expand its gathering lines, compressor stations and other equipment to care for such gas in whatever quantities it is produced.

The Department does not dispute the fact that such an agreement might work an unwarranted hardship upon the applicant. But no such agreement is sought.

Under the modified stipulation it is not the purpose of the Department to compel the applicant to enter into an economically unsound plan for the purchase or transportation of gas or to expand its equipment unreasonably. The considerations which form the basis of a determination of the soundness of any plan for purchase or transportation are too numerous and too variable to admit of definition in the stipulation or in this opinion. The stipulation is designed to secure some equitable plan for apportioning the production of gas as between Government and private lands, the question of purchase or transportation of gas produced on any particular tract of Government land to be governed by a consideration of all those circumstances generally recognized as pertinent to a consideration of the advisability of, or terms of, purchase or transportation

of gas produced from private lands. The interpretation of the stipulation should be, and is hereby declared to be, in conformance with those purposes.

In the second ground of appeal the applicant questions the authority of the Secretary of the Interior to require such a stipulation as a condition precedent to the granting of a right of way.

The contention that no such authority exists is based upon a strained construction of the statutory provision which reads:

Rights of way through the public lands, including the forest preserves of the United States, are hereby granted for pipe-line purposes * * * 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, * * *. (41 Stat. 437, 449).

It is argued that the Secretary has only the right "to promulgate regulations as to survey, location, application and use of the right of way, but that no authority is contained in said Section 28 giving the Secretary of the Interior the power to regulate the pipe line, except that he must require that the same be 'constructed, operated and maintained as common carriers'." That argument embodies a *non sequitur*, for regulation of the "use" of the right of way includes regulation of the pipe line. Such must be the case, inasmuch as the right of way is granted only "for pipe-line purposes." The only "use" of the right of way contemplated by the statute is use for a pipe line, and regulation of that "use" must, of necessity, include regulation of the pipe line.

Nor can it be said that the statutory mention of the express condition that the pipe line must be operated as a common carrier excludes, by implication, any other control over the pipe line. If such were the case, then the provision that the Secretary might regulate the use of the right of way (and thus the pipe line) would have little or no meaning. But Congress is presumed to have had a purposeful intent in the inclusion of such regulatory power, and to have intended to give to the Secretary actual control over the use of the right of way for pipe line purposes. The inclusion in the statute of the express condition that the pipe line must be operated as a common carrier was clearly not intended to remove by implication the express regulatory power theretofore granted, but was intended only to direct the Secretary's exercise of discretion thereunder on one particular subject matter, the common carrier requirement, and to leave in him freedom of discretion over the other elements of regulation as to use of the pipe line.

Such a construction of this statute is not new in departmental practice. On February 21, 1931, the Secretary of the Interior, acting under the same statute, promulgated a regulation which required as

a condition precedent to the granting of a pipe line right of way, a stipulation limiting the use of the line to the transportation of oil or gas produced in conformity with State and/or Federal laws, including laws prohibiting waste. This order is still in effect, and is based upon a construction of the statute as one granting to the Secretary the exercise of control over the pipe line.

There is further authority for the requiring of such a stipulation. The applications are made under Section 28 of the Leasing Act (Act of February 25, 1920, *supra*). Section 32 of that same act provides:

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, * * *

One of the primary purposes of the act is to secure to the United States a return, in the form of royalties, on the oil or gas produced from public land, and to safeguard that oil and gas, as well as the royalty return therefrom, by preventing exploitation, by preventing unregulated monopolistic control of production, transportation, or sale, and by preventing drainage from Government to private lands. Specific provisions need not be cited; that purpose is evident throughout. The Leasing Act cannot be read in any other way.

Congress could not foresee all possible situations which might arise, and thus granted to the Secretary the power to "do any and all things necessary to carry out and accomplish" that purpose as well as others. In the situation shown to exist upon this appeal, that purpose can be effectuated only by a stipulation in the form herein provided. Otherwise, the applicant and its affiliates, because of domination over the market, may monopolize transportation and production as well. The wells on Government lands stand idle while the gas, which the Leasing Act sought to protect, is drained from beneath them.

In *Wilbur v. Texas Company* (40 Fed. 2d, 787; certiorari denied, 282 U. S. 843) the court dealt with a question in many respects similar to that before the Department on this appeal. In that case the Texas Company, holding an operating agreement with a lessee of Government lands, sought to enjoin the Secretary of the Interior from fixing the price at which the company might sell oil produced from the leased premises. No specific provision of the Leasing Act authorized the Secretary to fix that price. In upholding the action of the Secretary, the court said, on page 789:

Moreover, the construction placed upon the act by the Secretary of the Interior is not unreasonable, for it enables the government to prevent a "chilling" of the market price of oil produced in the Oregon Basin field, such as might reduce the amount of the royalties received by the government when taken "in value," and might also tend to discourage the development of the field by pros-

pectors and operators. These considerations are not foreign to the legislative purposes expressed by section 32 of the act (30 USCA Sec. 189), granting the Secretary of the Interior authority "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." * * *

That language is directly applicable to the facts presented on this appeal. The required stipulation clearly comes within the purview of section 32.

Since authority for the requiring of the stipulation is to be found in the Leasing Act, it is not necessary to discuss the general powers of the Secretary of the Interior over the public domain as guardian for the people. Suffice it to say that the purposes to be accomplished by this stipulation are such that the Secretary probably has sufficient authority to act under those general powers alone, as indicated by a consideration of the following group of cases: *Williams v. United States* (138 U. S. 514); *Knight v. United States Land Association* (142 U. S. 161); *United States v. Midwest Oil Company* (236 U. S. 459); and *United States v. Wilbur* (283 U. S. 414).

Thus, the stipulation may be required. The action of the Commissioner of the General Land Office is affirmed, subject to the modifications of the stipulation herein indicated and subject also to the interpretation herein given to that stipulation. In the interest of unity and orderliness, the entire stipulation to be required is reformed to include not only the modifications, but also a rearrangement of the whole.

The granting of the right-of-way shall be subject to the express condition that the exercise thereof will not interfere in any way with the administration of the act of February 25, 1920 (41 Stat. 437), and any and all similar act or acts, or with prospecting, developing, and producing operations in pursuance thereof; and that the grantee hereby expressly agrees and consents to these conditions and provisions and to each of them; and further expressly consents and agrees to bury such part of its pipe line as traverses the public lands of the United States within thirty days after receipt of written notice from properly accredited agent of the Secretary of the Interior in such a manner that it will in no way interfere with the enjoyment of surface rights by the United States, its permittees or lessees; and further expressly consents and agrees that its pipe line shall be constructed, operated, and maintained as a common carrier and that the use of the pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and/or Federal laws, including laws prohibiting waste and any applicable code of fair competition adopted under the National Industrial Recovery Act; and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches without discrimination as between Government lands and lands of others and in such ratable proportions as may be satisfactory to the Secretary of the Interior.

It is to be noted that the standard form of stipulation has been further modified above by the inclusion of an agreement to transport only such oil or gas as has been produced in conformity with any

applicable code of fair competition adopted under the National Industrial Recovery Act. That modification is merely an expansion of the terms of the agreement to transport only such oil or gas as has been produced in conformity with Federal laws.

Affirmed.

GRAND COULEE DAM AND POWER PLANT ON COLUMBIA RIVER, WASHINGTON

Opinion, May 19, 1934

RECLAMATION SERVICE—BONDS—GUARANTORS AND SURETIES—CONSTRUCTION.

Regulations of the Federal Emergency Administration of Public Works regarding sufficiency of guarantors and sureties, adopted to give effect to provisions of the Federal Emergency Relief Act, contained the declaration that "the bond * * * of two responsible individual sureties will be accepted as security for any bid or contract." *Held*, That by this declaration it is not intended to limit to two the number of individual sureties, but to require that their number shall not be less than two.

BOND—CORPORATION—LIABILITY OF STOCKHOLDER AS SURETY—FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.

A stockholder of a corporation may, under the terms of Bulletin 51 of Federal Emergency Administration of Public Works, be accepted as surety on the bond of the corporation, provided he has sufficient property, exclusive of his holdings in the corporation, so that he can justify for double the amount of his stipulated liability on the bond of the corporation.

BOND—LIABILITY OF INDIVIDUAL AS SURETY—FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.

Paragraphs 64 and 65 of Bulletin 51 of Federal Emergency Administration of Public Works permit two or more individuals to execute a bond as security for the faithful performance of a contract between the United States and construction companies, and in such bond limit their liability; but each such individual must justify for double the amount of his stipulated liability.

RECLAMATION SERVICE—BONDS—GUARANTORS AND SURETIES—FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.

Paragraphs 64 and 65 of Bulletin No. 51 of Federal Emergency Administration of Public Works contain no inhibition against more than two surety companies signing the same performance bond, and, in doing so, each company executing the bond may lawfully limit its liability to a stated sum less than the full amount of the bond, the sole interest of the United States being to secure a good and sufficient bond for a definite total amount designated.

RECLAMATION SERVICE—BOND—SURETIES—HOLDING CORPORATIONS—LIABILITY.

Corporations holding stock of a corporation submitting the successful bid on a contract between the United States and a construction company will be acceptable as sureties if their assets, independently of the stock of the bidding corporation, are collectively in excess of double the amount of the stipulated liability.

FAHY, *Acting Solicitor*:

The Bureau of Reclamation has issued specifications and advertised for bids for the construction of the Grand Coulee dam and power plant on the Columbia River near Almira, Washington. The possible cost of the structures and machinery will exceed \$25,000,000. Twenty-six surety companies have advised the Chief Engineer of the Bureau of Reclamation at Denver, Colorado, that they believe that the surety companies will be unable to furnish a bond in excess of \$3,000,000. The specifications require a bond in the sum of \$5,000,000. Prospective bidders have, therefore, become interested in offering the United States some form of guaranty bond or other security not offered by the surety companies.

You have asked for my opinion whether corporations holding stock of the corporation submitting the successful bid will be acceptable as sureties if their assets, independent of the stock of the bidding corporation, are collectively in excess of \$10,000,000 and whether more than two individual sureties will be acceptable on a performance bond notwithstanding the statements made in paragraph 64, Bulletin 51, issued by the Federal Emergency Administration of Public Works.

There are three distinct classes of security acceptable to the United States to guarantee the performance of construction contracts: (1) deposit of United States bonds or notes; (2) surety bond executed by one or more surety companies; and (3) individual bond, signed by two or more individuals.

If deposit of the United States bonds or notes is accepted as security in lieu of a surety bond in support of a contract, such bonds or notes shall equal, at their par value, the amount of the required bond stated in the specifications and shall be accompanied by an agreement authorizing the disposal of the same in case of default. This plan is authorized by section 1126, Revenue Act of February 26, 1926 (44 Stat. 9-122); Treasury Circular No. 154, dated April 30, 1926.

Paragraph 64 and a part of paragraph 65 of Bulletin No. 51, Federal Emergency Administration of Public Works, provide as follows:

Sufficiency of guarantors and sureties.—The bond of any surety company authorized by the Secretary of the Treasury to do business, or of two responsible individual sureties, will be accepted as security for any bid or contract. Individual guarantors or sureties must make the affidavit appearing on the bond as to their sufficiency and furnish the certificate of a judge or clerk of a court of record, a United States district attorney or commissioner, or the president or cashier of a bank or trust company. Individual sureties shall justify in sums aggregating not less than double the penalty of the bond.

Restrictions as to guarantors and sureties.—A firm, as such, will not be accepted as a guarantor or surety, nor a partner for copartners or for a

firm of which he is a member. Stockholders of a corporation may be accepted as guarantors or sureties provided their qualifications as such are not dependent upon their stock holdings therein.

This regulation amounts to an assertion that bonds executed by surety companies or by individuals are acceptable and that in case of a bond executed by individual sureties at least two individuals must execute the instrument. There is no inhibition against more than two surety companies signing the same performance bond, and, in doing so, each company executing the bond may limit its liability to a stated sum less than the full amount of the bond. The only interest of the United States is to secure a good and sufficient bond for a definite total amount designated.

The Six Companies' contractor for the construction of Boulder Dam offered, and the Department approved, a bond as security for the faithful performance of the contract, signed by more than twenty surety companies, each one limiting its liability at an amount less than the full amount of the bond. This same plan is feasible where the bond is executed by individual sureties. Two or more individuals can execute the bond and limit their liability, but each must justify for double the amount of his stipulated liability. If each of 20 men assume a joint and several liability for \$100,000 on a bond for the full sum of \$1,000,000, and each bondsman would justify for \$200,000, it would be a good bond for \$1,000,000.

A firm as such will not be accepted as surety nor a partner for copartners. A stockholder of a corporation may be accepted as surety on the bond of the corporation provided he has sufficient property exclusive of his holdings in the company so that he can justify for double the amount of his stipulated liability. In other words, his net assets over and above his ownership of stock in the company must be double the amount of his liability on the bond. If the stockholder is a corporation instead of an individual, the same rule would be applicable.

It is my opinion that contractors on Government construction may have approved security outlined in any one of the three classes above designated and that two or more individual sureties are acceptable in executing an individual bond and that stockholders, either individual or as corporations, holding stock in the contracting company, may execute bonds if their assets, independent of their stock ownership in the contracting company, permit them to justify in twice the amount of their liability on the bond.

Approved:

T. A. WALTERS,

First Assistant Secretary.

COPPER BELT SILVER AND COPPER MINING COMPANY

Decided May 28, 1934

STATE SELECTION—PATENT EQUIVALENT—AUTHORITY OF SECRETARY OF THE INTERIOR—TERMINATION OF JURISDICTION.

Where an act of Congress granting public lands provides for action by the Secretary of the Interior which is equivalent to the granting of a patent, such action by him ends the jurisdiction of his Department.

PATENT—CANCELATION—SUIT BY DEPARTMENT—ESSENTIALS.

Suit for cancellation of a patent will not be advised by the Department of the Interior merely because the patent was issued inadvertently; but it must appear that some interest of the Federal Government or some person to whom it is under obligation has suffered by such inadvertent action.

MINERAL LAND—ESSENTIALS TO ENTRY.

Public land subject to entry as mineral must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of.

STATE SELECTION—WHEN EQUITIES ESTABLISHED AGAINST THE UNITED STATES—EXPENDITURES BY STRANGER UPON LAND FOLLOWING CERTIFICATION AND STATE'S APPROVAL—NOTATION UPON OFFICE RECORDS.

Equities are not established against the United States by expenditures on lands in ignorance of the prior certification and approval of selection thereof by the State, the fact of such certification and approval being duly noted upon the local land office records.

STATE SELECTION—CERTIFICATION—SUIT TO CANCEL SELECTION—STATUTE OF LIMITATIONS.

It has not been authoritatively settled that a suit to cancel a list of lands certified to a State, if not brought within six years from the date of certification, or within six years from the date of discovery of fraud, would be barred by section 8 of the Act of March 3, 1891 (26 Stat. 1099), but this statute has been referred to by the Supreme Court as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a certain time, and it has been frequently held that certification of lists pursuant to similar grants is of the same effect as a patent.

PATENT—PRESUMPTION OF REGULARITY—PROOF NECESSARY TO REBUT—REQUIREMENTS TO ESTABLISH LAND AS MINERAL.

There is marked unanimity of opinion among authorities that to overcome the presumption that a patent to public land was issued upon sufficient evidence, clear, unequivocal and convincing proof must be produced, and, in consideration of the mineral character of the land, not only must it satisfactorily appear that the land was known mineral land at the time the patentee's rights would have otherwise vested, but it must be more valuable for mineral than for agricultural or other purposes.

MINERAL LANDS—INDICIA OF PRESENCE OF VALUABLE DEPOSITS—WHEN INSUFFICIENT TO IMPUTE FRAUD TO THE STATE.

Copper and iron veins exposed on the surface of land inducing a surmise that they were more or less certain indicia of the presence of valuable copper

deposits in underlying but unexplored formations of limestone are insufficient to impute a fraudulent intent to the State to acquire valuable mineral lands under selections made thereof under its grant of non-mineral lands.

ICKES, *Secretary of the Interior*:

On February 15, 1932, there was filed what is styled petition for writ of certiorari in behalf of the Copper Belt Silver and Copper Mining Company, which is in effect a request that the Secretary of the Interior exercise his supervisory power and cancel in part approved selections Las Cruces 09419, 09420, made by the State of New Mexico under the provisions of section 7 of the Enabling act of June 20, 1910 (36 Stat. 557-563).

The grounds assigned for taking such action are that the land at the time of selection was and is now valuable mineral land and the certification thereof to the State was through mistake or was procured by fraudulent misrepresentation as to the character of the land.

The dates of certification by the Secretary of the lands involved were October 5, 1914, and May 19, 1915. It is well settled that if the granting act provides for other action by the Secretary equivalent to a patent, such as the approval of a list, as in the cases under consideration, the approval ends the jurisdiction of the Department. *Fraser v. O'Conner* (115 U. S. 102); *Henry Farrady* (32 L. D. 379); *Re Knapp* (47 L. D. 152); *Sewall A. Knapp* (51 L. D. 566); *West v. Standard Oil Company* (278 U. S. 200). And it, likewise, imports that the necessary determination as to the character of the land has been made. *Chandler v. Calumet & Hecla Min. Co.* (149 U. S. 79).

The Secretary is therefore without authority to cancel the selections, so that the only question that remains is whether, from the facts and circumstances disclosed by the record and in the petitioner's showings, recommendations to the Attorney General are at this time advisable to institute suit to set aside the certifications for the reasons either that the certifications were procured by fraud or issued by mistake.

It appears that one F. Muller, an employee in the office of the Commissioner of Public Lands of the State, made the nonmineral affidavits in support of the selections in the usual form. The publication of notices of the selections were made in a paper published at Magdalena, New Mexico, for the required period, but no one protested against selection of the land here in question. A mineral examiner of the General Land Office made reports on June 29, 1914, that he had examined the land and that there were no indications of mineral thereon. The Geological Survey reported that they had no data indicating the lands were mineral lands. The selection lists were thereupon cleared for approval.

In September, 1915, H. W. MacFarren, a mineral inspector of the General Land Office, examined the lands embraced in selections 09419 and 09420, and reported certain of the tracts included therein as mineral in character, among which are those hereinafter more particularly described. His reports were received in the General Land Office on December 21, 1915, and at later dates. Pursuant to instructions from the Commissioner of the General Land Office, he made a more exhaustive and detailed examination of the lands in October, 1916, and reported that the following described tracts were of known mineral character long prior to and at the date of the approval of the selections:

Serial 09419—T. 2 S., R. 4 W.: Sec. 9, E $\frac{1}{2}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 17, lots 1 and 2, SE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$.

Serial 09420—T. 2 S., R. 4 W.: Sec. 19, all except lot 10; Sec. 20,

N $\frac{1}{2}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$.

With the approval of the Commissioner, the State officials were approached with a view of obtaining a reconveyance to the United States of the above described tracts and they were advised as to the facts disclosed by the mineral inspector. Nothing definite resulting from these negotiations with the State officials, and after a considerable lapse of time, the Attorney General, on February 11, 1919, was requested to bring suit to set aside the certifications. The Attorney General requested additional data as to whether any of the land had been sold, and pointed out that a suit against the State would have to be brought in the Supreme Court of the United States. He further inquired of the Governor of the State whether the State would be willing to reconvey the lands to the United States.

In reply, dated July 11, 1921, the Governor transmitted a letter from the Attorney General of the State, which, in brief, expressed the opinion that the selections were in all respects regular and without any evidence of fraud on the part of the selecting agents; that the land, while showing indications of mineral on the surface, disclosed nothing sufficient to show that it was valuable for minerals; that the State should defend itself in any suit brought by the United States to cancel the selections. After exchange of several communications between the Department and the Attorney General, the latter, by letter of January 30, 1923, observed that it was a grave and serious matter to charge the State with fraud, and concluded by saying:

All things considered, I think it inadvisable to go ahead with this suit, and inasmuch as you (the Secretary) have indicated that it is not your intention that I should go ahead unless I thought this step advisable, I now beg to inform you that I am strongly of the opinion that this suit ought not to be instituted. Accordingly the matter will be considered closed.

On February 17, 1926, the petitioner here lodged a protest against the selections and asked for their cancellation, claiming as it does now, that it was the owner of 13 lode mining claims covering lands in Secs. 17, 19 and 20, T. 2 S., R. 4 W.; that it had been the owner of such claims since 1919 and had expended approximately \$70,000 in development work and had produced therefrom valuable ores. Similar protests were filed by other mineral claimants. By letter of July 29, 1926, the Commissioner dismissed these protests, expressing the view, based upon certain language of the court in *United States v. Carbon County Land Company et al.* (9 Fed. 2d, 517, 518), that section 8 of the act of March 3, 1891 (26 Stat. 1099), providing, among other things, that no suit to vacate or annul patents shall be brought after six years from the date of the issuance of such patents, applied to the certification of lists under State grants, and as more than 11 years had elapsed since the certifications, action to set aside the certificates was barred by the act.

The petitioner here protested to the President. The protest was referred to this Department and in turn referred to the chief of field division. The latter caused a further examination of the land to be made by two mineral inspectors, whose report contained the additional information that subsequent to the examination of MacFarren, the petitioner had sunk a shaft some 300 feet deep with several drifts and two diamond drill holes, 1020 and 848 feet deep respectively, in which high and low grade ore had been encountered; that two shipments had been made in 1919 of ore out of the shaft aggregating 4382 pounds and which brought a net return of \$219.22; that no shipments were made later because petitioner learned the land was certified to the State. Further attempts to have the State reconvey title that it might enure to the benefit of the mining claimants resulted in a letter from the Commissioner of Public Lands of the State which expressed the conclusion that he was without power to execute such reconveyances. The Commissioner of the General Land Office in sanctioning negotiations to this end, by letter of October 25, 1926, declined to make any further recommendations for suit to set aside the selections.

It appears that F. Muller, who made the nonmineral affidavits and Inspector Jaffa, who made the nonmineral reports above mentioned, were both interviewed by the chief of field division, who reported that Muller said he saw no mineral on the land, though he admitted he had not certainly identified it by the monuments of public survey; that Jaffa was willing to concede that he might have been misled in his identification of the land embraced in the selections, and examined the wrong land.

It has been a long standing rule of the Department that a suit for cancellation of a patent will not be advised by it merely because

the patent was inadvertently issued; but it must appear that some interest of the Government, or some party to whom it is under obligation, has suffered by such inadvertent action. *Heirs of Oreciat* (40 L. D. 623); *Mary E. Coffin* (34 L. D. 298). The petitioner makes no case showing any duty on the Government to prosecute a suit in its behalf. The petitioner does not pretend that it initiated any rights under the mining law to the land it now claims prior to the approval or certification of the selections, nor that it is a successor in interest to the owners of valid claims initiated prior to such approval or certification. Moreover, affirmative evidence appears that no such locations existed at such time in the report of MacFarren, who stated that there was but one subsisting location within the area embraced in the lands particularly herein described, and that is shown situated on lands other than those claimed by petitioner. The land sought to be entered upon as mineral land must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of. *Lindley on Mines*, sections 112, 322, and cases there cited; *Grassy Gulch Placer* (30 L. D. 191). From all that appears, the petitioner's claims were initiated after legal title passed to the State, and it therefore has no valid rights under the mining laws. Nor will it do to say that petitioner established equities against the United States because it made expenditures and improvements in ignorance of the State's title. The fact of approval and certification is noted upon the records of the local land office, and had it made proper inquiry as to the status of the land, such fact would have been brought to its knowledge. The inquiry is therefore narrowed to the question whether it is advisable to prosecute a suit of annulment in the interest of the United States alone.

It has not been authoritatively settled that a suit to cancel a list certified to the State, if not brought within six years from the date of the certification of the list or within six years from the date of discovery of fraud, would be barred by section 8 of the act of March 3, 1891, *supra*. The question was not involved in *United States v. Carbon County Land Company, supra*. In reviewing the last cited case on certiorari, the Supreme Court found it unnecessary to decide the question. *Independent Coal & Coke Company et al. v. United States et al.* (274 U. S. 640, 650). The statute has, however, been referred to by the Supreme Court as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a certain time. *United States v. Winona & St. Peter R. R. Co.* (165 U. S. 463, 476); *Exploration Co. v. United States* (247 U. S. 435, 449). And it has been frequently held that certification of lists pursuant to similar grants is of the same effect as a patent. See *Lindley on Mines*; section 143. There is then a serious

question whether the suit urged in this case would not be held to be too late.

Other reasons, however, of more moment, exist for not favorably entertaining the petition.

There is marked unanimity of opinion among authorities that to overcome the presumption that a patent to public land was issued upon sufficient evidence, clear, unequivocal and convincing proof must be produced, and, in consideration of the mineral character of the land, not only must it satisfactorily appear that the land was known mineral land at the time the patentee's rights would have otherwise vested, but it must be more valuable for mineral than for agricultural or other purposes. *Deffenbacke v. Hawk* (115 U. S. 404); *Iron Silver Mining Co. v. Mike Starr Gold & Silver Mining Co.* (143 U. S. 394, 430); *United States v. Iron Silver Mining Co.* (128 U. S. 673); *United States v. Central Pacific R. Co.* (93 Fed. 871), and cases there cited. As to the sufficiency of the evidence to show mineral of value, this expression of the Supreme Court in *Davis Administrator v. Weibold* (139 U. S. 507) is frequently quoted, *i. e.*, "there are vast tracts of country in the mineral States which contain precious metals in small quantities, but not to sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of the statute, is applicable." As to the point of time to which the inquiry should be addressed as to the condition and character of the land, it must be when all the necessary requirements have been complied with by the person seeking title; no change in such conditions subsequently occurring can impair or in any manner affect his rights. *Wyoming v. United States* (255 U. S. 489, 503). The information gathered by MacFarren and presented in his reports furnishes the only illuminating data as to mineral conditions at the vital date. He secured affidavits from old miners and prospectors at Magdalena, who accompanied him to the ground, which are to the effect that the conditions disclosed at the time of examination by him were the same as had existed for some years previously. The allegations in petitioner's showings add little to the specific evidence obtained by MacFarren. Briefly summarized, the reports of MacFarren are to this effect: that the land lies about 1½ miles from Magdalena, a mining and stock-raising center; that the land is rough and hilly, nontillable, but could be classed as second- or third-rate grazing land; that the land is covered by an andecite flow, with narrow fissures generally trending southeast and northwest, which is several hundred feet in depth and underlain by limestone; that in the fissures calcite and quartz were deposited; that at numerous places along these fissures old pits and cuts of small prospecting type had been made, exposing veins

of mineral rock in place showing copper carbonates in the veins and on the dumps, which on assay showed values in copper, silver, gold and other metals, some of the copper ore being of commercial grade; that the openings were large and the copper carbonates so conspicuous and of such vivid color that no one observing could fail to note the mineral indications.

The mineral examiner was of the opinion that certain of the copper veins exposed would pay if worked, but, if this were not true, that if followed down below the andecite capping into the limestone, where mineralizing solutions would have a chance to enrich that deposit, big deposits of copper mineral would be found; that between 1880 to 1890 silver ore had been mined and shipped but that the copper was discarded as negligible. The affidavits secured by him were more or less corroborative of the facts and of his opinion. In the reports it is however admitted that the State could probably show that there was no mineral activity or *bona fide* mining at and after the time of selection; that the veins are narrow and never had been worked at a profit; that the mineral had been known for thirty years but there had been no recent work and only one location then subsisting, all of which could be urged as showing that the mining ventures as a whole were unprofitable and had been abandoned.

Taken as a whole, the reports of MacFarren as to known conditions depict a not unusual situation of rich seams and samples, but pockety deposits with no valuable ore bodies left of such extent or continuity as would pay to exploit.

The geologic surmise by the inspector, MacFarren, and certain mining men that the copper and iron veins exposed on the surface were more or less certain indicia of the presence of valuable deposits of copper in underlying but unexplored formations of limestone is an opinion as to which fair minds might differ, and insufficient to impute a fraudulent intent by the State to acquire valuable mineral lands under its grant, and there is no other evidence disclosing such an intent. Another consideration, and one mentioned in the memoranda submitted by the Attorney General in support of his conclusion not to bring the suit, is not without weight. That is, that the cancellation of the lists would restore the land to the mining law and enable private parties to acquire it at a nominal price and result in no substantial benefit to the Government. Upon restoration of the land, the present petitioner, under present departmental rulings, could regard his rights as attaching *eo instanti*, and in effect the suit would be one in behalf of private parties to whom the United States is under no obligation.

For the reason above stated, the petition is

Denied.

SUSPENDING ANNUAL ASSESSMENT WORK ON MINING CLAIMS—ACT OF MAY 15, 1934

[Circular No. 1325]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 29, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to the act of May 15, 1934, Public No. 226, providing for the suspension of annual assessment work on mining claims held by location in the United States and Alaska, and reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, including Alaska, during the year beginning at 12 o'clock meridian July 1, 1933, and ending at 12 o'clock meridian July 1, 1934: *Provided,* That the provisions of this Act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1933: *Provided further,* That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1934, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1933: *And provided further,* That such suspension of assessment work shall not apply to more than six lode-mining claims held by the same person, nor to more than twelve lode-mining claims held by the same partnership, association, or corporation: *And provided further,* That such suspension of assessment work shall not apply to more than six placer-mining claims not to exceed one hundred and twenty acres (in all) held by the same person, nor to more than twelve placer-mining claims not to exceed two hundred and forty acres (in all) held by the same partnership, association, or corporation.

Attention is called to the fact that this act applies only to claimants who are exempt from the payment of a Federal income tax for the taxable year 1933, and who file on or before 12 o'clock noon July 1, 1934, in the office where the location notice or certificate is recorded, a notice of their desire to hold the claims under the act. The notice so filed should state that they were entitled to exemption from the payment of a Federal income tax for the year 1933.

It is to be observed that an individual who files such notice is not entitled to exemption from performing assessment work on more than six lode claims nor on more than six placer claims not to exceed

120 acres (in all), and that a partnership, association, or corporation is not entitled to such exemption on more than twelve lode claims nor on more than twelve placer claims not to exceed two hundred and forty acres (in all).

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

PRIVATELY OWNED LANDS IN YOSEMITE NATIONAL PARK

Opinion, June 1, 1934

YOSEMITE NATIONAL PARK—FEDERAL JURISDICTION—LEGISLATIVE ACTS.

The basis and extent of the jurisdiction of the United States Government over privately owned lands within the Yosemite National Park are established by the Act of October 1, 1890 (26 Stat. 651); Act of February 7, 1905 (33 Stat. 702); Act of June 2, 1920 (41 Stat. 731); California Laws of 1919, chapter 51.

YOSEMITE NATIONAL PARK—JURISDICTION—POLICING AUTHORITY.

The power of policing privately owned lands within the exterior boundaries of the Yosemite National Park is incident to the cession of exclusive jurisdiction over said lands made to the Federal Government by the State of California, no exception as to jurisdiction over privately owned lands being made in said cession.

YOSEMITE NATIONAL PARK—LEGISLATIVE AND ADMINISTRATIVE CONTROL OF CONDITIONS ON PRIVATELY OWNED LAND WITHIN THE PARK.

Under the Act of June 2, 1920 (41 Stat. 731) and regulations issued pursuant thereto, there are provisions for proper control of unsanitary conditions, disorderly conduct, the carrying of firearms, keeping of domestic animals, etc., on privately owned land in Yosemite National Park.

FAHY, *Acting Solicitor.*

My opinion is requested upon certain matters set forth in a letter of the Superintendent of the Yosemite National Park, transmitted for consideration by the Director of the National Park Service by letter of September 27, 1933.

The letter of the Superintendent mentions certain unsanitary conditions upon privately owned lands within the boundaries of the park. In some cases latrines are insufficient and not properly disinfected. Goats, hogs, and chickens are allowed to run at large over certain camp sites. The Superintendent inquires whether he has the authority of a public health officer to abate such public nuisances on privately owned lands.

He also asks certain other questions concerning rights and privileges of persons occupying private lands:

- a. Are such land owners entitled to keep unsealed firearms on their properties? If so, should they report them for sealing when they leave the boundaries of their lands to enter Park lands?
- b. Are the owners of private lands entitled to keep any number of dogs and cats on their property?
- c. May owners of private lands maintain boarding houses, stores, etc.?
- d. May they engage in transportation business, particularly the rental of horses and pack animals?
- e. Should special consideration be given to owners of private lands who wish to enter or leave the Park?
- f. Are owners of private lands privileged to stage noisy parties or comport themselves more roughly than regular Park visitors?

All of these questions are indicative of the general uncertainty concerning the basis and extent of the authority of the Secretary of the Interior and of the Superintendent of the park to exercise the power of policing privately owned land included within the exterior boundaries of the Yosemite National Park.

There are two preliminary questions involved:

1. What is the basis and extent of the jurisdiction of the United States Government over privately owned lands within the Yosemite National Park?
2. To what extent has this jurisdiction been exercised by Congress?

I. JURISDICTION.

In 1890 Congress withdrew from settlement certain tracts of public land in California, and designated these tracts as forest reserves (26 Stat. 651). At that time entry had been made upon certain parts of these lands, and the rights of those who had entered were specifically reserved. In 1905 a portion of this forest reserve was set aside as the Yosemite National Park (33 Stat. 702). However, it was not until 1919 that exclusive jurisdiction over this property was ceded by California to the United States (California Laws 1919, c. 51) and accepted by Congress (Act of June 2, 1920, 41 Stat. 731). By the act of cession the United States was given exclusive jurisdiction over all of the territory included in the tracts of land which had previously been set aside for park purposes by the United States. No exception from this jurisdiction was made in favor of privately owned lands. In fact, the grant itself would seem to imply that jurisdiction over such lands was intentionally ceded, since the State specifically reserved the right to tax the private property of individuals residing in the park, a reservation which would not have been necessary if jurisdiction over the privately owned lands had been retained.

The Supreme Court of the United States has held that a similar cession conferred jurisdiction over a railroad right of way which traversed the reservation. *United States v. Unzueta*, 281 U. S. 138 (1930). The Court there said:

We come to the question whether the jurisdiction over the reservation covered the right of way which Congress had granted to the railroad company. There was no express exception of jurisdiction over this right of way, and it can not be said that there was any necessary implication creating such an exception. The proviso that the jurisdiction ceded should continue no longer than the United States shall own and occupy the reservation had reference to the future and cannot be regarded as limiting the cession of the entire reservation as it was known and described. As the right of way to be located with the approval of the Secretary of War ran across the reservation, it would appear to be impracticable for the State to attempt to police it, and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purposes to which it was devoted. There is no adequate ground for cutting down the grant by construction.

* * * * *

While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation.

In *Curtin v. Benson*, 222 U. S. 78 (1911), the Supreme Court considered the powers of the Federal Government to restrict the rights of private owners to pasture their cattle upon their land located within national park limits. The Court determined that the restrictions imposed deprived the owners of the use of their property, but did not hold that the United States lacked jurisdiction to impose proper restrictions. It was there stated at page 86:

On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the Park not only rights of a proprietor but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land and the right of access to it are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.

On the basis of the act of cession, and the two cases just cited, it appears that the United States has governmental jurisdiction over

all properties within the exterior boundaries of the Yosemite National Park.

II. EXERCISE OF JURISDICTION.

Congress has provided that three distinct groups of statutes and regulations shall be effective within the park:

First, the criminal laws of the United States, applicable generally to places under the sole and exclusive jurisdiction of the United States, are declared to be in force (41 Stat. 731). These laws relate principally to serious offenses, and define particular crimes in the punishments imposed therefor. They have no application to the practices about which the Superintendent makes inquiry.

Second, in accepting exclusive jurisdiction, Congress provided:

If any offense shall be committed in the Yosemite National Park * * * which offense is not prohibited or the punishment is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws in the State of California in force at the time of the commission of the offense in said State. (41 Stat. 731.)

Third, the Secretary of the Interior has been authorized by Congress to issue appropriate rules and regulations for the use and management of the park. This authority is set forth in two acts of Congress. The first reads:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1 and 2 of this title shall be punished by a fine of not more than \$500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings (39 Stat. 535; as amended by 41 Stat. 731).

The second reads:

That the Secretary of the Interior shall make and publish such general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits other than those legally located prior to the passage of the respective Acts creating and establishing said parks, natural curiosities or wonderful objects within said parks, and for the protection of the animals in the parks from capture or destruction, and to prevent their being frightened or driven from the said parks; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the said parks or either of them (41 Stat. 731).

In accordance with authority so granted, rules and regulations have been adopted by the Secretary of the Interior with respect to the management of the park. The most recent revision of these rules was approved on December 21, 1932. Consideration will be given to certain of these rules in considering the questions asked by the Superintendent.

The procedure for enforcing the applicable statutes and rules governing the park is also provided by the statute (41 Stat. 731). In the first place, the United States District Court for the Northern District of California is authorized to appoint a commissioner who shall have jurisdiction within the park to hear and act upon all complaints made of any violations of law or of the rules and regulations. This commissioner may try persons charged, and impose punishments subject to an appeal to the United States District Court for the Northern District of California. He may also issue processes for the arrest of any persons charged with criminal offenses. It is further provided, "but nothing herein contained shall be so construed to prevent the arrest by any officer or employee of the Government or any person employed by the United States, in the policing of such reservation within the boundaries of said parks, or either of them, without process of any person taken in the act of violating the law or this act or the regulation prescribed by said Secretary as aforesaid."

III. APPLICATION OF THE FOREGOING TO SPECIFIC PROBLEMS RAISED BY THE SUPERINTENDENT.

a. Unsanitary conditions:

No provision in the Federal statutes nor in the rules and regulations issued by the Secretary of the Interior would appear to deal specifically with the unsanitary conditions complained of by the Superintendent. Therefore, recourse should be taken to the appropriate California statute dealing with public nuisances (California Penal Code, sections 370, 372). Prosecutions for unsanitary conditions under this statute may be undertaken before the commissioner.

b. Firearms:

Paragraph 5 of rule 4 of the regulations issued by the Secretary of the Interior provides: "Firearms are prohibited within the Park except upon written permission of the Superintendent. Visitors entering or traveling through the Park to places beyond shall, at entrance, report and surrender all firearms * * * in their possession to the first park officer, and in proper cases may obtain his written permission to carry them through the Park sealed. * * *" A note to this section reads: "This act (41 Stat. 731) by its terms applies to all lands within said Park whether in public or private ownership." This regulation appears to be well within the power of the Secretary of the Interior to make rules for the protection of the animals in the park from capture or destruction, and is, therefore, probably valid and enforceable. The statute provides for a \$500 fine or imprisonment not exceeding six months, or both, for violation of such regulations.

c. Dogs and cats:

Rule 14 provides: "Dogs and cats are prohibited on government lands in the Park except that upon written permission of the Superintendent, secured upon entrance, they may be transported over through roads by persons passing through the Park provided they are kept under leash, crated, or otherwise under restrictive control of the owner at all times while in the Park * * *." This does not prohibit the keeping of dogs and cats upon private lands, nor is there any Federal or California statute applicable to the situation. It is suggested that if the Superintendent wishes authority to limit the number of these animals, he draft what he considers to be an appropriate regulation for submission to the Secretary.

d. Boarding houses and stores, etc.:

There is no applicable regulation or statute. Moreover, the authority of the Secretary of the Interior is to approve rules only for the specific purposes of protecting the property and wild life in the park. It is, therefore, doubtful whether a rule or regulation restricting the right to operate boarding houses can be adopted, and this is particularly true in view of the decision in *Curtin v. Benson, supra*, which held that the Secretary has no power to issue regulations which destroy "essential uses of private property."

e. Pack animals and horses:

The Secretary probably has no power to issue rules and regulations restricting the rights of private land owners to keep and rent horses and pack animals upon their own properties. However, the Secretary does have power to limit the use of such rented horses and pack animals upon Government lands within the park boundaries. If the Superintendent desires the power to restrict the use of such animals upon the Government lands, it is suggested that he draft appropriate regulations for submission to the Secretary.

f. Right of private land owners to enter or leave the park:

The right of the land owner of ready access to his property has been held by the Supreme Court to be "of the very essence of his proprietorship." Under that decision no restriction may be placed upon that right.

g. Disorderly conduct:

Rule 19 provides: "Persons who render themselves obnoxious by disorderly conduct or bad behavior shall be subject to the punishment hereinafter prescribed for violation of the foregoing regulations and/or they may be summarily removed from the Park by the Superintendent." It is doubtful whether the rule-making power of the Secretary of the Interior extends to disorderly conduct upon private lands which does not directly affect the use of the park or result in destruction of its natural beauties or animal life. Therefore, it is suggested that disorderly conduct should be prosecuted

under the applicable California statute, California Penal Code 1931 Section 415. Although the statute is a State one, the prosecution may be brought before the commissioner under the statute referred to above.

Approved, June 1, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

UTAH RAPID TRANSIT COMPANY AND UTAH IDAHO CENTRAL RAILROAD COMPANY

Opinion, June 5, 1934

TRANSPORTATION—COMMON CARRIERS—RATES—CARRIAGE OF GOVERNMENT FREIGHT—AUTHORITY OF EXECUTIVE DEPARTMENT HEADS.

The head of an Executive Department of the Federal Government is authorized to enter into a contract for transportation of Government freight over the lines of a common carrier at a rate lower than that in the schedule filed with the Interstate Commerce Commission.

TRANSPORTATION—FREIGHT—ADVERTISING FOR COMPETITIVE BIDDING—SECTION 3709, REVISED STATUTES—AUTHORITY OF FEDERAL OFFICIALS.

In the carriage of freight by use of railway lines, the provisions of Section 3709 of the Revised Statutes of the United States, requiring advertisement for competitive bidding, have not been held applicable to purchases and other contracts made or entered into by Federal officials.

FAHY, *Acting Solicitor:*

You [the Secretary of the Interior] have asked for my opinion concerning the validity of a draft of contract proposed to be entered into by the United States with the Utah Rapid Transit Company and the Utah Idaho Central Railroad Company, both corporations of the State of Delaware, in connection with the Ogden River project, Utah.

Two questions arise regarding the validity of the contract; first, has the Secretary of the Interior authority to obtain a rate for transportation of Government freight over the lines of a common carrier which is lower than the rate in the schedule filed with the Interstate Commerce Commission, and second, is the Secretary of the Interior compelled to advertise, pursuant to section 3709, Revised Statutes, and accept the lowest bid for transportation of material by freight?

The project consists of a dam, reservoir, canals, pipe lines, roads and appurtenant works, and the construction will require the movement by freight of a large tonnage of materials and equipment.

The railway line of the Utah Rapid Transit Company, which is a wholly-owned subsidiary of the Utah Idaho Central Railroad

Company, extends for a part of its length through the reservoir site of the principal reservoir of the project and it therefore becomes necessary for the United States to arrange for the acquisition of the right of way and railway lying between the dam and the highest line of flowage. The companies are willing to abandon the line from Black Rock Point, below the dam, to Huntsville, Utah, above the area to be flooded. As partial consideration for the abandonment of the line in the reservoir site the United States agrees that it will ship certain freight required in the construction of the dam and irrigation works over the railroad company's lines at rates fixed in the contract and deemed favorable to the United States. The rates set forth in the contract are more favorable than those which are granted to other shippers, and they have not been fixed by competition, although in some respects competition by transportation with trucks might be possible.

The records in the case indicate that the field officers secured estimates of rates for transportation by truck of the materials that must be transported to the vicinity of the project works and that the rate obtained is actually lower by railway than it would be by truck, with the possible exception of the haul to Ogden from the mouth of the canyon.

The contract provides that the railway company will abandon its lines within the reservoir site in consideration of certain payments to be made. By paragraphs 9 and 10 of the proposed agreement the United States agrees that it will ship the materials used in the construction of the works at rates specified where in the opinion of the contracting officer of the United States it is reasonably and conveniently possible to do so, with due regard to the proper carrying on of the work and to the spirit of the contract. The United States also agrees that materials shipped over the Oregon Short Line Railroad Company line from points north and west of Ogden will be routed over the contractor's line, *provided, however, that freight costs are not to be increased by reason of routings under this sentence.* By paragraph 10 of the contract, rates for movement of material over the company's lines are set forth in detail.

The right of the United States to contract with a railroad company for rates different from those published and filed with the Interstate Commerce Commission is derived from section 22 of the act of February 4, 1887 (24 Stat. 379-387). This section provides in part as follows:

Sec. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments; or for charitable purposes; or to or from fairs and expositions for exhibition thereat; or the issuance of mileage, excursion, or commutation passenger tickets.

This is quoted from the act creating the Interstate Commerce Commission and has been carried into the existing law as part of Section 22, Title 49, United States Code. The Bureau of Reclamation in carrying on its construction work in the western States has made many contracts with railroads in which the rates were less than those filed by the railroad companies with the Interstate Commerce Commission. In the contract dated August 1, 1930, between the United States and the Los Angeles and Salt Lake Railroad Company, a subsidiary of the Union Pacific Railroad Company, the Secretary of the Interior secured an agreement for the transportation of material for Boulder Dam at rates below those established for other shippers for similar materials. It is my opinion that the authority of the Secretary of the Interior to contract for freight rates for moving material is unhampered by the law.

With respect to the second question, concerning the necessity of advertisements to secure competitive bids for moving freight where railroad facilities are available, no court decisions have been found.

Section 3709, Revised Statutes, provides as follows:

Sec. 3709. All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

This provision of the law has not been considered applicable either by the Comptroller General or the administrative officers in the movement of freight by use of railway lines. It is believed that shipment of goods can be made by rail without advertisement as maximum rates are fixed by competent Federal or State authority. A lesser rate may be obtained by an administrative officer, but the rate cannot be in excess of that fixed by competent authority except for special services rendered. (19 Comp. Dec. 725).

It is my opinion that all of the provisions of the proposed contract are valid. The reasonableness of the contract is for administrative determination.

Approved, June 5, 1934:

HAROLD L. ICKES,

Secretary of the Interior and Federal Emergency Administrator of Public Works.

TRANSFER OF ADMINISTRATIVE JURISDICTION OVER BEDLOE'S ISLAND

Opinion, June 5, 1934.

JURISDICTION—CESSION OF LAND BY STATE—TITLE OF UNITED STATES—INTER-DEPARTMENTAL TRANSFER FOR ADMINISTRATIVE PURPOSES—BEDLOE'S ISLAND.

The title of the United States to Bedloe's Island, acquired by cession from the State of New York, is not affected by an interdepartmental transfer of that island from the administrative jurisdiction of the War Department to the administrative jurisdiction of the Department of the Interior.

JURISDICTION—CESSION BY STATE TO UNITED STATES—ADMINISTRATIVE CONTROL—REVERTER.

The circumstances that lands ceded by a State to the United States were ceded in contemplation of their devotion to a particular use, and for a considerable length of time were so devoted, do not warrant the inference that upon the termination of such particular use or the substitution of other uses, title to the land reverts to the State, the cession containing no such reservation.

JURISDICTION—CESSION BY STATE TO UNITED STATES—FORCE AND EFFECT OF LEGISLATIVE ENACTMENTS.

Express enactments of a State legislature recognizing jurisdiction in the United States over lands ceded by said State to the United States counter-veil mere inferences that the State granted only a qualified fee in the lands, under which title thereto would revert to the State in the event said lands were employed for a use not originally contemplated, or their administration transferred to another Federal Department.

FAHY, Acting Solicitor:

You [the Secretary of the Interior] have requested my opinion upon the legal effect of a proposed transfer of Bedloe's Island from the administrative jurisdiction of the War Department to the jurisdiction of the Department of the Interior. This question has arisen as a result of a suggestion made by the Secretary of the Interior to the Secretary of War, under date of November 11, 1933, that they jointly recommend to the President that Bedloe's Island be abandoned by the military and transferred to this Department as an addition to the Statue of Liberty National Monument, which is located upon the island.

The Secretary of War was of opinion that, if the military use of the island should be abandoned and the proposed transfer effected, title to and jurisdiction over the island would become lost to the United States and would revert to the State of New York. For this reason he declined to concur in the proposed recommendation.

It is my opinion that no such loss of title and jurisdiction as the Secretary of War has anticipated would result from the proposed transfer.

By Act of February 15, 1800, the New York Legislature ceded jurisdiction over Bedloe's (sometimes "Bedlow's"), Ellis (sometimes "Oyster") and Governor's Islands, all located in New York Harbor, to the United States. No limitation was placed upon the cession except a reservation to the State of the right to serve process upon the islands. No mention was made of transfer of title to the United States. However, the subsequent course of legislation in New York reveals numerous confirmations and interpretations of the cession as a cession of title as well as of jurisdiction.

By Act of May 7, 1880, New York ceded to the United States all right and title of the State to the submerged lands "adjacent and contiguous to the *lands of the United States* [emphasis added] * * * at Governor's, Bedloe's, Ellis', and David's Islands". It was further provided in the same statute that the cession thus effected should "continue no longer than the *United States shall own*" [emphasis added] both the uplands and the submerged lands of the said islands. See 1 N. Y. Rev. Stat. (8th ed. 1889) 223.

In 1892 the New York Legislature enacted a "State law" in which miscellaneous cessions to the United States were assembled, classified, and confirmed. See N. Y. Laws 1892, ch. 678. That catalogue of cessions was reenacted in chapter 59 of State law of 1909, which is now chapter 57 of the Consolidated Laws. Section 22 of the State law, as it has existed since 1892, provides:

Title and jurisdiction to the following described tracts or parcels of land have been ceded to the United States by this state on condition the jurisdiction so ceded should not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein:

* * * * *

3. Islands in New York harbor. Three certain islands in and about the harbor of New York, viz.: Bedlow's island and Ellis or Oyster island, bounded on all sides by the waters of the Hudson river, and Governor's island, bounded on all sides by the waters of the East river and Hudson river.

Section 24 reenacts the Act of May 7, 1880, cited above.

It is significant that the State law classifies cessions according to their limitations. Section 20 lists cessions "without reservation"; section 22, cessions "with reservation of right to serve process"; section 24, cessions "during ownership of the United States, with reservation of right to serve process"; section 26, cessions "during ownership by the United States and use for public purposes, with reservation of right to serve process"; section 28, cessions "during use for purposes thereof with reservation of right to serve process"; section 32, cessions "during use for purposes thereof with sundry reservations". In view of the inclusion of the cessions of the uplands and submerged lands of Bedloe's Island in sections 22 and 24,

there seems no justification for reading into them any unexpressed conditions or limitations.

The opinion of the War Department, that the United States must continue to use Bedloe's Island for military purposes, seems based solely upon the circumstance that the original act of cession was passed by the New York Legislature very soon after Congress had provided for Federal acquisition and construction of fortifications in the several States (1 Stat. 521; *id.* 554), and the further circumstance that the value and use of the islands at the time of their acquisition was military. The subsequent express enactments of the New York Legislature seem to countervail any such inference, but there are additional interpretations of the cessions implicit in the conduct of the United States and the State of New York with respect to Ellis and Bedloe's Islands.

Ellis Island was for a long time under the jurisdiction of the Navy Department and used as a naval magazine, but in 1890 Congress ordered that the naval magazine be removed and that the island be converted into an immigration station under the jurisdiction of the Treasury Department. Concerning this change, the Attorney General of the United States has made the following observations:

It is well known that Ellis Island is property of the United States, and that it has been practically dedicated to the uses of the immigration service.

April 11, 1890 (26 Stat., 670), Congress by a joint resolution directed the Secretary of the Navy to remove the naval magazine from that island, appropriating \$75,000 for the establishment of the magazine elsewhere.

Said joint resolution concludes as follows:

"And the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to enable the Secretary of the Treasury to improve said Ellis Island for immigration purposes."

The "sundry civil" appropriation act of 1890 (26 Stat., 372), carries the following item:

"For Ellis Island, New York: For improvements upon the island for the business of the immigration service, seventy-five thousand dollars."

The "deficiency act" of March 3, 1890 (26 Stat., 867), makes an appropriation for furniture for the "immigration buildings, Ellis Island, New York."

* * * * *

It will be seen that Ellis Island was, under the direction of Congress, relieved from its former public charge and turned over to the Secretary of the Treasury to improve for immigration purposes. (20 Op. Atty. Gen. 379, 381.)

And, since the transfer, the Attorney General of New York has recognized the continuing title and exclusive jurisdiction of the United States. See Op. Atty. Gen. (N. Y. 1909) 929.

On Bedloe's Island itself, within the last year, the Statue of Liberty and the land upon which its foundations rest, have been transferred from the jurisdiction of the War Department to the

jurisdiction of the Department of the Interior under authority of Executive Order of June 10, 1933. It has not been suggested that title or jurisdiction of the United States to the site of the monument has been extinguished thereby. Certainly a similar change in the use and administration of the small plot surrounding the monument would have no different effect.

Upon the whole case, it is my opinion that the United States has title to and jurisdiction over the uplands and the submerged lands of Bedloe's Island, subject only to the reservation to the State of New York of the right to serve process on the island, and a limitation that the submerged lands shall revert to New York whenever the United States shall cease to own the island. The proposed change in the use of the island and the proposed transfer of administrative jurisdiction from the War Department to the Department of the Interior would in no way affect the title or jurisdiction of the United States.

Approved, June 5, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

FRANK P. HEBERT

Decided June 7, 1934

AIRPORT LEASE—APPLICATION—REQUIREMENTS—ACT OF MAY 24, 1928.

An airport lease application under the act of May 24, 1928, if complete and the filing fee paid, should not be rejected upon the ground that the date set for the filing of the plat of survey has not been reached.

AIRPORT LEASE—GOVERNING REGULATIONS—LAND NOT REQUIRED TO BE SURVEYED.

In its regulations under the act of May 24, 1928 (52 L. D. 476), the Department has prescribed that any contiguous unreserved and unappropriated public land, *surveyed or unsurveyed*, not exceeding 640 acres in area, may be leased under its provisions.

WALTERS, *First Assistant Secretary:*

On December 28, 1933, Frank P. Hebert filed application for an airport lease of all of Sec. 5, T. 18 S., R. 5 W., G. and S. R. M., Arizona, which application was rejected by the register of the district land office because the filing fee of \$10 had not been paid. The applicant appealed and on February 9, 1934, paid the required amount of \$10.

By decision dated February 16, 1934, the Commissioner of the General Land Office rejected the application on the ground that it was premature, but without prejudice to the filing of an application when the land should become subject to entry. He said:

On January 26, 1934, you notified this office that the date set for the filing of the plat of the township is April 3, 1934, and that the 6,611 acres in fractional T. 18 S., R. 5 W., will not be subject to entry by the general public until July 3, 1934; but that applications by the general public may be presented during the 20-day period prior to July 3, 1934, or from June 13, 1934, to July 2, 1934.

The applicant appealed to the Department on March 9, 1934. Thereafter, on May 7, 1934, he filed a withdrawal of his appeal and asked that his application be considered for certain described land in unsurveyed T. 17 S., Rs. 7 and 8 W., G. and S. R. M.

The application should not have been rejected by the General Land Office. The required payment of \$10 had been made. In section 1 of the act of May 24, 1928 (45 Stat. 728), the Secretary of the Interior is authorized, in his discretion and under such regulations as he may prescribe, to lease for use as a public airport any contiguous public lands, unreserved and unappropriated, not to exceed 640 acres in area. In its regulations under said act (Circular No. 1161, approved August 22, 1928, 52 L. D. 476) the Department has prescribed that any contiguous unreserved and unappropriated public land, *surveyed or unsurveyed*, not exceeding 640 acres in area, may be leased under its provisions.

With regard to the preference rights of soldiers and sailors the Department has prescribed:

The public resolution will not prevent settlement on unsurveyed lands otherwise subject thereto prior to the filing of the plat of survey, and where settlements are so made by qualified persons and maintained in the manner required by law, the rights secured thereby will not be subordinated, upon the restoration of the lands, to preferences asserted under the public resolution, but, from the date of the filing of the township plat of survey and until the preference period provided for soldiers has expired, settlements on the lands affected will confer no rights whatsoever. (Circular No. 822, 49 L. D. 1, 6.)

The land first applied for was unsurveyed and not withdrawn when Hebert made the necessary payment in connection with his application. It is true that survey in the field had been made, but the plat of survey had not been filed and the preference right period of soldiers and sailors did not begin until the filing of the plat of survey. The airport lease application was properly made for unsurveyed land and was not premature.

It may be that Hebert applied for amendment because of the rejection by the Commissioner. He should be given opportunity to elect whether to take the land originally applied for or that sought in the amended application, if the latter be subject to appropriation and in the absence of other objection.

The decision appealed from is modified and the case is remanded for appropriate action in accordance with the foregoing.

Modified.

DONATIONS TO FEDERAL SERVICES FOR AUGMENTATION OF SALARIES

Opinion, June 9, 1934.

NATIONAL PARK SERVICE—DONATIONS—FEDERAL OFFICERS AND EMPLOYEES—ACT OF MARCH 5, 1917.

In view of the provisions of the act of March 5, 1917 (39 Stat. 1106), forbidding, under penalty, the receipt by any Federal officer or employee of any salary in connection with his services as such officer or employee from any source other than the United States Government, except as may be contributed out of the treasury of a State, county or municipality, the National Park Service is without authority to accept a donation of money conditioned upon its application to the salary of one of its employees.

NATIONAL PARK SERVICE—STATUTORY CONSTRUCTION—ACTS OF MARCH 5, 1917, AND JUNE 5, 1920.

In accordance with well established principles of statutory construction, the act of June 5, 1920, permitting donations in aid of national parks, and the act of March 5, 1917, forbidding Federal employees receiving other than Government salary for Federal services, should both be given operation, the two acts not being unavoidably incompatible, and repeal by implication not being favored in law.

FAHY, Acting Solicitor:

My opinion has been requested with respect to the question whether the Department may accept a donation for national park or national monument purposes under conditions stated by the National Park Service as follows:

A donation, in the form of a check dated June 2, 1934, in the amount of \$280, has been received by this Service to be used for paying the salary for two months of Mr. Charles Chandler as a ranger in Mesa Verde National Park.

The authority to accept donations for the purposes of the national parks and monuments is found in section 6, Title 16, United States Code, which provides:

Donations of lands within national parks and monuments and moneys.—The Secretary of the Interior in his administration of the National Park Service is authorized, in his discretion, to accept patented lands, rights of way over patented lands or other lands, buildings, or other property within the various national parks and national monuments, and moneys which may be donated for the purposes of the national park and monument system. (June 5, 1920, c. 235, Sec. 1, 41 Stat. 917.)

This provision of law would be ample authority for acceptance of the proposed donation except for the inhibition contained in the act of March 5, 1917 (39 Stat. 1106—Section 66, Title 5, United States Code), which reads as follows:

No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than

the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine.

It is suggested by the National Park Service that this inhibition contained in the act of March 5, 1917, is not now effective to prevent acceptance of the proffered donation, in view of the later act of June 5, 1920, above quoted, expressly authorizing the acceptance of donations for the purpose stated therein. In my opinion, this contention is untenable. Repeals by implication are not favored. The two acts are not unavoidably incompatible. There is room for the operation of each in its own proper sphere. It is the duty of courts so to construe acts, seemingly repugnant in some particular, that both shall be operative, if possible. In the instant matter, the Secretary is authorized to accept donations when such acceptance will not violate some other provision of law. An unconditional gift might be accepted, or even a conditional gift if the condition be not incompatible with law. But here we have specific inhibition against contributing to the compensation of an employee, and when a so-called gift is accompanied with a condition that the amount contributed shall be paid to a particular person who is to be employed, I am clearly of opinion that such a donation coupled with such an understanding would violate both the letter and the spirit of the act cited.

Approved, June 9, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

FEDERAL SUBSISTENCE HOMESTEADS

Opinion, June 15, 1934

FEDERAL SUBSISTENCE HOMESTEADS—AUTHORITY FOR CREATION—CORPORATE ORGANIZATION.

Federal subsistence homesteads are financed under authority of Section 208 of Title II of the National Industrial Recovery Act, and Federal Subsistence Homesteads Corporation, organized under the laws of the State of Delaware, is the agency established to carry out the purposes of the act, under an authorized procedure, and is wholly financed and controlled by the United States Government.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—EXEMPTION OF FEDERAL INSTRUMENTALITIES FROM TAXATION—CORPORATE ENTITY INTERVENING.

The real and personal property of Federal Subsistence Homesteads Corporation, being property owned by the United States, may not be taxed by a State; and the formal interposition of the corporate entity, the Federal Subsistence Homesteads Corporation, should not prevent property acquired in the name of the corporation from being considered property of the United States for purposes of taxation.

FEDERAL SUBSISTENCE HOMESTEADS—PURCHASER OF LAND FROM THE UNITED STATES—WHEN LAND TAXABLE BY STATE—"EQUITABLE TITLE".

The interest of a purchaser of land from the United States becomes taxable by the State when the purchaser acquires "equitable title" to the land, but for purposes of State taxation a purchaser from the United States does not acquire "equitable title" until he has done all things necessary, under any controlling statute or under his purchase contract, to entitle him to a deed or patent.

FEDERAL SUBSISTENCE HOMESTEADS—WHEN TAXABLE BY STATE.

A subsistence homestead does not become taxable by the State until the homesteader shall have become entitled to a deed under the provisions of his contract with Federal Subsistence Homesteads Corporation.

FEDERAL SUBSISTENCE HOMESTEADS—STATE TAXATION—EXEMPTION OF FEDERAL INSTRUMENTALITIES.

In analogy to the exemption of private corporations engaged in interstate commerce from the operation of State statutes requiring that foreign corporations register and qualify to do business, a similar exemption is warranted on behalf of a corporate instrumentality of the United States having as its sole business the execution of an enactment of Congress.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—INCORPORATION TAX—EXTENT OF STATE'S TAXING POWER.

Delaware may tax Federal Subsistence Homesteads Corporation for the privilege of existence as a Delaware corporation, but no other franchise, license, occupation, income or excise tax may be imposed by Delaware or any other State, nor may the right of the corporation to enter into any State and conduct its operations there be qualified or restricted.

FEDERAL SUBSISTENCE HOMESTEADS—PURCHASES OF LAND BY THE UNITED STATES DISTINGUISHED—CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 8, CLAUSE 17.

A purchase of land by the United States with a view to immediate resale as homesteads is not comprehended within the purposes enumerated in Article I, section 8, clause 17 of the Federal Constitution or the purposes contemplated by the general cession and consent statutes which exist in most of the States.

FEDERAL SUBSISTENCE HOMESTEADS—ANALOGY TO PRACTICE IN PRIVATE INDUSTRY.

The acquisition and temporary holding of title by Federal Subsistence Homesteads Corporation, followed by resale to homesteaders, is substantially a security device adopted as a convenient alternative for the usual purchase money and construction loan secured by mortgage on premises acquired directly by a prospective home owner.

FEDERAL SUBSISTENCE HOMESTEADS—STATE CESSION LAWS—APPLICABILITY TO ACQUISITIONS IN NAME OF A CORPORATION—STATUTES ABROGATING AUTHORITY OF STATE STRICTLY CONSTRUED.

It is doubtful whether State cession laws should be construed as applying to acquisitions in the name of a corporation, as a cession of jurisdiction, being an abrogation of sovereign authority by the State, must be construed strictly, and construction of such a statute which employs inference or presumption to defeat the jurisdiction of the State should be avoided unless very cogent reasons for such a construction appear.

FEDERAL SUBSISTENCE HOMESTEADS—LOCAL AUTHORITY—CITIZENSHIP AND THE FRANCHISE.

Local authorities have power to arrest persons found in subsistence homesteads as a necessary incident of the jurisdiction of the State over such homestead sites; and the relationship of the United States to a subsistence homestead project is not such as to interfere with the acquisition by homesteading families of citizenship in the city, county, and State in which the homestead site is located, or the right to vote.

FEDERAL SUBSISTENCE HOMESTEADS—STATE WITHHOLDING PUBLIC BENEFITS—ESTABLISHMENT OF CONTRACT RELATION.

An agreement between Federal Subsistence Homesteads Corporation and local authorities that such benefits as roads, school facilities, fire protection, etc., shall be provided in a particular manner, would involve an undertaking different from any duty legally incumbent upon the local authorities and would accordingly be a contract upon legally sufficient consideration.

FEDERAL SUBSISTENCE HOMESTEADS—POWERS LEGALLY EXERCISABLE.

Among the powers legally exercisable by Federal Subsistence Homesteads Corporation are payment of cash to secure binding options on land, and employment of local attorneys and title companies to prepare abstracts of title, etc.

FEDERAL SUBSISTENCE HOMESTEADS—INSURANCE OF GOVERNMENT PROPERTY.

The broad discretion under which the subsistence homestead section of the National Industrial Recovery Act is administered may not be employed to override a rule and policy so firmly established as that which prohibits insurance of Government property.

FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—EMPLOYEES—ELIGIBILITY TO BENEFITS OF EMPLOYEES' COMPENSATION ACT.

Employees of Federal Subsistence Homesteads Corporation being employees of the United States and the corporation wholly directed and controlled by the Secretary of the Interior and the members of his departmental staff, are entitled to the benefits of the Employees' Compensation Act in the same degree as persons rendering similar services for the United States without the interposition of the corporate entity.

FEDERAL SUBSISTENCE HOMESTEADS—WHAT EMBRACED IN EXPRESSION.

Livestock, implements, seed, fertilizer and household effects may be embraced in the concept of a "subsistence homestead"; taking into account the employment of the designation in Section 208 of the National Industrial Recovery Act, the expressed purposes of the act, and the connotations of the individual words composing the expression.

CHAPMAN, *Assistant Secretary*.

Several legal questions which have arisen in connection with the administration of Section 208 of the National Industrial Recovery Act by Federal Subsistence Homesteads Corporation have been referred to me for opinion.

Section 208 under Title II of the National Industrial Recovery Act made available to the President the sum of \$25,000,000 "to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for, and otherwise aiding in the purchase of subsistence homesteads".

Pursuant to this section, the President issued an Executive order under date of July 21, 1933, whereby he authorized the Secretary of the Interior to exercise all the powers vested in the President, "for the purpose of administering all the provisions of Section 208 under Title II of said act, including full authority to designate and appoint such agents, to set up such boards and agencies, and to make and promulgate such regulations as he may deem necessary or desirable".

Pursuant to the above Executive order of the President, the Secretary of the Interior entered an order under date of December 2, 1933, directing the formation of a corporation under the laws of Delaware to be known as the Federal Subsistence Homesteads Corporation. This order directed that the capital stock of Federal Subsistence Homesteads Corporation should be issued to the Secretary of the Interior and should be held by him and his successors in office in trust for the United States of America. This corporation was duly organized under the laws of Delaware with a capital stock of \$1,000 and all of the said stock was issued to the Secretary of the Interior in trust for the United States of America. Federal Subsistence Homesteads Corporation was created to serve as the agency through which the Division of Subsistence Homesteads would purchase land and engage in constructing and operating subsistence homestead communities.

The present plan of procedure in the establishment and operation of subsistence homestead communities is somewhat as follows: The Division of Subsistence Homesteads determines where it wishes to establish a subsistence homestead community on the basis of applications submitted to it and researches conducted by members of its staff. Upon recommendation of the Division, the Board of Directors of Federal Subsistence Homesteads Corporation (the members of which are the Secretary of the Interior, the Assistant Secretary of the Interior and the Director of the Division of Subsistence Homesteads), if it approves, adopts a resolution directing the establishment of the project and appropriating a definite sum of money for that purpose. The title to lands to be acquired for the purposes of

the project is passed upon by the Office of the Attorney General of the United States. When the title is approved, title is taken in the name of Federal Subsistence Homesteads Corporation. A project manager and other necessary personnel are appointed, as employees of the Department of the Interior, to construct the necessary houses and other buildings, to select homesteaders and to operate the project. A special disbursing officer is appointed for each project. By appropriate transfer orders money on account of the appropriation made for that particular project is placed to the credit of the disbursing officer with the Treasurer of the United States and subject to check. Accounts were rendered to the Comptroller General of the United States.

When construction of a particular project is completed, Federal Subsistence Homesteads Corporation will enter into a separate contract with each homesteading family. These contracts will call for payment to the corporation by the homesteader of the total cost of the homestead tract, including house and outbuildings, in monthly payments over a period of approximately twenty years. In some instances title will be retained in Federal Subsistence Homesteads Corporation until all payments are completed, at which time a deed will be executed in favor of the homesteader. In other instances, when a part of the purchase price has been paid a deed will be executed in favor of the homesteader, subject to a purchase money mortgage taken in favor of Federal Subsistence Homesteads Corporation to secure payment of the balance.

In connection with the organization and procedure above outlined, the Director of Subsistence Homesteads has propounded the following questions:

1. Is the real and personal property owned by Federal Subsistence Homesteads Corporation subject to, or exempt from, taxation by state, county, city and other local taxing authorities?

2. If your answer to question 1 is that such property is exempt from local taxation, will Federal Subsistence Homesteads Corporation be able validly to contract with states, counties, cities and other local authorities to pay, in lieu of taxes, such reasonable sums as may be agreed upon as compensation for the use of such services and facilities as are customarily financed by such bodies from ad valorem taxes? We refer to such services as supplying roads, school facilities, police protection, fire protection and the like. (In this connection we call your attention particularly to section "third", sub-divisions (b), (g), (j), and (o) of the Certificate of Incorporation of Federal Subsistence Homesteads Corporation attached hereto as Exhibit IV).

3. Will the members of the homesteading families living in such subsistence homestead communities, during the time that they are making payments under their contracts and title is held by Federal Subsistence Homesteads Corporation, be entitled to vote in state, county, city and other local elections?

4. Will the members of such homesteading families be subject to arrest by local authorities?

5. Will the members of such homesteading families be generally entitled to the rights and privileges and subject to the duties and obligations of citizens of the city, county and state in which they reside, or will they be "wards" of the Federal Government?

6. Is Federal Subsistence Homesteads Corporation under the necessity of qualifying and registering as a foreign corporation in states other than Delaware when it seeks to enter into a state for the purpose of purchasing land, and entering into contracts with homesteaders as above set forth?

7. Is Federal Subsistence Homesteads Corporation subject to license, franchise, occupation, income and excise taxes?

a. Levied by the State of Delaware?

b. Levied by any other state in which it purchases land, builds homestead communities and enters into contracts with homesteading families?

8. May Federal Subsistence Homesteads Corporation pay cash to secure binding options on land?

9. May Federal Subsistence Homesteads Corporation retain local attorneys and title companies to prepare abstracts of title, certificates of title, letters of opinion of title and forms of warranty deed, and pay reasonable fees for such services, when such title papers, after they are completed, are to be transmitted to the Office of the Attorney General as the basis for the opinion of title of the Attorney General?

10. May Federal Subsistence Homesteads Corporation carry fire, tornado and other insurance on homestead properties during the time that title remains in the Corporation? May the Corporation carry public liability insurance?

11. Are employees of the Division of Subsistence Homesteads in Washington, and employees of Federal Subsistence Homesteads Corporation on the various projects in the various states entitled to the benefits of the United States Employees' Compensation Act?

12. In the event that the Secretary of the Interior should promulgate a regulation that livestock, tools, implements, seed, fertilizer, and household furnishings and furniture are to be included within the definition of a "subsistence homestead", will Federal Subsistence Homesteads Corporation be empowered, under such regulation, to make loans for the purchase of these items, or to purchase them and re-sell them on credit to homesteaders?

These questions will be answered somewhat out of the order of submission; however, consideration will be given first to question 1.

Property owned by the United States may not be taxed by a State. *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886). Any tax lien with which a State might purport to burden such property, or any obligation to pay a tax which the State might purport to impose upon the United States, would invade the sovereignty of the United States and would infringe upon the exclusive "constitutional power of Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." See *Irwin v. Wright*, 258 U. S. 219, 228 (1922). By parity of reasoning, property purchased with appropriated money of the United States in the name of a corporation, wholly financed and controlled by the United States, would seem necessarily exempt from State taxation. *King County v. United States Shipping Board Emergency Fleet Corp.*, 282 Fed. 950 (C. C. A. 9th, 1922); *United*

States Shipping Board Emergency Fleet Corp. v. Delaware County, 17 F. 2d, 40; 25 F. 2d, 722 (C. C. A. 3d, 1927); appeal and certiorari denied, 275 U. S. 483, 278 U. S. 607.

Federal Subsistence Homesteads Corporation is wholly financed and controlled by the United States. The purchase price of property acquired in the name of the corporation is paid by a disbursing officer of the United States out of appropriated money in the Federal Treasury, and all money for subsequent expenditures in connection with property so acquired is paid by the United States in the same way. It seems, therefore, that the formal interposition of the corporate entity, Federal Subsistence Homesteads Corporation, should not prevent property acquired in the name of the corporation from being considered property of the United States for purposes of taxation.

In most cases, however, the exemption of Government financed and controlled corporations and their property from State taxation has been put on a different basis. Since *McCulloch v. Maryland* (4 Wheat. 316) the immunity of Federal instrumentalities and agencies from State taxation has been an accepted doctrine with variant content. This problem of tax exemption has arisen with respect to United States Housing Corporation, United States Spruce Production Corporation and United States Shipping Board Emergency Fleet Corporation. These corporations and their property were means employed by the United States for the better execution of its power to wage war during the recent world conflict. As such means they shared the immunity of the United States from the burden of State taxation. *Clallam County v. United States*, 263 U. S. 341 (1923); *New Brunswick v. United States*, 276 U. S. 577 (1928).

This line of reasoning, as well as the reasoning which is predicated upon the real ownership of the property by the United States, seems applicable to Federal Subsistence Homesteads Corporation. Congress has appropriated money and provided for the creation of agencies for "aiding the redistribution of the overbalance of population in industrial centers", this result to be accomplished by "making loans for and otherwise aiding in the purchase of subsistence homesteads." (48 Stat. 195, 205, sec. 208). The Attorney General, in an opinion rendered to the Secretary of the Interior and dated October 4, 1933, has held that in the administration of the quoted statutory provisions, a corporate agency controlled and financed by the United States may be organized and property taken in its name with a view to reselling to homesteaders. The operating personnel of the corporation are employees of the United States. (See discussion of question 11, *infra*). Under these circumstances, it seems clear that Subsistence Homesteads Corporation and all property to which it

may acquire title are but means toward the execution of the undertakings of the Federal Government duly authorized by Congress. For this reason, therefore, and also because the United States is the real owner of such property, it is my opinion that property owned by Federal Subsistence Homesteads Corporation is exempt from taxation by State, county, city and other local taxing authorities.

The question of the taxable status of the property in question is not yet fully answered because the corporation proposes to surrender possession of particular sites to homesteaders under purchase agreements which may vary in their provisions concerning the transfer of legal title.

The courts have held that the interest of a purchaser of land from the United States becomes taxable by the State when the purchaser acquires "equitable title" to the land. And it is further held that for purposes of State taxation a purchaser from the United States does not acquire "equitable title" until he has done all things necessary, under any controlling statute or under his purchase contract, to entitle him to a deed or patent. *Irwin v. Wright*, 258 U. S. 219 (1922). Although a purchaser has paid a substantial part of the purchase price, the State may not tax his interest in the land if he is not presently entitled to a deed. *Lincoln Co. v. Pacific Spruce Corp.*, 26 F. 2d, 435 (C. C. A. 9th, 1928). But where a sale is made under a contract which provides that the purchaser shall receive a deed after payment of 10 per cent of the purchase price, the purchaser's interest becomes taxable immediately upon payment of that percentage of the price, and this despite the fact that when the deed is executed he will be required to give back a mortgage as security for payment of the balance of the purchase price. *City of New Brunswick v. United States*, 276 U. S. 547 (1928); *Hance v. City of New Brunswick*, 7 N. J. Misc. 610, 146 Atl. 673 (1929); *City of Philadelphia v. Myers*, 122 Pa. Super. 424, 157 Atl. 13 (1931).

Whether the interest of the purchaser under a contract to buy land from the United States is taxable as personalty is not settled by any adjudication of the Supreme Court of the United States. One district court has sustained such a tax. *Port Angeles Western R. R. v. Clallam County*, 36 F. 2d, 956 (W. D. Wash., 1930); affirmed on jurisdictional grounds, 44 F. 2d, 28; certiorari denied, 283 U. S. 848. It would seem, however, that where the interest of the purchaser cannot be taxed as an equity in the land (as is the case until he becomes entitled to a deed), this result cannot be avoided by an assessment upon the same interest as personalty. One court has held such a tax invalid, on the ground that the assessment is an unreasonable burden upon the contract by means of which the United States

is disposing of its property. *People ex rel. Donner-Hanna Coke Corp. v. Burke*, 128 Misc. 195, 217 N. Y. Supp. 803 (1926); aff'd. without opinion, 226 N. Y. Supp. 882. It is my opinion, therefore, that a subsistence homestead and the homesteader's interest therein become taxable by the State when, and only when the homesteader shall have become entitled to a deed under the provisions of his contract with Federal Subsistence Homesteads Corporation.

The State requirements and assessments mentioned in questions 6 and 7, like the property taxes mentioned in the first question, involve the doctrine of exemption of Federal instrumentalities from impositions of the several States. The analogous exemption of private corporations engaged in interstate commerce from the operation of State statutes requiring that foreign corporations register and qualify to do business is well settled. *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). Certainly, a similar burden is equally objectionable when imposed on a corporate instrumentality of the United States which has no other business than the execution of an enactment of Congress. See Opinion of the Attorney General of Texas, rendered to the Secretary of State of Texas, February 19, 1934. A striking exemplification of this principle appears in *Johnson v. Maryland* (254 U. S. 51) where a State was denied the right to require the driver of a Government motor truck to qualify as a competent operator and obtain a driver's license under the State law. The language of that decision seems applicable to a corporate agency as well as to a natural person:

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. 254 U. S. at 57.

The national bank cases, beginning with *Osborn v. Bank of the United States* (9 Wheat. 738), where a State attempted to levy an annual franchise tax on the bank, are perhaps the most familiar decisions asserting the exemption of corporate instrumentalities of the United States from State privilege taxes. See also *Williams v. Talladega*, 226 U. S. 404 (1912); Opinions of Attorney General of Ohio, 1917, p. 2175.

More recently, both privilege and income taxes were considered in a New York decision, the language of which is wholly pertinent to the issues submitted in question 7:

During the year 1918 the United States was the exclusive owner of the stock of the corporation and was likewise, through the Cramp Company, the exclusive manager of its affairs. It was the net income received by the corporation during that year which was made the basis of the tax. Therefore, if we regard the tax as being essentially a tax upon net income, it was a tax upon income accruing to the United States, and consequently invalid as a tax upon federal property. The same result follows if we regard it as a tax upon the privilege of doing business or exercising a franchise. * * *

On the date named the United States was still the owner of the stock and was still the manager of the business of the corporation. Moreover, the tax was payable, if at all, on or before January 1, 1920. Section 219-c Tax law. (See McKinney's Consol. Laws and Supp.) On that date the United States was still the owner of the stock. Therefore the tax, if payable at all, was payable by the United States. It was payable, if at all, for the privilege of exercising the franchise of doing the business of making vessels for the use of the Navy. We think that upon either theory the tax imposed had a manifest tendency to "retard", "impede", and "burden" the activities of the United States in the progress of the war, and otherwise to interfere with the execution of power constitutionally committed by Congress to the Federal Government. *De La Vergne Machine Co. v. State Tax Comm.*, 211 App. Div. 227, 207 N. Y. Supp. 680 (1925), aff'd without opinion, 150 N. E. 536.

It should be noted that in *De La Vergne Machine Co. v. State Tax Comm.*, *supra*, a private business incorporated in the State of New York acquired immunity from taxation by that State when the United States purchased the stock and took over the business of the corporation. Generally, it would seem that the State of incorporation has no greater power than any other State to tax a Federal instrumentality. However, in one particular the position of the State of incorporation is different from that of any other State.

Corporate personality is conferred upon an enterprise by the sovereign power of the State of incorporation. In the case of Federal Subsistence Homesteads Corporation the sovereign power of Delaware was invoked by representatives of the United States in order to obtain corporate personality for a Federal agency. If, for this privilege of corporate existence, Delaware imposes an initial fee and also a periodic assessment, the beneficiaries of the privilege may not complain. This conclusion seems inescapable if the sovereignty of Delaware and the sovereign character of incorporation are to be recognized. The taxable franchise of corporate existence as a personality created by a State is quite different from the nontaxable right of carrying on the business of the United States within that State.

Answering questions 6 and 7, it is my opinion that Delaware may tax Federal Subsistence Homesteads Corporation for the privilege of existence as a Delaware corporation. No other franchise, license, occupation, income or excise tax may be imposed upon the corporation by Delaware or by any other State, nor may the right of the

corporation to enter into any State and conduct its operations there be qualified or restricted.

Questions 2, 3, 4 and 5 can be answered only after it is determined whether or not the United States acquires exclusive jurisdiction over land purchased by Federal Subsistence Homesteads Corporation. In his opinion to the Secretary of the Interior, dated October 4, 1933, the Attorney General indicated that the United States would not acquire jurisdiction over such property, saying:

While there may be some proper degree of Federal "supervision", this cannot amount to a superseding of the authority of the State. The Constitution provides for the exercise of exclusive jurisdiction "over all places purchased by the consent of the State in which the same shall be" for the erection of forts, magazines, arsenals, dock-yards and "other needful buildings". There is no reason for believing that Congress contemplated any such assumption of jurisdiction over lands purchased for sites of subsistence homesteads, even assuming that the State legislatures would give the required consent.

Since the Attorney General did not discuss the effect of general cession and consent statutes which exist in most of the States, that pertinent question will be considered in this opinion.

The United States may acquire exclusive jurisdiction over land within a State either by purchase with the consent of the State for any of the purposes enumerated in Article I, section 8, clause 17 of the Constitution of the United States, or by cession of jurisdiction and acceptance thereof. By the terms of Article I, section 8, clause 17, Congress is expressly authorized—

To exercise exclusive Legislation * * * over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.

In many States the general statutes of cession and consent are expressly limited to acquisitions by the United States in accordance with the above clause of the Constitution, *e. g.*, 1 Ga. Code (Park, 1914) sec. 26; Ill. Stat. (Smith-Hurd, 1929) ch. 143, secs. 29, 30. It seems a clear implication of the Attorney General's opinion that a purchase of land for immediate resale of homesteads is not comprehended within those purposes enumerated in the clause in question. This is no more than an application of the rule of *ejusdem generis* to interpret the phrase "other needful buildings" as meaning other structures of the same general character as those particularly mentioned in the enumeration which precedes that phrase. Indeed, the acquisition and temporary holding of title by the Federal Subsistence Homesteads Corporation, followed by resale to homesteaders, is substantially a security device adopted as a convenient alternative for the usual purchase money and construction loan secured by mortgage on premises acquired directly by a prospective home owner.

Greater difficulty is presented by those State statutes which, without reference to Article I, section 8, clause 17, cede jurisdiction over all sites purchased by the United States for "public purposes" or "the purposes of the Government." The Maryland Code (art. 96, sec. 28) provides:

The jurisdiction of the State of Maryland is hereby ceded to the United States of America, over so much land as has been or may be hereafter acquired for the public purposes of the United States; provided, that the jurisdiction hereby ceded shall not vest until the United States of America shall have acquired title to the lands * * *

It seems to be an implication of the Attorney General's opinion of October 4, 1933, that any such general cession of jurisdiction by a State could affect property acquired for subsistence homestead purposes only upon affirmative indication by Congress that the United States accepts jurisdiction. It is true that the benefits to be derived by the United States from exclusive jurisdiction have given rise to a presumption of acceptance by Congress in cases involving such property as military reservations. *Ft. Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885); *Benson v. United States*, 146 U. S. 325 (1892). But since no benefit will result to the United States or to the corporation as a result of the purchase of subsistence homestead sites followed by a resale without profit, no basis for such a presumption exists in this case.

There is the further consideration that title to the property is being taken in the name of Federal Subsistence Homestead Corporation rather than in the name of the United States. It seems doubtful whether State cession laws should be construed as applying to acquisitions in the name of a corporation. *Cf.*: *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis. 1895); *In re O'Connor*, 37 Wis. 379 (1875). But *cf.*: *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928). For some purposes the relationship of Federal Subsistence Homesteads Corporation to the United States may justify an ignoring of the corporate entity, but a cession of jurisdiction, as an abrogation of sovereign authority by the State, must be construed strictly. Any construction of such a statute which employs inference or presumption to defeat the jurisdiction of the State should be avoided unless very cogent reasons for such a construction appear. "The rights of sovereignty are never to be taken away by implication." See *People v. Godfrey*, 17 Johns. 225 (N. Y., 1819).

These considerations cause me to believe that the United States does not acquire exclusive jurisdiction over homestead sites purchased by Federal Subsistence Homesteads Corporation. It follows that domicile at a subsistence homestead site is domicile within the State where the homestead is located. Therefore, answering question 3, the homesteader is not deprived of the right to vote because of his

residence at such a place. Answering question 4, it is my opinion that local authorities have power to arrest persons found in subsistence homesteads as a necessary incident of the jurisdiction of the State over such homestead sites. By the same token, answering question 5, the relationship of the United States to a subsistence homestead project is not such as to interfere with the acquisition by homesteading families of citizenship in the city, county, and State in which the homestead site is located.

Since a subsistence homestead site will remain within the jurisdiction of the State of its location, and also because it seems improper for a State to diminish the advantage of tax immunity by withholding from the exempted area those public benefits which are conferred upon the community generally, it seems doubtful whether a State may withhold from a subsistence homestead community those benefits enumerated in question 2. However, the exemption of a considerable neighborhood from taxation may very substantially hinder a State or a smaller political subdivision in rendering these services. Local authorities may not be forced to supply roads, school facilities, or other similar advantages unless public funds are available. Moreover, the members of a community have no right to the construction of roads or schools of any particular description or at any designated time or place. Certainly any agreement between Federal Subsistence Homesteads Corporation and local authorities that such services be rendered to a subsistence homestead community in a particular manner would involve an undertaking different from any duty legally incumbent upon the local authorities and would, therefore, be a contract upon legally sufficient consideration.

In addition to this question of general law, there is to be considered the propriety of the use of money in payment for roads or schools which has been appropriated by Congress to make loans for and otherwise aid in the purchase of subsistence homesteads. Similar problems arise in connection with questions 8, 9, 10 and 11. For convenience, therefore, these questions will be considered together. In this connection, it is assumed that all sums which Federal Subsistence Homesteads Corporation would pay for the community services enumerated in question 2, or to secure options on land, or to secure abstracts, opinions, or certificates of title, or for fire, liability or other insurance would be repaid by the benefited homesteaders either as part of the general purchase price of homesteads, or under particular covenants in the homesteaders' contracts. Each of these items represents an expense usually incidental to home buying and home owning. Unless some well established rule limiting incidental uses to which appropriated money may be put is violated, it seems that each of these expenditures may, within administrative discretion,

be authorized as a method of aiding in the acquisition of subsistence homesteads.

In the case of undertakings to pay for the erection of schools, construction of roads and similar services, a precedent appears in undertakings of the same character by the United States Housing Corporation. See 1 Report of United States Housing Corporation, 349, 358 (1920). My answer to question 2 is in the affirmative.

The expenditure of money appropriated under the National Industrial Recovery Act in the acquisition of options on sites for low-cost housing projects has been approved by both the Attorney General and the Comptroller General in opinions rendered to the Federal Emergency Administrator of Public Works and dated February 7, 1934, and February 8, 1934, respectively. The Comptroller General, however, suggested that options should provide for the application of "the amount paid therefor as a part of the purchase price for the real estate covered thereby" in the event of purchase. No difference in principle is perceived between payment for options upon such properties and payment for options upon subsistence homestead sites. Answering question 8, therefore, it is my opinion that Federal Subsistence Homesteads Corporation may pay cash to secure binding options on land.

In approving the expenditure of money by the Federal Emergency Administrator of Public Works for appraisal fees and for expenses of title search and the preparation of certificates of title by local experts and title companies, the Comptroller General, in an opinion dated February 8, 1934, used the following language:

It is unnecessary to consider in this connection what may be the rule as to the procurement of expert appraisal and certificate of title service by the permanent departments and establishments of the Government to be used prior to the actual acquisition of real estate, and, in fact, as a guide in determining whether to make such acquisition. The National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, 211, was intended to relieve unemployment (section 203) through the provision, in part, for the performance of certain public work, including low-cost housing and slum-clearance projects as stated in section 202 (2) thereof.

Expenditures of the nature mentioned are understood to be regarded by you as necessary to a proper and economical prosecution of the particular project and to safeguard the interest of the United States in selecting and acquiring of the sites for low-cost housing and slum-clearance projects involved.

In the circumstances as stated by you it is believed the acquiring of such expert assistance is justified as reasonably necessary under section 201 (b) of the Recovery Act, and in view of the quasi-personal nature of the service, the limited field as stated, the apparent reasonableness of the charges, and the emergent character of the work, this office will make no objection to the expenditures as proposed under such portion of the appropriation made for carrying out the Recovery Act as may be allocated to your Administration for low-cost housing and slum-clearance projects.

These considerations seem wholly applicable to the acquisition of sites for subsistence homesteads. Moreover, in the past, the propriety of expending for such incidental purposes money available for the purchase of land, has been recognized frequently by the accounting officers of the United States. In one opinion the following language appears:

It is well settled that the expense of procuring an abstract of title to land to be used by the Government for * * * (a boat yard) is a proper charge against the appropriation used for purchase of the land, if the abstract is for use by the United States attorney to assist him in examining the title, and provided the land is to be acquired by purchase." 23 Comp. Dec. 266. Accord: 8 Comp. Dec. 212.

The employment of persons who are attorneys to render services of the kind now under consideration is unobjectionable, since these persons act, not as attorneys, but rather as expert investigators collecting data upon which legal officers of the United States may base an opinion of title. See 6 Comp. Dec. 133.

It may be mentioned that no express provision for employing expert assistance is found in the subsistence homesteads section of the National Industrial Recovery Act, but the power of designating agencies and prescribing regulations for the accomplishment of the general purposes of the statute, conferred upon the President in Section 208, seems ample authority for the employment of such services as occasion may arise. In an analogous case the Secretary of the Interior sought to pay for services of the same type out of a reclamation fund. Statutory authority to perform any and all acts and make such rules and regulations as might be necessary to carry the reclamation statute into effect was deemed sufficient warrant for charging to the reclamation fund the cost of obtaining abstracts of title. (9 Comp. Dec. 569, 571). My answer to question 9, therefore, is in the affirmative.

Long continued practice and policy of the United States are opposed to the insurance of any Government property. This practice and policy seem to have crystallized into an inflexible rule of the accounting officers of the United States. In one of a long line of decisions on this point the Comptroller of the Treasury said:

The question of the use of appropriations made for general or specific objects to pay for insurance on Government property has been before this office many times, and it has been the uniform practice to recognize the policy of the Government with respect to assuming its own risks and to hold that such appropriations are not available to pay insurance premiums unless made so in express terms by Congress. 23 Comp. Dec. 269. See also 7 Comp. Gen. 105; 23 Comp. Dec. 297; 13 Comp. Dec. 779, 781.

It is my opinion that the broad discretion under which the subsistence homestead section of the National Industrial Recovery Act is

administered may not be employed to override a rule and policy so firmly established as that which prohibits insurance of Government property. My conclusion is the same with respect to public liability insurance. Assuming, without decision upon the point, that Federal Subsistence Homesteads Corporation would be liable in tort for negligence in construction operations undertaken by the corporation (*cf. Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549), no reason appears why this risk should not come within the general policy against the use of appropriated money for insurance unless Congress has expressly so provided. For these reasons my answer to both of the inquiries in question 10 is in the negative.

In question 11, inquiry is made concerning the right of employees of Federal Subsistence Homesteads Corporation to participate in the benefits of the United States Employees' Compensation Act. (39 Stat. 742, U. S. C. tit. 5, secs. 751 ff.) Section 40 of that statute (sec. 790 in U. S. C.), contains the following definition: "the term 'employee' includes all civil employees of the United States." The question under consideration, therefore, is whether or not employees of Federal Subsistence Homesteads Corporation are employees of the United States.

The Attorney General has held that employees of the Panama Railway and Steamship Line, a corporation in which the United States owned most of the stock, were not "employed by the United States" within the meaning of a statute requiring an 8-hour day for persons so employed. It will be noted, however, that the corporation in question was serving the public generally as a common carrier. The general public, and even the United States, seem to have paid this corporation for services rendered. (25 Ops. Atty. Gen. 465).

On the other hand, speaking of the federally financed and controlled Alaska Railroad, also a common carrier, the Comptroller General has said:

The Alaska Railroad has been held in *Ballaine v. Alaska Northern Railroad Co.*, 259 Fed. Rep. 133, to be a governmental agency. The claimants are employees of the railroad, and, therefore, employees of the United States. 8 Comp. Gen. 420. See also 5 Comp. Gen. 806.

Federal Subsistence Homesteads Corporation presents a particularly strong case for holding that employees of the corporation are employees of the United States. The corporation has no function except the execution of the provisions of Section 208 of the National Industrial Recovery Act. It has no independent treasury, but meets its obligations out of appropriated money disbursed as required for its various purposes, including salary payments, according to the

usual system and procedure of Government disbursements and accounting. The corporation is wholly directed and controlled by the Secretary of the Interior and the members of his departmental staff. In short, Federal Subsistence Homesteads Corporation is a division of the Department of the Interior organized in corporate form for the more effective carrying out of emergency legislation. It is my opinion, therefore, that employees of the corporation are employees of the United States, and as such are entitled to benefits under the employees' compensation act to the same degree as persons rendering similar services for the United States directly without interposition of the corporate entity. Cf. 34 Op. Atty. Gen. 363 (1925).

Question 12 involves the definition of "subsistence homestead." Section 208 of the National Industrial Recovery Act reads in full as follows:

To provide for aiding the redistribution of the overbalance of population in industrial centers \$25,000,000 is hereby made available to the President, to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section.

Cognizance must be taken of the fact that this section is one phase of the legislative effort to relieve a national economic emergency. A fund is made available for removing families from overpopulated industrial centers and reestablishing them on a self-supporting basis in a more favorable environment. Language in the statute should be interpreted in the light of this purpose.

The phrase "subsistence homestead" is not familiar to professional usage or lay speech. However, the component words have established meanings. The conception of homestead today is that of a home place. In the law this noun appears usually in connection with exemption statutes and Federal laws concerning the disposition of the public domain. In neither case does personal property seem to be included in the concept. However, the qualifying word "subsistence" seems to indicate some special adaptation to maintenance and support. Under Federal statutes and in Government contracts allowances for food and lodging are described as allowances for subsistence. In the Subsistence Expense Act of 1926 (44 Stat. 688, 5 U. S. C., sec. 822) "subsistence", used in connection with expense allowances, is defined as "lodging, meals and other necessary expenses incidental to personal sustenance or comfort". In the case of the homesteader, all of the items mentioned in question 12 contribute to "personal sustenance and comfort". Furniture which renders the home habitable, and tools, livestock, seeds and other agricultural supplies which

assist materially in the supporting of life upon the home site, may reasonably be considered as important and characteristic features of a subsistence homestead. It is highly improbable that Congress intended to aid in the purchase of real property but to refuse aid in the purchase of personal property, equally essential to the homesteader, and equally beyond his power to acquire without assistance.

In the absence of precedent, and so long as no distortion of plain and accepted meanings appears, it would seem that administrative interpretation of the phrase "subsistence homestead" should be controlling. It follows that should the Secretary of the Interior promulgate such regulations as are suggested in question 12, the inclusive interpretation of "subsistence homestead" therein contained should be given effect as a reasonable administrative definition of a phrase which otherwise lacks precise meaning.

Approved, June 15, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

**ABSENCES FROM HOMESTEAD LANDS BECAUSE OF ECONOMIC
CONDITIONS—ACT OF MAY 21, 1934 (48 STAT. 787).**

[Circular No. 1326]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 15, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

The act of May 21, 1934 (48 Stat. 787), entitled "An Act granting a leave of absence to settlers of homestead lands during the years 1932, 1933, and 1934," reads as follows:

That any homestead settler or entryman who, during the calendar years 1932 or 1933, found it necessary, or during 1934 should find it necessary, because of economic conditions, to leave his homestead to seek employment in order to obtain the necessaries of life for himself and/or family or to provide for the education of his children, may, upon filing with the register of the district his affidavit, supported by corroborating affidavits of two disinterested persons, showing the necessity of such absence, be excused from compliance with the requirements of the homestead laws as to residence, cultivation, improvements, expenditures, or payment of purchase money as the case may be, during all or any part of the calendar years 1932, 1933, and 1934; and said entries shall not be open to contest or protest because of failure to comply with such requirements during such absence; except that the time of such absence shall not be deducted from the actual residence required by law, but a period equal to such absence shall be added to the statutory life of the entry: *Provided*, That any entryman holding an unperfected entry on ceded Indian lands may be excused from the requirements of residence upon the conditions provided herein, but shall not be entitled to extension of time for the payment of any installment.

of the purchase price of the land except upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted hereunder.

Leaves of absences for all or part of the years mentioned by this act may be granted thereunder to any homestead settler or entryman who has established actual residence upon the lands and who thereafter found it necessary because of economic conditions to leave his homestead to seek employment in order to obtain food and other necessities of life for himself and/or family or to provide for the education of his children.

The application for such leave of absence must be filed in the proper district land office and give the name and present address of the applicant and be sworn to by him and corroborated by the affidavits of at least two witnesses in the land district or county within which the lands claimed under the homestead laws are located, before an officer authorized to administer oaths and using a seal. It must describe the land by legal subdivisions, section, township and range numbers, give the serial number of the entry and name of land office and show the date when residence was established thereon and how the same was maintained thereafter by giving the dates of the beginning and ending of all residence periods and of all absence periods, and the character of the improvements and cultivation performed by the applicant. It must set forth fully all the facts on which the claimant bases his right to a leave of absence, what effort was made to raise crops, giving the dates of the planting and the kind of crops planted, the purpose of his request for leave, and the period for which the leave is desired. The address of the claimant during his absence should also be supplied if possible.

Entrymen of ceded Indian reservation lands desiring relief under this act are not entitled to an extension of time for the payment of any installment of the purchase price of the land unless their application for relief thereunder is accompanied by payment of interest at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted under the act.

The act applies to entrymen only if they have established residence upon their claims. It also applies to settlers who have not made entries. If the latter file application for leave of absence hereunder, you will assign them current serial numbers. If the settler has theretofore filed notice of his absence under the act of July 3, 1916 (39 Stat. 349), the application under this act will be given the serial number already assigned such notice of absence.

Relief may not be granted under this act in cases where entrymen have not complied with the law sufficiently to enable them to make acceptable proof within the statutory period of the entry as extended by invoking the provisions of this act or other relief acts. The period during which a homesteader is absent from his claim, pursuant to a leave duly granted under this act, can not be counted as a part of the actual residence on the land required by law, but an equivalent period may be added to the statutory life of the entry.

If the application for relief under this act is allowed, it will operate as a stay during the period for which the leave is granted against contest based upon the charge that the entryman has failed to comply with the law in the matter of residence, cultivation, improvements, expenditures, or payments of purchase price, prior to the filing of the application for leave of absence, in the absence of fraud in procuring the same.

If the showing made is satisfactory, you will promptly forward the application to this office by special letter with notation of your allowance thereof and advise the applicant of your allowance of this application by ordinary mail. If it is not satisfactory, you will reject the application, subject to the usual right of appeal, and all appeals will be promptly forwarded to this office by special letters.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

MIGRATORY BIRD TREATY ACT AND SWINOMISH INDIAN RESERVATION

Opinion, June 15, 1934

INDIANS AND INDIAN RESERVATIONS—TREATIES—MIGRATORY BIRD TREATY ACT—SCOPE AND APPLICATION.

The Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), passed to give effect to the treaty between the United States and Great Britain, proclaimed by the President on December 8, 1916 (39 Stat., pt. 2, p. 1702), is applicable to Indians and Indian reservations, the treaty and statute containing no provision excluding Indians or Indian reservations from their operation, and the treaty expressly mentioning concessions to Indians not extended to any other race.

INDIANS AND INDIAN RESERVATIONS—TREATY WITH SWINOMISH AND OTHER TRIBES IN STATE OF WASHINGTON—HUNTING RIGHTS.

The privilege of hunting given to the Swinomish and other Indian tribes by the treaty of January 22, 1855, known as the Treaty of Point Elliott, does not extend to the reservation lands, but is confined to the undisposed of and

unappropriated public lands of the United States, there being no necessity for making a specific reservation with respect to the reservation lands at the time this treaty was entered into.

INDIANS—SWINOMISH RESERVATION—TREATY AND NATURAL RIGHTS.

The right of the Indians who were parties to the Treaty of Point Elliott to hunt on their reservation lands was not based upon any provision of the treaty, but was a right already existing in them and not granted away by the treaty.

INDIANS AND INDIAN RESERVATIONS—MIGRATORY BIRD TREATY ACT—POWERS OF CONGRESS.

The Migratory Bird Treaty Act, in so far as it restrains the Indians from taking and killing the class of game to which it applies, is based upon the power of Congress, as the lawmaking authority, to prescribe game laws restricting the Indians in their rights of hunting on reservation lands.

INDIANS AND INDIAN RESERVATIONS—AUTHORITY OF THE STATES—GAME LAWS.

Primarily, the States, both as trustees of the rights of their people and in the exercise of their police power, have control over the right to reduce wild game to possession; but this rule is without application to Indian reservations, and Congress, having paramount authority over such reservations and the Indians occupying them, may provide game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting.

FAHY, *Acting Solicitor*:

You [the Secretary of the Interior] have requested my opinion as to whether the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), is applicable to the Indians of the Swinomish Indian Reservation in the State of Washington.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President (39 Stat. 1702). It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada and that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. The treaty therefore provided for specific close seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying out the treaty. The act of July 3, 1918, *supra*, entitled "An Act to give effect to the convention", prohibits the killing, capturing, or selling of any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with its terms to be made by the Secretary of Agriculture.

The treaty and statute contain no provision excluding the Indians or Indian reservations from their operation. The treaty expressly mentions the Indians and makes concessions to them not extended to any other race. Article II, paragraph 1, dealing with close seasons, declares that the "Indians may take at any time scoters for food but not for sale". Paragraph 3 of the same article further declares:

The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murrens and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

These specific references to the Indians and the special concessions made them plainly show that it was the intention of the high contracting powers that the convention and the statute enacted for its enforcement should bind the Indians as well as others, irrespective of where the migratory birds might be found. That intention must be given effect, unless the Indians have been withdrawn from the operation of the treaty and statute by some other controlling law.

It is urged that such other controlling law is found in the treaty under which the Swinomish Indian Reservation was created. That treaty, known as the Treaty of Point Elliott, was concluded on January 22, 1855, between the United States and the Dwamish, Suquamish and other allied and subordinate tribes of Indians in Washington Territory. Article V of the treaty, relating to the fishing and hunting rights of the Indians provides:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

It is to be observed that the privilege of hunting given the Indians by the foregoing article does not extend to the reservation lands, but is confined to "open and unclaimed lands", that is, the undisposed of and unappropriated public lands of the United States. The right to hunt on the reservation lands was not specifically reserved to the Indians by the treaty. There was no necessity for making such a specific reservation with respect to the reservation lands. At the time the treaty was entered into in 1855, there was no impediment on the hunting rights of the Indians on the lands occupied by them. "The treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *United States v. Winans* (198 U. S. 371). The right of the Indians to hunt on the reservation lands thus continued not in virtue of any specific provision in the treaty but as a right already existing in them and not granted away by the treaty.

The Migratory Bird Treaty Law, in so far as it restrains the Indians from taking and killing the class of game to which it applies, does not therefore conflict with the Indian treaty, and its validity, as applied to the Indians, depends upon the power of Congress to prescribe game laws restricting the Indians in their rights of hunting on the reservation lands. That Congress has such power

appears to be beyond question. From the earliest traditions, the right of every individual to reduce wild game to possession has been subject to regulation and control by the lawmaking power. *Geer v. Connecticut* (161 U. S. 519). Primarily the State, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce wild game to possession (*United States v. Samples*, 258 Fed. 479, 481). But this rule is without application to Indian reservations, to which, according to repeated decisions of our Federal courts, the State's game and fish laws do not extend. *In re Blackbird* (109 Fed. 139); *In re Lincoln* (129 Fed. 247); *United States v. Hamilton* (233 Fed. 685). See also *Peters v. Malin* (111 Fed. 244) and *State v. Campbell* (53 Minn. 354; 55 N. W. 553). Congress has paramount authority over such reservations and the Indians occupying them (*Lone Wolf v. Hitchcock*, 187 U. S. 553, 565), and may, if it sees fit so to do, provide game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting. *In re Blackbird, supra*. And even though such laws should conflict with the provisions of prior treaties with the Indians, there is respectable authority for upholding their validity. Thus in *The Cherokee Tobacco Case* (11 Wall. 616), it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. And in *Ward v. Race Horse* (163 U. S. 504), the court ruled that the provision in the treaty of February 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon", was superseded by the provisions of the Enabling Act admitting Wyoming into the Union, and that the treaty provision did not give the Indians the right to exercise the hunting privilege within the limits of the State in violation of its laws.

As hereinbefore pointed out, the treaty of December 8, 1916, is drawn in terms disclosing a clear intent on the part of the high contracting powers that the Indians as well as all other persons should be bound by the terms of the convention, and in the absence of any other legislation purporting to exempt them, it is my opinion that the Indians of the Swinomish Reservation are included within the prohibitions of the treaty and the statute enacted for its enforcement.

Approved, June 15, 1934:

OSCAR L. CHAPMAN,
Assistant Secretary.

TAYLOR GRAZING ACT

(APPROVED JUNE 28, 1934, 48 STAT. 1269)

**STATEMENT OF THE PRESIDENT
ON APPROVAL OF THE ACT**

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EXPLANATION OF THE LAW

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TEXT OF THE ACT

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**EXECUTIVE ORDER WITHDRAWING
PUBLIC LANDS**

STATEMENT OF THE PRESIDENT ON APPROVAL OF THE TAYLOR GRAZING ACT

The passage of this act marks the culmination of years of effort to obtain from Congress express authority for Federal regulation of grazing on the public domain in the interests of national conservation and of the livestock industry.

It authorizes the Secretary of the Interior to provide for the protection, orderly use, and regulation of the public ranges, and to create grazing districts with an aggregate area of not more than 80 million acres. It confers broad powers on the Secretary of the Interior to do all things necessary for the preservation of these ranges, including, amongst other powers, the right to specify from time to time the number of livestock which may graze within such districts and the seasons when they shall be permitted to do so. The authority to exercise these powers is carefully safeguarded against impairment by State or local action. Creation of a grazing district by the Secretary of the Interior and promulgation of rules and regulations respecting it will supersede State regulation of grazing on that part of the public domain included within such district.

Water development, soil-erosion work, and the general improvement of such lands are provided for in the act.

Local residents, settlers, and owners of land and water who have been using the public range in the past are given a preference by the terms of the act to the use of lands within such districts when placed under Federal regulation so long as they comply with the rules and regulations of the Secretary of the Interior. The act permits private persons owning lands within a district to make exchanges for federally owned land outside a grazing district if and when the Secretary of the Interior finds it to be in the best public interests.

The Federal Government, by enacting this law, has taken a great forward step in the interests of conservation, which will prove of benefit not only to those engaged in the livestock industry but also to the Nation as a whole.

GENERAL EXPLANATION OF THE TAYLOR GRAZING ACT

Approved June 28, 1934

[48 Stat. 1269]

SECTION 1

Creation of grazing districts.—The Secretary of the Interior is authorized to create grazing districts from any part of the vacant and unappropriated public domain which, in his opinion, is chiefly valuable for grazing. The Secretary of the Interior may not, however, place more than 80,000,000 acres of the public domain in grazing districts. Lands in national forests, national parks and monuments, or Indian Reservations may not be included in such districts.

A grazing district is created by the issuance of an order which establishes the boundaries of the grazing district. Additions may be made to any district or its boundaries changed from time to time.

Hearings required.—Before grazing districts may be established in any State, a hearing must be held in the State (after a public notice of the hearing has been given), at a location fixed by the Secretary of the Interior, convenient for the attendance of State officials and the settlers, residents, and livestock owners of the vicinity where the district is proposed to be established. A district may not be established until the expiration of ninety days after such notice has been given nor until twenty days after such hearing is held.

Withdrawal of public lands within proposed grazing district from entry.—The publication of a notice of hearing has the effect of withdrawing all public lands within the exterior boundaries of a proposed grazing district from all forms of homestead entry or settlement.

Rights of way over grazing district lands.—The Secretary is required to grant any owner of lands adjacent to a district, upon application of any such owner, a right of way over the land included in such district, for stock-driving purposes, where necessary for convenient access to marketing facilities or to grazing lands not within such district.

Construction of act.—Nothing in the act is to be construed to impair any rights initiated under public land laws, except as required by other provisions of the act. The creation of a grazing district will not defeat the grant, to a State, of lands heretofore or hereafter surveyed. The act is not to be construed as limiting or restricting the power or authority of any State as to matters within its jurisdiction. The act is not to be construed as altering or restrict-

ing the right to hunt or fish within a grazing district, or as vesting in any permittee any right to interfere with hunting or fishing within a district.

SECTION 2

Powers of the Secretary of the Interior.—The Secretary of the Interior is empowered to do any and all things necessary for the protection, administration, regulation, and improvement of such grazing districts as may be created, including, among other things, power to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, and to provide for the orderly use, improvement, and development of the public range.

Rules and regulations.—The Secretary of the Interior is authorized to make rules and regulations and establish a suitable service to carry out the purposes of the act.

Rehabilitation of ranges. The Secretary is authorized to study erosion and flood control and perform such work as is necessary to rehabilitate public land areas subject to the provisions of the act.

Penalty.—Any willful violation of the act, or of the rules and regulations after actual notice thereof, is punishable by a fine of not more than \$500.

SECTION 3

Issuance of grazing permits.—The Secretary is authorized to issue permits to graze livestock within a district to such *bona fide* settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range. Permits may be issued only to citizens of the United States or to those who have filed the necessary declaration of intention to become such, and to groups, associations, or corporations authorized to do business under the laws of the States in which the grazing district is located.

Number of livestock to graze within district—Seasons of use.—The Secretary is also authorized to specify from time to time the number of livestock that shall graze within a district, and the seasons when a district shall be used for grazing.

Preferences to grazing privileges within districts.—Preference is to be given in the issuance of grazing permits to those within or near a district who are land owners engaged in the livestock business, *bona fide* occupants or settlers or owners of water or water rights.

After a permit has been issued, its renewal may not be refused for the purpose of allowing a preference application if the permittee is complying with all rules and regulations of the Secretary of the Interior, where such refusal will impair the value of a livestock unit

that has been pledged by the permittee as security for a loan. The number of livestock which such permittee may graze within a district may be increased or reduced, however, in the discretion of the Secretary of the Interior.

Each preference will be measured by the amount of grazing which is necessary for the permit applicant to make proper use of the lands, water or water rights owned, occupied, or leased by him. Until July 1, 1935, no preference is to be given in the issuance of such permits to any owner, occupant, or settler whose rights were acquired between January 1, 1934, and December 31, 1934.

After the allowance of the preferences hereinbefore provided for, persons recognized and acknowledged by the Secretary of the Interior as enjoying the use of the public range at the time of its inclusion within a district, will be given a preference in the balance of the grazing privileges of the district. Such preference will be measured by the amount of the permit applicant's past use of such range.

Duration of permit.—Permits will be issued for a period of not more than 10 years.

Renewal of permit.—The permittee has a preference to renew the permit at the discretion of the Secretary of the Interior.

Grazing fees.—The Secretary is authorized to make a reasonable annual charge for the privilege of grazing livestock within a district. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is given authority, in his discretion, to remit, reduce, or refund in whole or in part, or authorize postponement of payment, of grazing fees for the period of such emergency.

Water rights.—It is provided that nothing in the act shall be construed to impair any right to the possession and use of water, which has vested or accrued under existing public land laws, or which may be hereafter initiated or acquired and maintained in accordance with such laws. This provision protects vested rights to the use of water which may be situated within a grazing district, and also provides for the continued acquisition of rights to the possession and use of unappropriated water located within districts.

Creation of grazing district or issuance of permit not to create any rights in lands.—The creation of a grazing district or the issuance of a permit pursuant to the provisions of the act will not create any right, title, interest, or estate in or to the lands. The permittee has a revocable privilege, only, of grazing on public domain included within a district.

SECTION 4

Permit to construct improvements on public lands within districts required.—Fences, wells, reservoirs, and other improvements necessary to the care and management of permitted livestock may be constructed on public lands within the grazing districts under a permit issued by the Secretary.

Partition fences.—The act provides that the Secretary of the Interior shall require permittees to comply with the provisions of the law of the State within which the grazing district is located as regards the cost and maintenance of partition fences.

Use of improvements in districts by subsequent occupants.—Where improvements have been constructed within a district by a permittee, no permit shall be issued which will entitle a subsequent permittee to the use of such improvements until he has paid for the reasonable value thereof as determined under the rules and regulations of the Secretary of the Interior.

SECTION 5

Free grazing within districts for livestock kept for domestic purposes.—Free grazing for domestic livestock within districts is to be allowed.

Use of timber, stone, gravel, clay, coal, and other deposits.—Nothing in the act is to prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for minerals, settlers and residents for fire wood, fences, buildings, mining, prospecting, and other domestic purposes.

SECTION 6

Rights of way within grazing districts.—The act does not restrict the acquisition, granting, or use of rights of way within grazing districts under existing law; or ingress or egress over the public lands in grazing districts for all proper and lawful purposes.

Mining.—The act does not operate to restrict prospecting, locating, developing, mining, leasing, or the patenting of mineral resources within such districts under applicable law.

SECTION 7

Homesteading of public lands within grazing districts.—The Secretary is authorized, in his discretion, to classify lands within grazing districts which are more valuable and suitable for the production of agricultural crops than forage plants, and to open such agricul-

tural lands to homestead entry in tracts not exceeding 320 acres in area. No lands within a grazing district are subject to settlement or occupancy, however, until such classification is made and the lands found to be more valuable for agricultural crops are opened to entry after notice thereof has been given to the grazing permittees. Lands homesteaded remain a part of the grazing district until patents are issued therefor. After entry is allowed, the homesteader is entitled to the possession and use of the land.

When any qualified person files an application in the land office of the proper district to make a homestead entry to any tract not exceeding 320 acres, the Secretary is directed to make a classification of such land. If the Secretary classifies such land as agricultural, the applicant therefor has a preference right to enter such lands when they are opened to entry.

SECTION 8

The United States may be given title to lands within district.—The Secretary of the Interior on behalf of the United States may accept title to any lands within the exterior boundaries of a grazing district as a gift when he believes such action will promote the purposes of the district.

Exchange of privately-owned lands situated within district for lands of the United States.—When, in the opinion of the Secretary, the public interest will be benefited thereby, he is authorized to accept title to any privately-owned lands within the exterior boundaries of a grazing district and in exchange therefor to issue a patent for not to exceed an equal value of public land in the same State or within a distance of not more than 50 miles within the adjoining State nearest the base lands. Public lands given in exchange must be surveyed and may be situated either within or without a grazing district.

Notice of exchange.—Before any exchange can be effected, notice thereof must be published by the Secretary once each week for 4 successive weeks in some newspaper of general circulation in the county or counties in which the lands to be accepted are situated, and also in some newspaper published in the county in which the lands to be given in such exchange are situated. Lands conveyed to the United States under this section become a part of the grazing district within whose exterior boundaries they are located. Either party to an exchange may make reservations of minerals, easements, etc.

Exchange of State-owned lands.—Upon application of any State, the Secretary is directed to exchange Federally-owned lands for State-owned lands. The base lands to be taken by the United States from a State in any such exchange may be located either within or

without a grazing district. Such exchanges are to be made in the manner that is provided for the exchange of public lands for those in private ownership.

SECTION 9

Cooperation with local stockmen and State land and conservation officials.—The Secretary is directed to provide by suitable rules and regulations for cooperation with local organizations of stockmen, State land officials and official State agencies engaged in the conservation of wild life.

Appeals from decisions of officer in charge of grazing district.—The Secretary is directed to provide for local hearings on appeals from the decisions of administrative officers in charge of grazing districts, in a manner similar to the procedure in the General Land Office.

Contributions.—The Secretary is authorized to accept contributions toward the administration and improvement of the district.

SECTION 10

Disposition of grazing fees.—One-fourth of all the moneys received from each grazing district each fiscal year is to be used by the Secretary of the Interior, when appropriated by Congress, for the construction and maintenance of range improvements in the district where collected; and one-half of the moneys received from each grazing district during any fiscal year is to be paid at the end thereof by the Secretary of the Treasury to the State where collected, to be expended as the State Legislature may prescribe for the benefit of the county or counties in which the grazing district is situated.

SECTION 11

Ceded Indian lands—Disposition of grazing fees.—One-fourth of all moneys received during any fiscal year from a grazing district composed of lands ceded by Indians to the United States for disposition under the public land laws, is to be used for the construction and maintenance of range improvements in such district; and one-fourth of all such moneys is to be paid at the end of each fiscal year by the Secretary of the Treasury to the State in which said lands are situated to be used as the State Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such grazing lands are situated; and the remaining one-half of all such money received from such grazing lands is to be deposited to the credit of the proper Indians pending final disposition of such lands under applicable laws, treaties, or agreements.

Disposition of ceded Indian lands.—Applicable public land laws continue in operation as to ceded Indian lands placed within a grazing district. If the Secretary of the Interior decides that an application for nonmineral title to any ceded Indian lands situated within a district will adversely affect the best public interest, or that the land is of a character not suited to disposal through the act under which the application is made, he may refuse to allow it. In no event, however, is settlement or occupation of such lands to be permitted until 90 days after the allowance of an application.

SECTION 12

Cooperation with other departments of the Government.—The Secretary is authorized to cooperate with other Departments of the Government in carrying out the purposes of the act, and in coordinating range administration.

SECTION 13

Transfers of national forest and grazing lands.—The President of the United States is given authority to place under national forest administration, in any State where national forests may be created or enlarged by Executive order, any unappropriated public lands lying within watersheds forming a part of the national forests, which, in his opinion, can best be administered in connection with existing national forest administration units.

The President is also authorized to place under the Interior Department administration any lands within national forests principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this act.

SECTION 14

Sale of isolated tracts of the public domain.—This section is an amendment of the present isolated tract law and authorizes the Secretary of the Interior, in his discretion, to order the sale of isolated tracts of the public domain which do not exceed 760 acres in area. Such land may not be sold for less than the appraised value nor until after 30 days' notice of the proposed sale has been given by the land office of the district in which the land is situated. After the highest bid has been determined, any owner of contiguous land has a preference right to buy the offered lands at such highest bid price for a period of 30 days. In no case is an adjacent landowner to be required to pay more than three times the appraised value.

SECTION 15

Leasing of isolated tracts of the public domain.—The Secretary is authorized, in his discretion, to lease isolated tracts of 640 acres

or more of vacant and unappropriated public domain, to contiguous landowners for grazing purposes, upon such terms and conditions as he may prescribe.

SECTION 16

Construction of act.—This section is declaratory of the States' power to enact and enforce statutes for police regulation as regards public health or public welfare. The States, on the other hand, are declared to have no power to restrict or impair the power and authority of the United States to regulate grazing on the public domain.

TAYLOR GRAZING ACT

[PUBLIC—No. 482—73D CONGRESS]

[H. R. 6462]

AN ACT

To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to

any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U. S. C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U. S. C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U. S. C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry or settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

Sec. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be neces-

sary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose; and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than \$500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and main-

tained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

SEC. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

SEC. 6. Nothing herein contained shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto.

SEC. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of

the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: *Provided*, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

SEC. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands: *Provided*, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: *Provided further*, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land.

and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end; but no State shall be permitted to select lieu lands in another State.

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of the district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost.

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received from each grazing district during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said grazing district is situated, to be expended as the State legislature may prescribe for the benefit of the county or counties in which the grazing district is situated: *Provided*, That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area therein.

SEC. 11. That when appropriated by Congress, 25 per centum of all moneys received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year is hereby made available for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements; and an additional 25 per centum of the money received from grazing during each fiscal year shall be

paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 50 per centum of all money received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application.

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly where the same stock grazes part time in a grazing district and part time in a national forest or other reservation.

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this Act: *Provided*, That such reservations or transfers shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained. Lands placed under the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933.

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), 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 the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty 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 for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: *Provided further*, 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. The word 'person' in this section shall be deemed to include corporations, partnerships, and associations."

SEC. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or disconnected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

SEC. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at

all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

Approved, June 28, 1934.

EXECUTIVE ORDER

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

Now, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the

most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

FRANKLIN D. ROOSEVELT.

10 a. m. E. S. T.

November 26, 1934.

CONDITIONAL DONATION OF LANDS FOR SUBSISTENCE HOMESTEADS

Opinion, June 28, 1934

SUBSISTENCE HOMESTEADS—DONATION OF LANDS BY STATE—WHEN ACCEPTABLE BY THE UNITED STATES.

The subsistence homesteads plan adopted to give effect to Section 208 of the National Industrial Recovery Act contemplates ultimate fee simple title in the homesteader, so that lands donated by a State to the United States, to be used for subsistence homesteads and "allied projects", with the condition subsequent that when such use shall cease, the lands shall revert to the State, should not be accepted on behalf of the United States, for the reason that the condition incorporated is incompatible with the subsistence homesteads plan.

MARGOLD, *Solicitor*:

Three questions propounded by the Director of Subsistence Homesteads have been submitted to me for opinion. The questions concern an enactment of the 57th Legislature of the State of Michigan at an extra session of the legislature in 1934 (Bill No. 64), which is in the following language:

The governor of the state of Michigan is hereby authorized to execute a quit-claim deed or deeds for and in behalf of the state of Michigan, any of its departments, institutions, boards and commissions, in which the title to land is vested, conveying to the federal government any lands so held deemed advisable by resolution of the state administrative board for use by any department or bureau of the federal government as a subsistence homestead project or projects or for any allied project or projects under the National Industrial Recovery Act. Any such deed or deeds shall contain a provision providing that the lands contained therein shall revert to the state of Michigan when the same shall cease to be used as a subsistence homestead project or projects or for any allied project or projects under the National Industrial Recovery Act.

It appears that by virtue of the authority vested in them by this act the Governor of Michigan and the State Administrative Board have indicated their willingness to convey certain land, now owned by the State, to the United States or to Federal Subsistence Homesteads Corporation. Under these circumstances the Director of Subsistence Homesteads inquires:

1. Assuming that the State of Michigan is now validly seized in fee of the said lands and should execute a quitclaim deed to such lands to the Federal Government, will the title so acquired be satisfactory?

2. Making the same assumptions as are stated in question 1, will Federal Subsistence Homesteads Corporation be warranted in expending a large sum of money in establishing a subsistence homestead community in the light of the following sentence which appears in the said Act: "Any such deed or deeds shall contain a provision providing that the lands contained therein shall revert to the state of Michigan when the same shall cease to be used as a subsistence homestead project or projects or for any allied project or projects under the National Industrial Recovery Act"?

3. Again making the same assumptions as in question 1, if appropriate resolution is adopted by the Administrative Board, can title be taken in the name of Federal Subsistence Homesteads Corporation, or must it be taken in the name of the United States?

Questions 1 and 2 will be answered together.

In view of the provision in the quoted statute for reverter of the land to the State of Michigan, it becomes necessary to determine the circumstances under which a subsistence homestead community ceases to be "a subsistence homestead project or any allied project under the National Industrial Act". Section 208 of the National Industrial Recovery Act, under which subsistence homestead operations are conducted, provides for "making loans for and otherwise aiding in the purchase of subsistence homesteads" (48 Stat. 195, 205). From this language it would seem that the association of the United States with any subsistence homestead community and the status of the community as a project under the National Industrial Recovery Act continue only until the United States is repaid such sums as it may expend to aid in the purchase of home sites for individual homesteaders. Indeed, the Attorney General has indicated that the acquisition of title to subsistence homestead sites by the United States is justifiable only as an intermediate step in a process by which title is to be vested in individual homesteaders. See Opinion of the Attorney General, rendered to the Secretary of the Interior, October 4, 1933.

It is understood that present plans for the development of subsistence homestead communities contemplate the purchase of home sites by homesteaders under deferred payment contracts. Some 20 or 25 years after a community is settled the several homesteaders will obtain the unencumbered fee to their homesteads free of any interest, control or supervision of the United States. It seems clear that at this point land acquired under the act in question would "revert to the State of Michigan".

It is my opinion, therefore, that any title which the United States might acquire under the terms of the statute in question would be unmarketable. The sole purpose of acquisition, namely, resale to in-

dividual homesteaders, would be unattainable. For this reason questions 1 and 2 must be answered in the negative.

This conclusion makes unnecessary any consideration of the third question.

Approved, June 28, 1934:

OSCAR L. CHAPMAN,
Assistant Secretary.

SOIL EROSION SERVICE

Opinion, July 14, 1934

COOPERATIVE AGREEMENT FORM BETWEEN FARMERS OR LANDOWNERS TO HOLD EACH HARMLESS BY REASON OF DAMAGES FROM PROJECT OPERATIONS ON THE LAND OF EITHER.

MARGOLD, *Solicitor.*

With the letter of June 11, 1934, signed by the First Assistant Secretary, there was transmitted to the Chief of Operations, Soil Erosion Service, a draft of easement intended to be used for securing right of way to construct and maintain drains and ditches for collecting water and discharging it in connection with a soil erosion project. It now appears that the Soil Erosion Service has need for a form of cooperative agreement between two or more farmers wherein each of the farmers or landowners engaged in a joint enterprise contract to permit the construction of soil erosion works and to hold each harmless by reason of any damage that may occur from the construction, operation, and maintenance of the soil erosion project.

The field officer of the Soil Erosion Service at Stillwater, Oklahoma, submits a form of cooperative contract which he deems to be sufficient. The form has been examined and plainly sets forth the requisites of what seems to be needed for a soil erosion project. It is prepared for acknowledgment by the landowners who execute the contract and this permits the recording of the instrument. Instruments of this nature affecting real estate should be recorded in the county in which the lands are situated.

The form of contract which has my approval is as follows:

CONTRACT

This agreement made and entered into this ____ day of _____, 193__ by and between _____ and _____, husband and wife, of _____, Oklahoma, parties of the first part, and _____ and _____, husband and wife, of _____, Oklahoma, parties of the second part, and _____ and _____ husband and wife, of _____, Oklahoma, parties of the third part.

WITNESSETH: *Whereas*, said parties of the first part are the owners of the following described real property situated in _____ County, State of Oklahoma, to-wit: _____, and

Whereas, said parties of the second part are the owners of the following described real property situated in the County of _____, State of Oklahoma, to-wit: _____, and

Whereas, said parties of the third part are the owners of the following described real property situated in _____ County, State of Oklahoma to-wit: _____, and

Whereas, it is necessary that there be a mutual understanding between the parties to this contract in regard to the outlet for water which will necessarily flow in or through the terrace ditches to be constructed on the land of each party hereto, and

Whereas, the parties to this agreement have entered into a cooperative agreement with the Federal Soil Erosion Service for the purpose of preventing erosion on their lands, and

Whereas, said agreement contemplates the construction of terraces, baffles and like improvements, which improvements must be constructed as a unit on the farms operated by the parties to this agreement, and

Whereas, the water accumulating on such terraces may overflow onto and damage lands lying below by reason of the failure of such baffles or ditches, and

Whereas, the terracing and other improvements of said land will prevent erosion and add to the value of the lands;

Now, therefore, the said parties to this contract, in consideration of the mutual benefits that will inure to all the properties covered by this agreement, do hereby agree that each party may discharge the water accumulating on said parties' terraces onto the lands of the other parties, but only through the baffles and ditches constructed pursuant to the cooperative agreements with the Federal Soil Erosion Service, and each party agrees not to place any obstruction or impediment to the flow of such water through the portion of such baffles and ditches located on their land, and each party further agrees to hold the other parties harmless from any damages that may occur by reason of the construction or maintenance of such baffles or like improvements or that may hereafter occur by reason of any failure of such improvements.

It is further agreed that all parties to this contract shall repair, replace and maintain jointly, and in cooperation, all such ditches, baffles, and other structures, or portions thereof, which dispose of water falling on all properties involved. The obligations of each party, in such maintenance, both in cost of materials and labor, shall

be in proportion to the area of their respective lands draining through such structures and is as follows:

Party of the first part -----

Party of the second part -----

Party of the third part -----

Each party to this contract may enter upon the land of the others to repair such terraces, baffles or other structures on said land, and place the same in a condition to care for the flow of water as contemplated by this contract.

This contract and agreement shall be binding upon the heirs, executors, administrators, and assigns of the parties hereto.

Witness our hands the day and year first above mentioned:

Parties of the first part

Parties of the second part

Parties of the third part

STATE OF OKLAHOMA, COUNTY OF ----- SS.

Before me the undersigned, a Notary Public in and for said County and State, on this ---- day of ----- 193-- , personally appeared ----- and -----, husband and wife, ----- and ----- husband and wife, ----- and -----, husband and wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and seal the day and date last above named.

Notary Public

My commission expires ----- 19--.

It is my opinion that the form of cooperative contract quoted is sufficient and well designed for the use intended.

Approved, July 14, 1934:

T. A. WALTERS,
First Assistant Secretary.

SECOND HOMESTEAD ENTRIES, ACT OF JUNE 21, 1934

[Circular No. 1328]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 18, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress approved June 21, 1934 (48 Stat. 1185), which provides:

That hereafter any person who has heretofore made entry under the homestead laws on any lands embraced within any reservation ceded to the United States by the Indian tribes, and has paid for his land the sum of at least \$1.25 per acre, shall, upon proof of such facts, if otherwise qualified, be entitled to the benefit of the homestead law as though such former entry had not been made; but 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: *Provided*, That, in making any new homestead entry as authorized by this Act or the prior, similar Acts of February 20, 1917 (39 Stat. 926), and February 25, 1925 (43 Stat. 981), such entry shall not include any land to which the Indian title shall not have been fully extinguished.

2. A person claiming the right of second homestead entry pursuant to the provisions of this act must furnish a description of the land included in his perfected entry or data from which it can be identified, and he must state that he paid \$1.25 or more per acre for the tract, but it is not necessary that he name the precise price paid. If the former entry embraced tracts appraised at less than \$1.25 per acre and tracts appraised at more than \$1.25 per acre, a second entry hereunder is not allowable unless the aggregate sum of the appraised prices of the former entry equals \$1.25 per acre or more.

3. A second entry is not allowable unless the first entry was made prior to June 21, 1934, and unless satisfactory final proof has been submitted thereon and the entire price of the land included therein has been paid prior to the date of the application for second entry.

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

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

6. A person who is entitled to the benefits of this act may at his option make second entry under either the general homestead law, the enlarged homestead act, or the stock-raising homestead act.

Compliance with the law must be shown as though it were an original entry.

7. This act prohibits the allowance of any application to make a second homestead entry thereunder or under the act of February 20, 1917 (39 Stat. 926), or the act of February 25, 1925 (43 Stat. 961), if it includes any land to which the Indian title shall not have been fully extinguished.

FRED W. JOHNSON, *Commissioner.*

Approved, July 18, 1934:

T. A. WALTERS,

First Assistant Secretary.

ALGOMA LUMBER COMPANY.

*Opinion, July 26, 1934.**

* See opinion March 30, 1934, in Washington Pulp and Paper Corporation, at page 401.

INDIAN TIMBER SALES—CONTRACTS WITH INDIANS—CONSTRUCTION.

A contract must be viewed and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them, and, once ascertained, the intention of the parties must be given effect, sacrificing, if necessary, the literal meaning in order that the major purpose may not fail.

INDIAN TIMBER SALES—CONTRACT WITH LOGGING COMPANY—CONSTRUCTION.

A provision in a contract between an Indian tribe and a logging company required that before a reduction could be made in the stumpage price paid to the Indians it must be established that the logging "is being conducted" at a loss. *Held*, That by the use in the contract of the words "is being conducted" it was not intended that the means of proof should be limited to logging then and there actually being performed, but that it would be permissible to establish by other means that logging could not be conducted on the land at a profit unless a reduction was made in the price to be paid the Indians.

MARGOLD, *Solicitor.*

The Algoma Lumber Company having made application to the Commissioner of Indian Affairs for a reduction in stumpage prices under its contract for the purchase of timber on the Antelope Valley Unit of the Klamath Indian Reservation, you have requested my opinion as to the authority of the Commissioner in the premises.

The contract was approved by the Secretary of the Interior on September 13, 1923. It provides for basic prices of \$3.75 per thousand feet of yellow pine, \$1.50 per thousand feet of Douglas fir and incense cedar, and .75 per thousand feet of all other species of timber. The contract further provides for automatic increases in prices over successive three-year periods beginning April 1, 1928, and under this provision the prices for the period beginning April

1, 1934 are \$5.457, \$2.183 and \$1.091 per thousand feet, respectively, on the species of timber mentioned above. The contract requires minimum annual cuts of timber, but under authority conferred by the contract the company has been relieved from such annual cutting requirements.

It appears that the Algoma Lumber Company has heretofore sought price reductions under the act of March 4, 1933 (47 Stat. 1568), as amended, which act permits modifications of contracts by the Secretary of the Interior with the consent of the purchaser and the Indians involved. The Klamath Indian Council, however, refused to consent to a reduction in price below \$4 per thousand feet for yellow pine. In my opinion of March 30, 1934 (see page 401), it was held that the act of March 4, 1933, did not preclude the Commissioner of Indian Affairs from granting price reductions pursuant to express contract provisions therefor. In conformity with that opinion the Algoma Lumber Company now petitions the Commissioner of Indian Affairs for relief under the following provisions of its contract:

Upon presentation by the Purchaser of detailed information supported by affidavits by a certified public accountant and by the Purchaser, showing that the logging of the said unit is being conducted at a loss, investigation will be made by forest officers under the direction of the Commissioner of Indian Affairs, for the purpose of ascertaining whether under existing market conditions, the Purchaser is able, with efficient management, to earn a reasonable profit on the operation. If such investigation shall show to the satisfaction of the Commissioner of Indian Affairs that the operation will not, under efficient management, earn a reasonable profit, he may, in his discretion, relieve the Purchaser from any portion or all of the increase in price over the original contract stumpage price for such period as he shall consider necessary to protect the Purchaser from serious loss on account of adverse market conditions: *Provided*, That none of the stumpage rates will ever be reduced below the prices specified in the contract for the period ending March 31, 1928; and the Commissioner shall have authority to reimpose any part or all of the increase in prices at any time upon giving notice to the Purchaser, subject to review by Secretary of the Interior.

The foregoing provision is obviously designed to afford the purchaser relief from the automatic price increases during periods of economic depression when operations at such increased prices may not only deprive the purchaser of a reasonable margin of profit but may result in serious losses. To provide the needed relief, the Commissioner of Indian Affairs is given authority to scale down the prevailing contract prices to, as low as the basic prices, if upon investigation by forest officers under his direction, it appears that operations on the unit cannot be conducted at a reasonable profit with efficient management at the contract prices. But the Commissioner's investigation is to be made upon the presentation by the purchaser of information showing that logging on the unit covered

by the contract is being conducted at a loss, and herein lies the principal difficulty in the present case. No logging operations are being conducted on the Antelope Valley Unit, hence, the Algoma Lumber Company is unable to furnish the specific information required by the contract. In lieu thereof the company has submitted a balance sheet and an analysis of operations for the ten-months period ending December 31, 1933, on its private holdings adjoining the Antelope Valley Unit. The company claims that the private operations are on tracts sufficiently like the Antelope Valley Unit to be a fair indication of prospective costs on the Antelope Valley Unit. The sole question presented is whether the information so submitted by the Algoma Lumber Company may be accepted by the Commissioner of Indian Affairs as a basis for investigation and determination of the facts as to whether the company is entitled to relief.

The literal language requiring presentation of information showing loss from logging the contract unit, standing alone, would deprive the Commissioner of authority to grant relief to the Algoma Lumber Company from excessive price increases however much the company might otherwise be entitled to such relief. But particular words may not be isolatedly considered. The whole contracts must be viewed and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them. *United States v. Stage Co.* (199 U. S. 414). As stated by Mr. Justice Bradley in *Canal Co. v. Hill* (15 Wall. 94, 99):

We should look carefully to the substance of the original agreement * * * as contra-distinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements.

And once ascertained, the intention of the parties must be given effect, sacrificing if necessary the literal meaning in order that the major purpose may not fail. See *Serralles' Succession v. Esbri* (200 U. S. 103, 113); *United States v. Stage Co.*, *supra*; *Ozawa v. United States* (260 U. S. 178, 194); *United States v. Arzner* (287 U. S. 470).

Viewing the contract provision under consideration as a whole, it is at once apparent that the major purpose of the parties was to confer upon the Commissioner of Indian Affairs authority to relieve the purchaser from losses occasioned by the conjunction of adverse market conditions and the automatic price increases. It is incredible that the parties could have intended to make a showing of actual loss upon the particular contract unit a condition precedent to the granting of relief. So to hold would be to give controlling effect to inapt language of relative unimportance, with the result that the major purpose of extending relief to the purchaser from

excessive price increases is defeated. This is not permissible under the authorities cited above. The condition precedent to the granting of relief is that the Commissioner of Indian Affairs shall find that the purchaser is not able, with efficient management, to earn a reasonable profit on the operation. This is to be determined, not from the preliminary showing made by the purchaser, but by the independent investigation to be made under the direction of the Commissioner. Extensions of time within which to operate having been made under express authority of the contract, the information presented by the purchaser as a basis for the Commissioner's investigation must, of necessity, be taken from sources other than operations on the contract unit. As it is possible for the Commissioner to ascertain with reasonable certainty the prospective costs of operations on the unit from such other comparable sources, no reason is seen why information of that nature may not be accepted as a basis for the Commissioner's investigation. The obvious purpose of the contract provision was to have before the Commissioner a *prima facie* showing that the purchaser is entitled to relief, and in the absence of operations on the contract unit, this purpose will be satisfied equally as well by the presentation of information from other comparable sources.

Construing the contract provision under consideration as a whole and in the light of its obvious purpose, it is my opinion that the statements submitted by the Algoma Lumber Company of operations on its private holdings adjoining and comparable to the Antelope Valley Unit may be accepted by the Commissioner of Indian Affairs as a basis for investigation and determination of the facts as to whether the company is entitled to relief. The extent of the relief, if any, to be granted is, of course, a matter for administrative determination.

Approved, July 26, 1934:

T. A. WALTERS,

First Assistant Secretary.

ASSIGNMENTS OF INTERESTS IN OIL AND GAS PERMITS

[Circular No. 1331]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 31, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

May 10, 1934, the Department adopted and made effective with reference to approval of assignments of interests in oil and gas prospecting permits under paragraph 1 (g) of the regulations of April

4, 1932 (53 I. D. 640, 642), the following rules of administrative practice:

1. Assignments of royalty interest in permits shall be approved only "subject to the condition that notwithstanding anything in this assignment to the contrary, the assignee shall have no right to a voice in and no vestige of control over prospecting, development, or production operations or over disposal of the oil and gas deposits affected, but shall take and hold only a contingent right to receive a portion of the oil and gas or of the proceeds derived from the disposal of such deposits if and when produced with the sanction of the Secretary of the Interior." Royalty interests so limited involve no holding or control of lands or deposits within the meaning of section 27 of the leasing law of February 25, 1920 (41 Stat. 437), as amended and re-enacted March 4, 1931 (46 Stat. 1523), and owners thereof will not be chargeable with acreage under said section. Reservations of royalty interest in permits shall be treated in like manner.

2. Assignments of other than royalty interest in permits shall be approved only if effecting a change of ownership of the entire interest or an undivided partial interest in the control of operations under permit affected. Such interests constitute holdings and control of lands and deposits within the meaning of section 27, *supra*, and will be charged with acreage *pro rata* in accordance with the degree or percentage of control over development and disposal of production.

Accordingly, the holders of royalty interests, whether by approval of assignments or reserved by the transferors of title to permits, will not be recognized as having any voice in or control over operations under the permits or disposal of production therefrom. Consent to the stipulations provided by the regulations of April 4, 1932, will, therefore, not be required as a condition to the approval of an assignment of a royalty interest.

Give such publicity to this circular as may be done without cost to the Government.

ANTOINETTE FUNK,
Acting Commissioner.

Approved, July 31, 1934:

T. A. WALTERS,
First Assistant Secretary.

RELIEF OF WATER USERS ON IRRIGATION PROJECTS OF THE RECLAMATION SERVICE—ACT OF MARCH 27, 1934.

Opinion, August 1, 1934

RECLAMATION SERVICE—IRRIGATION PROJECTS—RELIEF OF WATER USERS—ACTS OF APRIL 1, 1932, AND MARCH 27, 1934—STATUTORY INTERPRETATION.

The common object of the acts of April 1, 1932, and March 27, 1934, being the relief of settlers on Reclamation projects by extending the period of payment of construction charges, such legislation should receive a liberal construction and the two acts be considered *in pari materia*.

RECLAMATION SERVICE—IRRIGATION PROJECTS—ACTS OF APRIL 1, 1932, AND MARCH 27, 1934—STATUTORY INTERPRETATION.

Although the act of April 1, 1932, for the relief of water users on irrigation projects of the Reclamation Service by extending the period of payment of construction charges, provides for the deferment of "regular construction charges", and a charge already deferred is not a regular construction charge, it does not of necessity follow that the deferred charges cannot be further deferred under the later act of March 27, 1934, enacted to extend the operation of the earlier act. Such a further extension comes reasonably within the scope of the language, "all similar charges coming due for the year 1934" contained in the later act.

MARGOLD, *Solicitor*:

By the act of April 1, 1932, (47 Stat. 75) irrigation districts, water-users' associations, and individual water-right applicants or entrymen were granted a moratorium on the payment to the Bureau of Reclamation of the construction charges fixed in their various contracts. In that moratorium it was provided that, under certain conditions, the 1931 charges and one-half of the 1932 charges should be deferred and paid as an additional installment to be due and payable one year after the due date of the last installment prescribed by the repayment contracts. The act of March 3, 1933 (47 Stat. 1427) authorized and directed the Secretary of the Interior "to extend the provisions of" the moratorium "relating to certain charges coming due for 1931 and one-half of certain charges due for 1932, in like manner to the remaining one-half of such charges coming due for 1932 and to all of similar charges to become due for 1933." The act of March 27, 1934 (48 Stat. 500), in substantially similar terms, extended the moratorium to "all similar charges coming due for the year 1934."

Under the terms of the repayment contracts executed in connection with several of the Reclamation projects, the last regular construction charge installment became due and payable during the year 1933. Under the terms of the act of April 1, 1932, *supra*, any deferred installments will become due and payable during 1934, one year after the due date of the last installment prescribed by the contracts. I have been asked whether, in my opinion, the payment of those deferred installments may be again deferred under the act of March 27, 1934, *supra*.

Although the 1932 act provides only for the deferment of "regular construction charges" and although a charge already deferred is not a *regular* construction charge, it does not necessarily follow that the deferred charges cannot be further deferred under the 1934 act. In that latter act the Secretary of the Interior is directed "to extend such provisions of the" act of 1932, as extended by the act of 1933,

"as relate to the deferment of payment of certain water-right charges for the years 1931, 1932 and 1933, in like manner to all similar charges coming due for the year 1934." The use in the statute of the word "similar" introduces an ambiguity. The commonly accepted meaning of that word is "nearly corresponding; resembling in many respects; somewhat like; having a general likeness" (Webster's New International Dictionary). Under such a definition it is not unreasonable to interpret the language of the statute to permit the deferment of a charge already deferred, although it is not a "regular construction charge." Neither is that interpretation imperative.

For the purpose of resolving the ambiguity it is proper to look to the intent of Congress. An examination of the legislative history of the three moratory statutes discloses no clear intent on the part of Congress concerning the deferment of charges already deferred. Nor does it indicate the intent with which the phrase "similar charges" was included in the 1934 act. Of doubtful significance is the fact that the 1934 statute passed the Senate with only the following discussion:

MR. MCKELLAR. Mr. President, will the Senator from Colorado (Mr. Adams) explain the bill?

MR. ADAMS. Mr. President, this bill is an extension of the provisions of a bill passed in the last Congress, and also in the preceding Congress, designed to give temporary relief to settlers on Reclamation projects so as to enable them to defer the payments of installments for an additional year. It does not carry an appropriation, and it does not waive any installments of payments. (Congressional Record, Volume 78, page 2949.)

The explanation given by Senator Adams, and upon which the Senate acted, indicates a general purpose to relieve the settlers on Reclamation projects and to defer construction charge payments for another year. It does not, however, resolve the ambiguity concerning payments due under a previous deferment.

To apply the statute to the facts which have been presented to me in the absence of a direct expression of Congressional intent concerning those facts, and in the presence of ambiguity in the language of that statute, I must fall back upon the general canons of statutory construction. It is well established that remedial or relief statutes are to be liberally construed. *Grier v. Keenan* (1933) 64 Fed. 2d, 605; *Camunas v. New York & P. R. S. S. Co.* (1919) 260 Fed. 40. There is no doubt that all of these moratory statutes are remedial, having as their expressed purpose the relief of settlers on Reclamation projects.

The ambiguity existing in the act of March 27, 1934, *supra*, must be resolved in such manner as to allow the most complete relief consistent with the provisions of the statute. Consequently, it is my

opinion that the deferred payments falling due during 1934 may again be deferred.

Approved, August 1, 1934:

T. A. WALTERS,
First Assistant Secretary.

**RESTORATION TO ENTRY OF POINT MACKENZIE ABANDONED
MILITARY RESERVATION**

[Circular No. 1332]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 1, 1934.

REGISTER, ANCHORAGE, ALASKA: By Executive Order No. 4131, dated January 22, 1925, a number of military reservations in the Territory of Alaska, including Signal Corps stations and rights of way, were placed under the control of the Secretary of the Interior for disposition as provided by the act of July 5, 1884 (23 Stat. 103), or as may be otherwise provided by law.

One of the reservations included in the transfer was the Point Mackenzie Reservation, situated on the north side of Cook Inlet near the mouth of Knik Arm.

The act of March 27, 1928 (45 Stat. 371), provides as follows:

That when any lands included within the limits of abandoned or useless military reservations, including Signal Corps stations or rights of way, and not otherwise withdrawn or used for a public purpose, in the Territory of Alaska, have been or may be placed hereafter by order of the President, under the jurisdiction of the Secretary of the Interior for disposition, the Secretary may proceed to cause the survey, appraisal, and disposition of such lands or any portions thereof in the manner provided by the act of July 5, 1884 (Twenty-third Statutes at Large, page 103), or the Secretary may, in his discretion, direct the restoration of such lands or any portions thereof to disposition under the public land laws applicable to the Territory of Alaska; *Provided*, That any person locating, entering or acquiring title to any such lands shall, in addition to the regular fees, commissions, and purchase price of the land, pay the appraised price of any improvements placed thereon by the Government.

Sec. 2. That the Secretary of the Interior is hereby authorized to prescribe all necessary rules and regulations for administering the provisions of the Act.

The public land surveys have been extended over this reservation and in accordance with the official plats of survey the description of the reservation is as follows:

T. 13 N., R. 4 W., S. M., Alaska:

Sec. 2, Lot 1

Sec. 3, Lots 1, 3, 4, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ Sec. 4, Lots 1, 2, 3, 4, N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 5, Lots 1, 2, 3, 4, N $\frac{1}{2}$ N $\frac{1}{2}$

Sec. 9, Lot 1

Sec. 10, Lot 1

T. 14 N., R. 4 W., S. M.:

Sec. 25, Lot. 4

Sec. 26, S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 27, S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 28, S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 29, S $\frac{1}{2}$ S $\frac{1}{2}$

Sec. 32, All

Sec. 33, All

Sec. 34, All

Sec. 35, Lots 1, 2, 3, 4, N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$

Sec. 36, Lot 1

The Special Agent in Charge has reported that there are no improvements on the reservation and recommended that the land be restored to the public domain.

No withdrawals are now of record affecting this land.

It is accordingly hereby ordered, pursuant to Public Resolution No. 85, approved June 12, 1930 (46 Stat. 580), that, subject to valid rights, the said lands shall be opened, under the terms and conditions of such resolution and the regulations issued thereunder, to entry under any public land law applicable to the Territory of Alaska by qualified ex-service men for whose service recognition is granted by the resolution, for a period of 91 days beginning with the 35th day from the date hereof, and thereafter to appropriation by the public generally under any applicable public land law. Applications by ex-service men and by persons claiming preference right of entry superior to that of the soldier may be presented during the 20-day period prior to the date of restoration, and soldiers' applications so received will be treated as though simultaneously filed on the opening day.

Applications on the part of the general public may be presented during the 20-day period prior to the date of restoration to general disposition, and applications so received will be treated as though simultaneously filed on that date.

You will upon receipt hereof prepare a notice of this restoration for the information of the public, posting a copy thereof in your office, and you will give as much publicity thereto as possible, without expense to the Government, by forwarding a copy of the notice to the post office nearest the land for posting therein, to the clerks of courts of record in the county, and by transmitting copies of the notice or an item concerning the restoration to newspapers published nearest the land, being careful in sending such item to call particu-

lar attention of the publisher to the fact that the matter is sent as news and that the Government will not be responsible for the cost of any publication thereof. Any item furnished concerning the restoration should state that all inquiries relative thereto must be addressed to your office. You will promptly report your compliance with these instructions.

You will forward a copy of your notice to this office immediately upon issuance thereof in accordance with the requirements of Circular No. 935.

ANTOINETTE FUNK,
Acting Commissioner.

Approved, August 1, 1934:

T. A. WALTERS,
First Assistant Secretary.

MEMORANDUM OF EFFECTIVE DATES IN ABOVE ORDER

Date of Order: August 1, 1934.

Soldiers' simultaneous filing period from August 16, 1934, to September 4, 1934, inclusive.

Soldiers' preference right period from September 5, 1934, to December 4, 1934, inclusive.

Simultaneous filing period for the public from November 15, 1934, to December 4, 1934, inclusive.

Land open to general disposition: December 5, 1934.

ALIENATION OF CHIPPEWA ALLOTTED LANDS

Opinion, August 3, 1934

INDIAN LANDS—CHIPPEWA ALLOTTEES—ALIENATION BY DEVISE—APPROVAL BY PRESIDENT—EFFECT.

An Indian's disposal of an allotment by will is an alienation within the meaning of the provisions contained in the restricted fee patents issued to the Chippewa Indians under the Treaty of September 30, 1854, and approval of such wills by the President is effective to remove all restrictions against alienation of such lands in the hands of the devisees.

INDIAN LANDS—CHIPPEWA ALLOTTEES—ACTS OF JUNE 25, 1910, AND FEBRUARY 14, 1913—SCOPE—APPROVAL OF SECRETARY OF THE INTERIOR.

The act of June 25, 1910, as amended by the Act of February 14, 1913, requiring, among other things, approval by the Secretary of the Interior of a will of a Chippewa allottee devising lands held under a restricted fee patent issued pursuant to the Treaty of September 30, 1854, deals only with Indians alive or who might thereafter come into being, and contains nothing, express or implied, indicating intention to embrace within its terms the will of an Indian who died prior to its enactment.

OPINION DISTINGUISHED.

Solicitor's opinion of October 29, 1921 (48 L. D. 472) distinguished.

MARGOLD, *Solicitor*:

You have requested my opinion as to whether a will executed by Shaday or Edwin Green, as the sole heir of Joseph Green, Jr., a deceased Chippewa allottee of the Bad River Indian Reservation in Wisconsin, operated to remove the restrictions against alienation on 80 acres of land allotted to the deceased allottee and described as the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 27, T. 47 N., R. 2 W.

The allotment was made under the provisions of the Treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi (10 Stat. 1109). Article III of the treaty conferred authority upon the President of the United States to issue patents to the Indians for the lands allotted thereunder "with such restrictions of the power of alienation as he may see fit to impose." In pursuance of this authority, a patent issued on June 20, 1889, conveying the above-described land to Joseph Green, Jr., and his heirs in fee, subject, however, to the restriction that the allottee and his heirs "shall not sell, lease, or in any manner alienate the said tract without the consent of the President of the United States."

The allottee died February 4, 1893, intestate, leaving as his sole heir at law his father, Shaday, or Edwin Green, a Chippewa Indian of the Bad River Reservation. June 2, 1906, Shaday or Edwin Green executed a will by which he devised the land under consideration in equal shares to his grandson, Joseph E. Green, and his granddaughter, Agnes E. Green. The testator died April 8, 1909, and his will, after admission to probate in the County Court of Ashland County, in 1918, was presented to and approved by the President of the United States on August 18, 1919. This will, according to a familiar rule, became effective on the date of the testator's death in 1909 and the subsequent approval of the President related back and took effect as of that date.

By Section 2 of the act of June 25, 1910 (36 Stat. 855, as amended by the act of February 14, 1913 (37 Stat. 678, 679), Congress authorized any person [Indian] over the age of 21 years having any right, title or interest in land held under a trust or other patent containing restrictions against alienation, to dispose of the same by will. The act provides that no will so executed "shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior," and declares that the "approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period." October 29, 1921, the Solicitor for this Department held that this statute applied to wills executed by Chippewa Indians devising lands allotted in severalty under the provisions of the treaty of 1854, and ruled that such a will did not remove the restrictions against alienation imposed by that treaty

(48 L. D. 472). From a reading of that opinion, however, it is apparent that the Solicitor was there dealing with wills executed by Indians who died subsequent to the enactment of the act of June 25, 1910, as amended, and not with wills of Indians who died testate at some prior date. To hold that the statute applies to this latter class of wills is to give the statute retroactive operation. Retroactive laws are not favored, and unless the intention that a statute is to have retroactive operation is clearly evidenced in the statute and its purposes, it will be presumed that it was enacted for the future and not for the past. *White v. United States* (191 U. S. 545); *Cameron v. United States* (231 U. S. 710). The act of June 25, 1910, as amended, contains nothing express or implied indicating any intention on the part of Congress to embrace within its terms the will of an Indian who died prior to the enactment. To the contrary, the statute deals only with persons then alive or who might thereafter come into being, and confers upon them the authority to make a testamentary disposition of their restricted property subject to the conditions prescribed. This obviously excludes from the operation of the statute persons not then in being.

As hereinbefore pointed out, the will of Shaday or Edwin Green became effective on the date of the testator's death in 1909. The effect of the will and the power to make it are governed and controlled by the law then in force. There was then no statute in existence expressly dealing with the making of wills by the Chipewa Indians, but it does not follow that there was a lack of testamentary power. While it has been held in certain cases that an Indian was without the power to dispose of his allotted lands by will in the absence of legislation by Congress permitting it, such cases are without application here because based upon statutes containing an absolute inhibition against alienation, so that the allottee was unable, with or without approval of the President or the Secretary of the Interior, to make any disposition whatever of his lands. See *United States v. Zane*, 4 Ind. Ter. 185, 69 S. W. 842; *In re House's Heirs*, 132 Wis. 212; *Taylor v. Parker*, 235 U. S. 42. The restrictions imposed under authority of the treaty of 1854 were not absolute. The inhibition extended only to such forms of alienation as failed to receive the approval of the President of the United States. Under the well settled rule that the word "alienation" includes the disposition of real estate by will (*Hayes v. Barringer*, 168 Fed. 221, 224), it appears to be beyond question that the allottee or his heirs could make a valid testamentary disposition of the allottee lands with the approval of the President.

Regarding the effect of the will as removing restrictions, it appears that the Commissioner of Indian Affairs by letter approved by the First Assistant Secretary of the Interior on October 5, 1933, advised

the Superintendent of the Lac du Flambeau Agency that the approval of the will of Shaday or Edwin Green by the President of the United States did not operate to terminate the restrictions against alienation and that it was the purpose to recover possession of the land for the devisees through a suit to clear title, if such course should prove to be necessary. The Commissioner now states:

An attack upon the validity of conveyances made since approval of the will in this case involves changing an administrative ruling which has been in effect, it is believed, over a period of 30 years or more. During that period we have consistently held that disposal of an allotment by will is an alienation within the meaning of the provisions contained in the restricted fee patents issued to the Chippewa Indians under the treaty of 1854, and that approval of such wills by the President of the United States is effective to remove all restrictions against alienation of such lands in the hands of the devisees. * * *

No record has been kept of the number of Chippewa allotments which have been alienated by wills approved by the President. It is safe to say, however, there are a large number of such wills and that in most cases the devisees have sold or encumbered their interests. These conveyances have not received the approval of the Department or of the President, for in the few cases in which the instruments of conveyance have been submitted for approval they have been returned to the parties unapproved with the explanation that the restrictions had been removed by approval of a will.

Any possible doubt which might otherwise exist as to the soundness of the administrative view referred to by the Commissioner of Indian Affairs appears to be removed by the decision of the Supreme Court of the United States in *La Motte v. United States* (254 U. S. 570). In that case the question of whether a will made under authority of Section 8 of the act of April 18, 1912 (37 Stat. 86), by a member of the Osage Tribe of Indians in Oklahoma, devising his restricted allotted lands to incompetent members of the tribe, conveyed the title to them free from restrictions, was squarely presented and decided. There, as here, the authorizing statute was silent as to the effect of the will upon the restrictions. Holding that the restrictions were removed, the court said:

This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the Secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissible, if not the necessary, conclusion from its words. After its enactment the Secretary of the Interior construed it as having that meaning, and it was administered accordingly in that department up to the time of this suit. And that Congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the Secretary (c. 55, 37 Stat. 678); for that act, while providing that "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period," expressly excepted the Osages from its reach. These

matters apparently were not brought to the attention of the courts below. We regard them as of sufficient weight to put the question at rest.

(See also *United States v. Harris*, 293 Fed. 389 and *Yarhola v. Duling*, 207 Pac. 293).

Neither the will of Shaday or Edwin Green nor the presidential approval thereof contains any provision purporting to preserve the restrictions against alienation. In the absence of such provision and upon authority of the cases just cited, it is my opinion that the will conveyed title to the devisees free from all restrictions. The administrative ruling of October 5, 1933, is, therefore, in error and should be recalled and vacated.

Approved, August 3, 1934:

T. A. WALTERS,

First Assistant Secretary.

RESTORATION OF LANDS FORMERLY INDIAN TO TRIBAL OWNERSHIP

[Instructions]

DEPARTMENT OF THE INTERIOR,

BUREAU OF INDIAN AFFAIRS,

Washington, D. C., August 10, 1934.

THE COMMISSIONER OF INDIAN AFFAIRS

TO THE SECRETARY OF THE INTERIOR,

(Through the Commissioner of the General Land Office):

Section 3 of the Act of June 18, 1934 (48 Stat. 984), enacted to conserve and develop Indian lands and resources and for other purposes, contains the following provision:

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

During the early years of our dealings with the Indians, the custom was to have individual or combined nations, tribes, or bands relinquish or cede to the United States large areas claimed by them, for which there was usually a cash or other consideration, and also the setting apart or reserving of certain lands within such ceded areas or from lands belonging to the United States and located

elsewhere. These reserved lands thereafter became the recognized reservation of a tribe or band. In this way the Indians lost all identity with the ceded areas and their rights and interest therein were recognized as having been completely extinguished. In many instances such cessions, taken as a whole, embraced practically all of the lands now comprising many of the States of the west.

In years following, for reasons varying on the different reservations, portions of these diminished or newly established reservations were also ceded to the United States, the Indians receiving from the Government in lieu thereof a cash consideration and other benefits. Such transactions were also recognized as carving or separating a certain area from a particular reservation, operating as an extinguishment of the Indian title. In this way the exterior boundaries of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation.

This brings us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company v. United States*, 252 U. S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest. It can safely be said that it would not be to the interest of the public to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation.

In connection with this matter, attention is invited to Section 16 of the same act, which authorizes the formation of tribal organizations and provides that tribes and tribal councils shall have authority "to prevent the sale, disposition, lease, or encumbrance of tribal lands, * * *"; also to Section 18 which authorizes the Indians of any reservation, by a vote of a majority of the adult Indians on the reservation, to exclude themselves from the operation of the entire act, referendum election for such purpose to be held within

one year after approval of the act. It, therefore, will be some time before it is known definitely whether the Indians of any of the reservations will exclude themselves from operation under the act, and until tribal organizations can be formed and thereafter definitely determine which of the "opened" Indian reservation lands still undisposed of should be permanently restored to tribal ownership. Tribal organizations should have a voice in deciding which lands should be withheld from disposition. It is understood from informal inquiry in the General Land Office that, although there are "opened" lands on various reservations, there are only a very limited number of reservations where sales can actually be made. Nevertheless, there is a possibility that in the meantime some desirable undisposed of "opened" lands might be entered or filed upon by non-Indians and thereby prevent the restoration of such lands to tribal ownership. For this reason, action should be promptly taken to prevent, for the present, the further disposition of any of such lands by public entry, sale, or otherwise. A withdrawal of this kind would be merely of a temporary nature.

The following is a list of reservations where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of. As a matter of convenience, citations to treaties, agreements, or acts, under which such "openings" occurred, are also furnished:

ARIZONA

San Carlos

Agreement of February 25, 1896, ratified by Act of June 10, 1896 (29 Stat. 388).

CALIFORNIA

Klamath River

Act of June 17, 1892 (27 Stat. 52).

Round Valley

Act of October 1, 1890 (26 Stat. 658).

COLORADO

Utes

Act of June 15, 1880 (21 Stat. 199).

IDAHO

Coeur d'Alene

Act of June 21, 1906 (34 Stat. 335).

MINNESOTA

Bois Fort

Act of January 14, 1889 (25 Stat. 642).

Deer Creek

Act of January 14, 1889 (25 Stat. 642).

Fond du Lac

Act of January 14, 1889 (25 Stat. 642).

Grand Portage or

Pigeon River

Act of January 14, 1889 (25 Stat. 642).

Red Lake

Act of January 14, 1889 (25 Stat. 642).

White Oak Point

Act of January 14, 1889 (25 Stat. 642).

Leech Lake

Act of January 14, 1889 (25 Stat. 642).

MONTANA

Flathead

Act of April 23, 1904 (33 Stat. 302).

Fort Peck

Act of May 30, 1908 (35 Stat. 558).

Crow

Act of April 27, 1904 (33 Stat. 352).

NORTH DAKOTA

Fort Berthold

Act of June 1, 1910 (36 Stat. 455).

NORTH AND SOUTH DAKOTA

- Standing Rock Act of May 29, 1908 (35 Stat. 460).
 " " Act of February 14, 1913 (37 Stat. 675).

OKLAHOMA

- Cheyenne & Arapaho Act of June 17, 1910 (36 Stat. 533).
 Kiowa, Comanche and
 Apache Act of June 5, 1908 (34 Stat. 213).

SOUTH DAKOTA

- Cheyenne River Act of May 29, 1908 (35 Stat. 460).
 Lower Brule Act of August 21, 1906 (34 Stat. 124).
 Pine Ridge Act of May 27, 1910 (36 Stat. 440).
 Rosebud Agreement of September 14, 1901, ratified
 by Act of April 23, 1904 (33 Stat. 254).
 " Act of March 2, 1907 (34 Stat. 1230).
 " Act of May 30, 1910 (36 Stat. 448).

UTAH

- Uintah and Ouray Act of May 27, 1902 (32 Stat. 263, as
 amended).

WASHINGTON

- Colville Act of March 22, 1906 (34 Stat. 80).
 Spokane Act of May 29, 1908 (35 Stat. 458).

WYOMING

- Wind River Agreement of April 21, 1904, ratified by
 Act of March 3, 1905 (33 Stat. 1016).

As a matter of explanation, it may be said that the Klamath River Reservation, mentioned in the list of reservations herewith, was established by Executive Order of November 16, 1855. The surplus lands were opened to settlement, entry and purchase under the laws of the United States by the Act of June 17, 1892 (27 Stat. 52). As a consideration for the lands so opened, the Indians were to receive allotments, village sites, and \$1.25 per acre for lands disposed of to certain settlers. Apparently the lands within this "opened" reservation remaining undisposed of at this time are of the class intended for withdrawal and should be retained from disposition until their need for Indian purposes has been investigated.

The Ute lands of Colorado, the areas covered by the Act of June 15, 1880 (21 Stat. 199), as amended by the Act of July 28, 1882 (22 Stat. 178), were deemed to be public lands of the United States and subject to disposal as such. However, the lands were to be sold, the proceeds to be first applied to reimbursing the United States for expenses incurred in connection with administration of the act and the remainder to be deposited in the Treasury of the United States for the benefit of the Indians. In view of this provision, such of these lands as remain undisposed of are also looked upon as being of the class to be temporarily withdrawn from further disposition, as proposed, and, therefore, have been included in the above list.

The Act of May 17, 1900 (31 Stat. 179), provided for free homesteads for the benefit of actual and *bona fide* settlers, and that

all sums of money so released from payment of collection, which if not released would have belonged to an Indian tribe, were to be paid to such Indians by the United States. It is, therefore, not intended that this withdrawal shall apply to any lands of this class where the Indians were reimbursed by the United States for the value of such lands in accordance with the said Act of May 17, 1900 (31 Stat. 179).

If there are lands on any of the reservations named, other than the areas covered by the said citations, that were "opened", and for which the Indians receive the proceeds when disposed of, it is intended that they be included in the withdrawal. Areas within regularly authorized reclamation projects are to be excepted.

It is, therefore, recommended that all undisposed-of lands of the Indian reservations named above that have been "opened", or authorized to be "opened", to sale, entry, or any other form of disposal under the public land laws, or which are subject to mineral entry and disposal under the mining laws of the United States, with the exception of areas included in reclamation projects, be temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934, *supra*, can be given appropriate consideration. The intention is to withdraw only lands the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians. In the event it is found that there are lands of other reservations that should have been included in this proposed withdrawal, appropriate recommendation will be made to have the withdrawal extended to embrace such lands.

JOHN COLLIER, *Commissioner*.

GENERAL LAND OFFICE,

Washington, D. C., September 15, 1934.

There are no reasons known to this Office why the foregoing recommendation should not be approved.

FRED W. JOHNSON, *Commissioner*.

Approved, as recommended, September 19, 1934:

HAROLD L. ICKES,

Secretary of the Interior.

BUREAU OF INDIAN AFFAIRS,

October 16, 1934.

THE SECRETARY OF THE INTERIOR, (Through the Commissioner of the General Land Office):

Under date of September 19 the Department approved the recommendation of this Office for the temporary withdrawal of vacant and undisposed-of lands on various Indian reservations that had been

"opened" to public entry or other disposition, excepting areas included in reclamation projects, until the question of their permanent reservation for tribal purposes, as authorized by section 3 of the Indian Reorganization Act of June 18, 1934 (Pub. No. 383—73d Congress), could be appropriately considered.

It has since been ascertained that there are "opened" lands of three additional reservations that should have been included in the order, as follows:

MINNESOTA	
White Earth	Act of January 14, 1889 (25 Stat. 642).
OKLAHOMA	
Wichita	Act of March 2, 1895 (28 Stat. 895).
OREGON	
Umatilla	Act of March 3, 1885 (23 Stat. 340-342).

It is recommended that the order of September 19, 1934, be amended to include vacant and unsold areas on the "opened" portions of these three reservations.

In said order of September 19, no mention was made of townsites within such "opened" areas, the proceeds from which, of course, go to the Indians. As to those townsites which have heretofore been completely sold out, it was not intended that such order should apply, but as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order of September 19, 1934, and this supplemental order, be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites until further investigation can be had and specific recommendations made in each instance as to the final disposition to be made thereof.

WILLIAM ZIMMERMAN, Jr., *Assistant Commissioner.*

GENERAL LAND OFFICE,

Washington, D. C., October 22, 1934.

There are no reasons appearing in the records of this Office why the foregoing recommendation should not be approved.

FRED W. JOHNSON, *Commissioner.*

Approved, as recommended, November 2, 1934:

T. A. WALTERS,

Acting Secretary of the Interior.

FIVE-DAY WEEK*Opinion, August 10, 1934.***FEDERAL EMPLOYEES IN WASHINGTON—FIVE-DAY WEEK—DEPARTMENT OF THE INTERIOR AND PUBLIC WORKS ADMINISTRATION—ACTS OF MARCH 15, 1898, AND MARCH 3, 1931.**

Congress having fixed the minimum hours of labor per day for employees in the executive departments in Washington at not less than seven hours per day, except employees whose compensation is determined by special wage-fixing authorities, and declared that service shall be required *each* day except Sundays and days declared public holidays, there is no authority of law for elimination of Saturday as a partial workday by adding to the other workdays the four hours of service required by the act of March 3, 1931.

MARGOLD, *Solicitor*:

Reference is made to the memorandum of Mr. E. K. Burlew, Administrative Assistant, dated July 2, 1934, requesting advice on the question whether the Secretary of the Interior has authority to declare a five-day week for employees in the Department of the Interior and the Public Works Administration in Washington by adding the four hours for Saturday to the preceding five days.

Section 29, Title 5, United States Code, reads as follows:

It shall be the duty of the heads of the several executive departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order. The heads of the departments may, by special order, stating the reason, further extend the hours of any clerk or employee in their departments, respectively; but in case of an extension it shall be without additional compensation.

It will be noted that service is required *each* day except Sundays and holidays.

The act of March 3, 1931 (46 Stat. 1482, sec. 26a, Title 5, U. S. Code, Supp. 7), declares that four hours, exclusive of time for luncheon, shall constitute a day's work on Saturdays throughout the year, with pay or earnings for the day the same as on other days when full time is worked, for all civil employees of the Federal Government, with certain exceptions not pertinent to this inquiry.

The act of March 3, 1933 (47 Stat. 1516, sec. 26b, Title 5, U. S. Code, Supp. 7), authorizes the Administrator of Veterans' Affairs to except certain classes of his employees from the Saturday half-holiday provision, and in such case, "seven hours shall constitute a workday on Saturday."

In the above provisions of law, Congress has fixed the minimum hours of labor per day for each day except Sundays and legal holidays. It is also provided that if the hours be extended "it shall be without additional compensation."

In cases where the employee is entitled to the Saturday half-holiday, but for special public reasons the services of such employee cannot be spared, he shall be entitled to an equal shortening of the workday on some other day. There is no provision for shifting the required four hours of Saturday service to other workdays.

Therefore, I am of the opinion that there is no authority of law for the elimination of Saturday as a partial workday by adding the required four hours of service to other workdays, except as regards such employees as come within the purview of section 23 of the act of March 28, 1934 (Public 141 — 73d Congress), which fixes a forty-hour week "for the several trades and occupations" where the compensation is fixed by wage boards or other wage-fixing authorities. With respect to the latter class of employees, the Comptroller General, in his decision of April 6, 1934, held:

If the 40 hours are distributed over 5 days of the week only, the Saturday half-holiday law becomes inoperative and the administrative office may, due to the exigencies of the service, include Saturday as one of the 5 working days of the week either as to individual employees, groups of employees, or the entire force.

As regards this class of employees, the working hours are put on a weekly basis, rather than a daily basis, and a five-day week may be fixed for them. A separate opinion has been prepared dealing with this class of employees in response to a request from the National Park Service.*

Approved, August 10, 1934:

HAROLD L. ICKES,

Secretary of the Interior.

SUBSISTENCE HOMESTEAD COMMUNITIES WITHIN RECLAMATION AREAS

Opinion, August 14, 1934.

SUBSISTENCE HOMESTEADS WITHIN RECLAMATION PROJECTS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—RECLAMATION ACT—CORPORATE CONTROL AND GOVERNMENTAL CONTROL.

The Federal Subsistence Homesteads Corporation, being wholly financed and controlled by the United States Government and serving no function other than aiding in the purchase of subsistence homesteads by individuals as provided by section 208 of the National Recovery Act, does not fall within the category of corporations which it was the intention of Congress should be barred from acquiring or controlling lands within Reclamation projects; nor does the statutory limitation of individual holdings to 160 acres apply to such a corporation.

* See Opinion of Solicitor, November 9, 1934 (m. 27737).

MARGOLD, *Solicitor*:

For the establishment of a subsistence homestead community in Arizona, Federal Subsistence Homesteads Corporation proposes to purchase from private proprietors land and appurtenant water rights within the area of a Reclamation project. In this connection the corporation has inquired whether its corporate status or the fact that the proposed purchase is of greater area than 160 acres will make the enterprise a violation of the reclamation law. This inquiry has been referred to me for opinion.

Material provisions of the Reclamation Law are in the following language:

The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390, 43 U. S. C., sec. 372.)

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land; and no such right shall permanently attach until all payments therefor are made. (32 Stat. 389, 43 U. S. C., sec. 431.)

No person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation law, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres; nor shall water be furnished under said law nor a water right sold or recognized for such excess; * * * and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction. (37 Stat. 266, 43 U. S. C., Sec. 544.)

The several provisions of the statute restricting "entry" upon land within a Reclamation project are not applicable here since the tracts in question are in private ownership.

In addition to the language of the statute two Administrative rulings concerning corporate ownership are to be considered. On June 11, 1913, the Secretary of the Interior issued formal instructions that applications of corporations for water rights on Reclamation projects should not be allowed. (44 L. D. 250.) The Secretary stated "that Congress did not intend that these Reclamation lands, upon which the Government is expending the money of all the people, should be the subject of corporate control. These lands are to be the homes of families." In a subsequent instruction an exception to this rule was made in favor of "religious, educational, charitable and eleemosynary corporations." (45 L. D. 541.)

The answer to the entire matter under consideration is determined by the fact that Federal Subsistence Homesteads Corporation is an agency wholly financed and controlled by the United States, and serving no function other than "aiding in the purchase of subsistence homesteads" as provided in Section 208 of the National Industrial Act. It is an established rule of construction that general limitations in a statute, although operative on all private persons, do not restrict the sovereign. *Dollars Savings Bank v. United States*, 19 Wall. 227 (U. S. 1873); *United States v. Herron*, 20 Wall. 251 (U. S. 1873); 26 Op. Atty. Gen. 415. Such an instrumentality as Federal Subsistence Homesteads Corporation shares this sovereign exemption. Its acquisitions are substantially in Government ownership, and, therefore, need not be restricted in area or embarrassed by a declared policy against corporate holdings.

It is significant that one of the quoted sections of the Reclamation Act (43 U. S. C., sec. 544) makes clear its intended limitation to acquisitions of private persons by making forfeiture to the United States a penalty for excessive holdings. Moreover, the plain purpose of limiting individual holdings and prohibiting corporate acquisitions is to assure distribution of the benefits of reclamation among a large number of families, each holding not more than an economically adequate farm unit. It is this very purpose which is served by a temporary holding of a consolidated tract by Federal Subsistence Homesteads Corporation.

Upon the whole case it is clear beyond need for extended discussion that the Reclamation Law does not prevent Federal Subsistence Homesteads Corporation from acquiring title to and water rights for so much land as may be needed for a subsistence homestead project within a Reclamation district. It is unnecessary to decide under what circumstances or to what extent private acquisitions are restricted by the quoted sections of the Reclamation Law.

Approved, August 14, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

SUBSISTENCE HOMESTEADS—ENTERPRISES AND ACTIVITIES WITHIN SCOPE OF ORGANIC ACT—INHIBITIONS

Opinion, August 15, 1934.

SUBSISTENCE HOMESTEADS—SEC. 208, CHAP. 90, NATIONAL INDUSTRIAL RECOVERY ACT—HOMESTEAD COMMUNITIES—AID TO COOPERATIVE ENTERPRISES.

The function of aiding in the purchase of subsistence homesteads as provided for in Section 208, Chapter 90, of the National Industrial Recovery Act (48 Stat. 119, 205), is broad enough to embrace sale of homestead plots and

sale of community structures to cooperatives of homesteaders and also the loan of operating capital to any such cooperative duly obligated to conduct or aid in community enterprises.

SUBSISTENCE HOMESTEADS—SEC. 208, CHAP. 90, NATIONAL INDUSTRIAL RECOVERY ACT—FUNCTION AND SCOPE.

Generally, undertakings reasonably calculated so to improve the economic status of homesteaders that they will be better able to pay for them, or undertakings reasonably calculated to create an environment appropriate for a residential community under presently accepted standards of living, are embraced within the conception of aiding in the purchase of subsistence homesteads.

SUBSISTENCE HOMESTEADS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—POWERS.

The Federal Subsistence Homesteads Corporation may construct and equip schools, community buildings, roads and other community facilities, and dispose of them by sale or such dedication as will make them available to a subsistence homestead community.

SUBSISTENCE HOMESTEADS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—INHIBITIONS.

The Federal Subsistence Homesteads Corporation may not lend financial aid to private enterprises to be conducted within subsistence homestead communities for profit and not primarily for the benefit of the homesteaders.

SUBSISTENCE HOMESTEADS—SEC. 208, NATIONAL INDUSTRIAL RECOVERY ACT.

Section 208, Chapter 90, of the National Industrial Recovery Act, does not contemplate that community buildings or facilities shall be supplied to homesteaders gratuitously, but requires that the cost thereof shall be repaid into the subsistence homestead revolving fund.

SUBSISTENCE HOMESTEADS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—LEASES OF LAND TO INSTRUCTORS.

The Federal Subsistence Homesteads Corporation may lease plots to teachers, social workers and technicians who serve a subsistence homestead community.

SUBSISTENCE HOMESTEADS—FEDERAL SUBSISTENCE HOMESTEADS CORPORATION—TEMPORARY OCCUPANCY OF LAND.

The Federal Subsistence Homesteads Corporation may permit such temporary occupancy of land acquired for a subsistence homestead project as it may deem expedient whenever it has been administratively determined that such property is not immediately useful for subsistence homestead purposes.

SUBSISTENCE HOMESTEADS—INTEREST EARNED—DISPOSITION.

Interest earned by subsistence homestead expenditures must be covered into the Treasury of the United States as "miscellaneous receipts."

MARGOLD, Solicitor:

Twelve questions propounded by the Director of Subsistence Homesteads have been referred to me for opinion. These questions have arisen in connection with the administration of Section 208 of the National Industrial Recovery Act by the Federal Subsistence Homesteads Corporation.

A Solicitor's opinion dated June 15, 1934 (M-27702), was responsive to an earlier submission of the Director of Subsistence Home-

steads concerning the activities of Federal Subsistence Homesteads Corporation. The history of the corporation and its method of doing business were the subject of a preliminary statement of fact in the opinion of June 15, 1934. It seems unnecessary to repeat that statement here.

The present submission of the Director of Subsistence Homesteads is in the following language:

It is planned to organize the homesteaders of some of the subsistence homestead communities into co-operatives. Each of such co-operatives will be organized under the laws of the particular state in which the project is located. All of the homesteaders will become members of the co-operative, and only the homesteaders will be admitted to membership. (In some instances, however, a small number of individuals, not homesteaders, who are especially qualified as technical personnel, may be likewise admitted to membership). The existence of such co-operatives of homesteaders will enable the carrying out of several experimental forms of community organization which are being considered:

1. May Federal Subsistence Homesteads Corporation (hereinafter referred to as "the Corporation") convey land and buildings to the co-operative of the homesteaders, rather than directly to the homesteaders, the co-operatives in turn to execute leases of individual tracts to homesteading families? (This procedure is being considered for some projects because it will enable all the properties to be co-operatively owned, and will avoid speculation by individual homesteaders on a rise in land values.)

2. May the Corporation, after entering into contracts with individual homesteading families for the outright sale to such families of small homestead tracts and dwellings, convey to the co-operative of homesteaders a tract of land to be held by such co-operative for use as pasture, woodland, cemetery plot, athletic field, playground, parks, general farm, or general orchard, for the equal benefit of all of the homesteading families? (It is frequently uneconomical to break up all the land into individual homestead tracts; the topography and nature of the soil, and the location of the individual tracts frequently make it desirable, or even imperative, that a large piece of land be set aside for pasture, woodland, play-ground, general farm, etc., for the equal benefit of all the homesteaders; so, too, some crops intended for the use of the homesteaders can be grown more economically on one large general farm or general orchard, in the products of which all the homesteaders may share.)

3. May the Corporation expend money made available in Section 208 to construct and equip any or all of the below listed properties, and then convey such properties to the co-operative of the homesteaders which will operate the properties, so as to give employment to some homesteaders, and make available to all homesteaders products, services and materials at cost:

(a) A dairy or poultry farm? (A herd of 100 cows may be adequate to supply milk, cream, cheese and butter for 200 families; one large poultry and dairy farm can more economically and efficiently provide for the needs of 200 families than 200 separate small farms. In such cases it is contemplated to have the livestock and equipment owned by the co-operative, with all homesteaders sharing equally in the products.)

(b) A general merchandise store? (It is desired to secure the economies of large scale purchases of food and other staples, seed, fertilizer,

clothing, and other general small articles, which may then be sold to homesteaders at cost.)

(c) A first-aid clinic or small hospital? (This can be inexpensively equipped. Where it is many miles to the nearest hospital, this may be essential. A nurse or doctor may be included among the homesteaders.)

(d) A small handicraft shop or factory? (To provide employment for cash income for some of the homesteaders, to manufacture small articles needed by the homesteaders, and to enable all the homesteaders to share in any profits from the sale of such articles.)

4. May the Corporation make a loan to such a co-operative of the homesteaders for operating capital?

5. May the Corporation make a loan to a private industry for operating capital where part of the consideration for such loan will be an undertaking by the borrower to employ the homesteaders so as to supply them with a source of cash income? May the Corporation sell or lease a small tract of land to such an industry? (Some such inducement is frequently necessary to induce an industry to locate near the subsistence homestead community.)

6. May the Corporation purchase and then sell to the co-operative of homesteaders farm implements and farm machinery? (Heavy farm machinery is sometimes needed for economical operation of the agricultural tracts. It is frequently uneconomical, however, for each of the homesteaders to attempt to purchase or lease such machinery. It is contemplated to have such machinery purchased by the co-operative and made available for use by all homesteaders as needed.)

7. May the Corporation build, equip and convey to the co-operative of homesteaders a school building? May the Corporation make a gift of such completed school building to the co-operative of homesteaders? (Frequently the local county or township is not in financial position to build and equip a needed school building for the community, and existing school facilities may be totally inadequate to meet the increased demand. If such a building can be supplied without cost to the county, the county will frequently be willing to pay the salaries of teachers and to meet other operating expenses.)

8. May the Corporation build and equip a community house, containing study rooms, reading rooms, assembly hall, kitchen, and similar facilities, and then convey such community house to the co-operative of homesteaders? May the Corporation make a gift of such community house to the co-operative of homesteaders?

9. May the Corporation set aside a small number of homestead tracts to be leased to teachers, social workers, and professional technicians? (It is frequently desirable to include in the community individuals who can render special services, but who do not wish to become permanent homesteaders. Such special services are those which teachers, social workers, agricultural experts, and others, may provide. It would be desirable to secure their residence within the community by leasing homes to them from year to year.)

10. After a community plan has been laid out for the establishment of a subsistence homestead community, may the Corporation convey to the local counties, or dedicate to the public, the following: roads, streets, walks, parks, and parkways, which have been constructed with moneys made available in Section 208? (After such dedication, the expense of maintenance is assumed by the local authorities.)

11. Should moneys paid to the Corporation by homesteaders as interest on amortization or on advances made by the Corporation, be deposited to the

credit of the revolving fund created in Section 208, or should such payments be covered into the Treasury as "miscellaneous receipts"?

12. Where part of the land which has been acquired cannot immediately be used by the Corporation for building or other operations, may such land be temporarily leased by the Corporation? Should the rentals from such leases be deposited to the credit of the revolving fund or covered into the Treasury as "miscellaneous receipts"?

The first question concerns a proposal that the Federal Subsistence Homesteads Corporation "convey" land and buildings to "co-operatives of homesteaders", and that each co-operative in turn lease home sites to homesteading families.

Authority for the conduct of any subsistence homestead enterprise must be found in Section 208 of the National Industrial Recovery Act (48 Stat. 195, 205). That section permits the use of an appropriated fund "for * * * aiding in the purchase of subsistence homesteads." In a decision concerning this section, rendered to the Secretary of the Interior October 4, 1933, the Attorney General stated that, "while land may be purchased and houses built thereon 'with a view to reselling them to homesteaders', it should be borne in mind that the statute necessarily contemplates that the persons who occupy the land and the houses erected thereon will actually purchase them." In concluding this opinion the Attorney General added: "You may enter into such agreements with settlers and prospective settlers as you may find proper for any land, having in mind, however, in addition to the other things suggested, that the settlers must be purchasers, or properly obligated prospective purchasers of the land which they occupy." The question now propounded by the Director of Subsistence Homesteads makes it necessary to decide whether the purchase of subsistence homesteads must be by the homesteaders individually, or whether an organization or association of homesteaders may be the purchaser of a community of home sites.

It is significant that Section 208 contains no detailed directions for or restrictions upon the expenditure of the subsistence homestead appropriation. Moreover, the appropriated sum of \$25,000,000 is plainly insufficient for curing the evil of overpopulation in industrial centers. Undertakings of Federal Subsistence Homesteads Corporation, therefore, must be essentially experimental, pointing the way for larger undertakings of similar character. Such experimentation involves the trial of projects of many types, variously organized. While the statute requires that there be a purchase of subsistence homesteads, I cannot find that the letter of the law forbids purchase by an organized group of homesteaders and occupancy by the individual homesteader under a leasing agreement with the group. And, if such a plan seems a worth while experiment, the undertaking would seem to carry out the intention of Section 208.

Since neither the form of co-operative organization nor the manner of Federal control over selection of homesteaders and development of projects under such a form of organization has been evolved, particular criticism of the proposal is difficult. It is quite possible, however, that complication of structure would result without compensating advantage. My answer to question 1, therefore, is in the affirmative, without expression of opinion, however, upon the desirability of undertaking the proposed experiment.

Certain general observations seem pertinent and properly preliminary to consideration of the second and following questions. In a Solicitor's opinion dated June 15, 1934, the conclusion was reached that a subsistence homestead may properly include a home site and such incidental equipment and chattel property as may be essential to the support and maintenance of a family. It also seems reasonable to assume that Congress intended that subsistence homesteads be, not isolated shelters of pioneer families, but homes in an improved community. It is the purchase of such homes which is the subject of Section 208 of the National Industrial Recovery Act. Federal Subsistence Homesteads Corporation is authorized to employ an appropriated fund "for aiding in" such purchases. Every expenditure of this appropriated fund must justify itself as a reasonable method of aiding in the purchase of subsistence homesteads. However, the choice of methods of aiding involves broad administrative discretion. Undertakings which have as their immediate objective, either (1) the improvement of the economic status of the homesteader so that he may better be able to pay for his homestead, or (2) the creation of an environment appropriate for a residential community according to presently accepted standards of living, seem reasonable methods of aiding in the purchase of subsistence homesteads.

Section 208 of the National Industrial Recovery Act is one phase of a legislative scheme for relieving a national emergency. The "redistribution of the overbalance of population in industrial centers" is the express purpose of the section. It must have been recognized by Congress when it enacted this section, and it must be recognized now, that subsistence homesteads established to serve such an end must be located in rural or suburban areas. Moreover, it must have been realized that many subsistence homesteads would be occupied by families which had not been self-supporting in their former environment. Therefore, the mere physical removal of families to a new place and their installation in new homes under purchase contracts would be a futile gesture and could not have been contemplated by Congress. Economic advantages and opportunities must be provided in order that the homesteaders may pay for their homes and at the same time earn a reasonable subsistence. To afford or assist in affording such economic advantages and opportunities

is, therefore, a proper way of aiding in the purchase of subsistence homesteads.

In another aspect the function of aiding in the purchase of subsistence homesteads cannot reasonably be separated from aiding in the creation of essential and proper environment for a residential community. Each home is part of the community, but the community is more than an aggregation of residences. I believe that authority to aid in the purchase of subsistence homesteads reasonably implies authority to assist in surrounding the actual home sites with environmental features characteristic of a modern suburban or rural community. This must be true particularly where subsistence homesteads are located in hitherto undeveloped areas. Roads, school facilities, playgrounds and similar features may reasonably be considered essential parts of such an environment.

2. May the Corporation, after entering into contracts with individual homesteading families for the outright sale to such families of small homestead tracts and dwellings, convey to the co-operative of homesteaders a tract of land to be held by such co-operative for use as pasture, woodland, cemetery plot, athletic field, playground, parks, general farm, or general orchard, for the equal benefit of all of the homesteading families?

The second question involves proposals of two types. A co-operatively owned pasture, a woodland, a general farm, and a general orchard are of one type. They may be of particular economic advantage to the several homesteaders as means of subsistence and source of cash income. I find no legal objection to aiding in acquisition of such large tracts by an organization of the homesteaders rather than including similar small tracts in the several homestead plots.

Playground, parks, athletic fields and cemetery plots belong in a different category. They may reasonably be considered essential features of the community environment. Therefore, their establishment by Federal Subsistence Homesteads Corporation and subsequent conveyance to a co-operative of the homesteaders seems a permissible method of aiding in the purchase of subsistence homesteads. Concerning cemetery plots, it is to be considered that an appropriate place of burial is often a substantial factor in the reconciliation of survivors to mortality. Care for the dead often seems more important to the living than undertakings which contribute largely to material well-being. It is not unreasonable to include among the essential features of environment any place which may mean so much to the members of the community.

It is my opinion that all of the proposed conveyances of property to co-operatives should be for a consideration equivalent to the cost of the property. Section 208 contains no express authority for any

conveyance of property by the United States. However, the Attorney General in his opinion of October 4, 1933, approved the general plan of purchase of tracts of land by the United States and sale of individual parcels thereof to homesteaders. He seems to have considered express authority for such sale unnecessary, since the proposed selling was part of a general scheme reasonably adapted to aiding in the purchase of subsistence homesteads. The same analysis would seem proper in the case of conveyances to co-operatives. I doubt, however, whether, in absence of express statutory authority gratuitous transfers of property to co-operatives are permissible. Certainly, general policy is opposed to gifts of public property. The provision in Section 208 for the use of money received in repayment of loans as a revolving fund is some indication that Congress did not contemplate any substantial dissipation of the subsistence homestead appropriation. Question 2 is answered in the affirmative, with a caveat, however, against gratuities. It remains for Federal Subsistence Homesteads Corporation to determine whether, as a matter of policy, the enumerated ventures should be undertaken.

3. May the Corporation expend money made available in Section 208 to construct and equip any or all of the below listed properties, and then convey such properties to the co-operative of the homesteaders which will operate the properties so as to give employment to some homesteaders, and make available to all homesteaders products, services and materials at cost:

- a. A dairy or poultry farm?
- b. A general merchandise store?
- c. A first-aid clinic or small hospital?
- d. A small handicraft shop or factory?

Detailed consideration of the four proposals in question 3 seems unnecessary in view of the foregoing general analysis. Subparagraphs a, b and d all relate to enterprises which may effect essential monetary savings for the homesteaders and also may provide much needed sources of cash income. A clinic such as is proposed in subparagraph c, may well be one of the most advantageous features of the homestead environment. In each of these cases, the establishment of the proposed institution by Federal Subsistence Homesteads Corporation and transfer to a cooperative of homesteaders for operation seems lawful. Here again, a gift to the homesteaders seems unauthorized; and here again, important decisions of policy must be made.

4. May the Corporation make a loan to such a co-operative of the homesteaders for operating capital?

5. May the Corporation make a loan to a private industry for operating capital where part of the consideration for such loan will be an undertaking by the borrower to employ the homesteaders so as to supply them with a source of cash income?

Questions 4 and 5 are rather similar to a question answered by the Attorney General in an opinion to the Secretary of the Interior, dated March 19, 1934. The Attorney General there considered a proposed loan of operating capital to The Virgin Islands Company, a nonprofit corporation, which proposed to employ homesteaders and to process their crops. The opinion recognized such a loan as authorized under Section 208, stating that "a loan coupled with an obligation on the part of the corporation to assist prospective homesteaders to establish and buy homesteads and to furnish them with part-time employment and substantial assurance of profit from crops grown by them, reasonably comes within the discretion conferred upon the President." In view of that opinion it seems that Federal Subsistence Homesteads Corporation may lend operating capital to a co-operative of homesteaders organized to aid, in approved manner, in the purchase of subsistence homesteads.

A similar loan to an enterprise organized for private profit may indirectly aid in the purchase of subsistence homesteads. However, such a transaction is immediately and primarily an aid to the private entrepreneur. Such is not the purpose of Section 208. It is my opinion that a loan to private business cannot be justified by its remote tendency to help the homesteaders.

A final inquiry in question 5 concerns the sale or leasing of small industrial sites to private industrial enterprises which propose to employ homesteaders. This question will be considered later, in connection with a somewhat similar inquiry in question 12.

6. May the Corporation purchase and then sell to the co-operative of homesteaders farm implements and farm machinery?

Question 6 concerns a proposed sale of heavy farm machinery to co-operatives of homesteaders. It is stated by the Director of Subsistence Homesteads that the purchase of such machinery by each homesteader would be impracticable, but ownership by a co-operative for the use and benefit of all, would be economically advantageous. From this statement it follows that purchase of such machinery by Federal Subsistence Homesteads Corporation and a sale thereof at cost to a co-operative is a proper method, of the general type first above described, in aiding in the purchase of subsistence homesteads. Question 6 is answered in the affirmative.

7. May the Corporation build, equip and convey to the co-operative of homesteaders a school building? May the Corporation make a gift of such completed school building to the co-operative of homesteaders?

8. May the Corporation build and equip a community house, containing study rooms, reading rooms, assembly hall, kitchen, and similar facilities, and then convey such community house to the co-operative of homesteaders? May the Corporation make a gift of such community house to the co-operative of homesteaders?

It is my opinion that construction and equipment of a school building and a community house, as proposed in questions 7 and 8, are reasonable ways of aiding in the purchase of subsistence homesteads. Such buildings are important features of a modern community. The adaptation of the home itself to family life cannot be considered apart from its relation and proximity to school and welfare facilities. The use of the subsistence homestead appropriation to make such facilities available seems proper; yet here, as elsewhere, it is my opinion that the homesteaders should ultimately reimburse the corporation for expenditures on their behalf.

9. May the Corporation set aside a small number of homestead tracts to be leased to teachers, social workers, and professional technicians?

Question 9 concerns residential facilities for teachers, social workers and professional technicians temporarily associated with subsistence homesteads. The services rendered by such persons should be of substantial value to the homesteaders not only in establishing and maintaining proper community environment, but also in the economic betterment of the community. These individuals are members of the essential personnel of the subsistence homestead enterprise, although many of them will not be employed by Federal Subsistence Homesteads Corporation. If the corporation leases dwellings to them, it is indirectly, yet substantially, furthering its ultimate end of assisting in the purchase of subsistence homesteads. It is my opinion that leasing homes to such persons from year to year would be lawful.

10. After a community plan has been laid out for the establishment of a subsistence homestead community, may the Corporation convey to the local counties, or dedicate to the public, the following: roads, streets, walks, parks, and parkways, which have been constructed with moneys made available in Section 208?

Where subsistence homesteads are established in an undeveloped rural area the laying out of roads, streets and walks which make the homesteads physically accessible is as essential as the construction of the houses themselves. Parks and playgrounds have already been considered in this opinion. Federal Subsistence Homesteads Corporation proposes to construct such facilities and then convey them to local counties or otherwise dedicate them to the public. The Director of the Division of Subsistence Homesteads states that after such dedication the expense of maintenance is assumed by the local authorities.

Dedication to public use seems an essential final step in the providing of roads and parks. It is assumed that money expended by Federal Subsistence Homesteads Corporation in acquiring land for roads and parks and in laying out and improving these facilities

will be repaid by the homesteaders as part of the homestead purchase price or as a separate obligation. Otherwise, the corporation would be supplying these facilities gratuitously. For reasons already stated I would consider such a gratuity improper.

It may also be mentioned in passing that if local authorities refuse to undertake the maintenance of roads and parks some arrangement must be made between the corporation and the homesteaders whereby the latter will bear the financial burden of such maintenance. If these restrictions and limitations are observed, the proposed dedication of roads and parks to public use seems a matter within administrative discretion.

11. Should moneys paid to the Corporation by homesteaders as interest on amortization or on advances made by the Corporation, be deposited to the credit of the revolving fund created in Section 208, or should such payments be covered into the Treasury as "miscellaneous receipts"?

In question 11 the Director of Subsistence Homesteads inquires whether moneys paid to the corporation by homesteaders as interest on amortization or on advances made by the corporation should be deposited to the credit of the revolving fund created by Section 208, or should be covered into the Treasury as "miscellaneous receipts." Section 208 provides that "moneys collected as repayment of loans" shall become a revolving fund. The Accounting Officers of the United States have consistently held in similar cases that interest should be credited not to the revolving fund but to miscellaneous receipts. In one decision the following language was used:

The authority to maintain a revolving fund is authority to maintain it at its principal and there is no doubt that upon sale of securities purchased under authority of section 7, the payment originally made therefor from the revolving fund may be returned to it. There is no purpose disclosed in the authority for a revolving fund that it shall increase its principal. Profits may be so involved in some revolving funds as to be impracticable of such accurate determination as to separate them immediately from the principal, but where the increment is definite and periodic, as a payment of interest, there authority should appear to augment the principal thereby.

* * * * *

The right of the revolving fund remains in the amount of the loan alone and as a part of its principal, but it has no right to the interest on such loan to add it to its principal. Such moneys belong to other accounts, and there being none provided aside from miscellaneous receipts, the interest on such securities must be deposited in miscellaneous receipts. (26 Comp. Dec. 295.)

In a later case, approving the above-cited decision, the Comptroller General observed, "that interest is not money coming out of the appropriation and may not be returned thereto"; but must be credited to miscellaneous receipts. (See 1 Comp. Gen. 657.)

The same general principle was involved in a still more recent decision. There the sale of security for a defaulted loan made out of a revolving fund resulted in recovery of more than the principal of the loan. It was held that only an amount equal to the principal should go into the revolving fund, and that the surplus should be credited to miscellaneous receipts.

(See 12 Comp. Gen. 553.)

In view of these holdings it seems clear that interest on subsistence homestead advances must be credited to miscellaneous receipts rather than to the subsistence homestead revolving fund.

12. Where part of the land which has been acquired cannot immediately be used by the Corporation for building or other operations, may such land be temporarily leased by the Corporation? Should the rentals from such leases be deposited to the credit of the revolving fund or covered into the Treasury as "miscellaneous receipts?"

In question 12, inquiry is made whether land acquired by the corporation for subsistence homestead purposes, but not immediately useful for such purposes, may be leased temporarily for other purposes. There is no express authority for such leasing. However, the power to permit temporary private use of Government-owned land not presently needed for its intended purposes has long been recognized as an incident of administrative control over such land. (22 Op. Atty. Gen. 544; 22 Op. Atty. Gen. 240; 19 Op. Atty. Gen. 628; 16 Op. Atty. Gen. 206.) The Attorney General has pointed out that "long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Government reservations by licensees without legislative objection from Congress and without the adoption of any legislative rule upon the subject, implied the tacit assent of Congress to this custom." (22 Op. Atty. Gen. 245.)

It is to be observed that temporary private use of Government-owned land may be permitted only if the land is not presently useful for purposes of the Government. Moreover, the right should be reserved to terminate private occupancy and regain possession upon short notice at any time. It is my opinion that Federal Subsistence Homesteads Corporation, as a Government agency, may exercise this limited administrative power with respect to the use of land within its control.

Money received in consideration for such use of land is not a repayment of any sum expended for subsistence homestead purposes. As in the case of interest payments, such money is a definite increment. It is my opinion that such receipts would not become a part of the subsistence homestead revolving fund.

Rather similar to question 12 is the inquiry in question 5, whether small parcels of land may be sold or leased by Federal Subsistence Homesteads Corporation to private entrepreneurs for use as indus-

trial sites within a subsistence homestead community. It is anticipated that private business so located will be a source of employment and income for the homesteaders. It is assumed that such parcels would be surplus land not needed for homesteads. As such they would come within the rationale of the answer to question 12, *supra*. The additional circumstance that homesteaders would benefit by the presence of the enterprises in question is an additional justification for permitting this type of private user. In the absence of statutory authorization, I question the power of Federal Subsistence Homesteads Corporation to sell industrial sites to private entrepreneurs; however, I find no objection to permitting temporary occupancy by such persons.

Approved, August 15, 1934:

T. A. WALTERS,

First Assistant Secretary.

FEDERAL SUBSISTENCE HOMESTEADS

Opinion, August 17, 1934

FEDERAL SUBSISTENCE HOMESTEADS—PURCHASE OF LAND—CONSENT OF STATE— SEC. 255, TITLE 40, U. S. CODE DISTINGUISHED.

Houses and related structures built by Federal Subsistence Homesteads Corporation in the various States are not within the purview of Sec. 255, Title 40, U. S. Code, which section contemplates purchases of land over which the United States shall thenceforth have exclusive jurisdiction, such as forts, arsenals, etc., whereas the authority of Federal Subsistence Homesteads Corporation to buy land and erect buildings has no existence apart from a duty to transfer the completed homesteads to private purchasers for residential use.

SUBSISTENCE HOMESTEADS—TITLE—ERECTION OF BUILDINGS—PURPOSE.

The acquisition and temporary holding of title and construction of the buildings of a residential community are preliminary steps taken by Federal Subsistence Homesteads Corporation to aid private persons in the purchase of subsistence homesteads.

MARGOLD, *Solicitor*:

Federal Subsistence Homesteads Corporation has inquired whether it may expend appropriated money for construction of subsistence homesteads without the consent of the State wherein the project is located. The inquiry is of practical consequence because in certain States the existing general cession and consent statutes are limited to acquisitions of area insufficient for a subsistence homestead community. The question thus raised has been referred to me for opinion.

The sole basis of a requirement of State consent is the following provision of Section 255 of Title 40 of the United States Code (46 Stat. 828):

No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. [A reenactment of Sec. 355, Revised Statutes, in turn derived from Joint Resolution of Sept. 11, 1841, 5 Stat. 468.]

Therefore, the question to be decided is whether houses and related structures built by Federal Subsistence Homesteads Corporation to constitute a subsistence homestead community are "other public buildings of any kind whatever" within the meaning of the quoted statute.

The money used by Federal Subsistence Homesteads Corporation for all of its operations has been appropriated "for making loans for and otherwise aiding in the purchase of subsistence homesteads." The Attorney General in an opinion dated October 4, 1933, advised the Secretary of the Interior as follows:

It is, therefore, my opinion that, in "making loans for and otherwise aiding in the purchase of subsistence homesteads," you may, if the exigencies require, take title to the homestead sites in the name of the United States or in the name of a corporation to be organized for the purpose, and that you may enter into such agreements with settlers and prospective settlers as you may find proper, having in mind, however, in addition to the other things herein suggested, that the settlers must be purchasers, or properly-obligated prospective purchasers, of the lands which they occupy.

For present purposes, the important circumstance is that the acquisition and temporary holding of title and the construction of the buildings of a residential community are preliminary steps taken by Federal Subsistence Homesteads Corporation to aid private persons in the purchase of subsistence homesteads. The adopted procedure of Government purchase and development, followed by sale to the several homesteaders, is but an expedient substitute for the usual commercial transaction of purchase money and construction loan secured by a mortgage of land and improvements. The structures of the community are not built to house Federal departments or agencies, or for any public use whatever. The authority of Federal Subsistence Homesteads Corporation to buy land and erect these buildings has no existence apart from a duty to transfer the completed homesteads to private purchasers for residential use.

The intended and required private use of subsistence homesteads, and the character of Government ownership as a temporary device for facilitating private acquisition, are substantial considerations against classifying such structures as "public buildings." Whether these are decisive considerations must be determined in the light of the reason of the statute.

In determining what situations are within the contemplation of Section 255 it may be pertinent to inquire what purposes the requirement of State consent can serve. Some indication of legislative intent may be gleaned in this manner.

The power of the United States, in the same manner as in a private person, to buy land within a State and erect buildings thereon, is unquestioned. However, without consent of the State the United States cannot acquire exclusive jurisdiction over the land it purchases. If State consent is given to a purchase of a site for any of the "needful buildings" comprehended within clause 17 of section 8 of Article I of the Constitution, the United States acquires exclusive jurisdiction thereby. A result, therefore, of the Joint Resolution of 1841 has been that the United States is assured of exclusive jurisdiction over such "needful buildings" before money is expended for their erection. In one opinion the Attorney General seems to indicate that the achievement of this end is the purpose of the joint resolution (10 Op. Atty. Gen. 34).

A second possible result of Section 255 is avoidance of offense to the several States by seeking their consent before constructing within their borders buildings designed to house military or civil operations of the United States. No purpose in addition to these two could be served by the statutory requirement of State consent. It seems a justifiable assumption that the statute was intended to serve one or both of these purposes and, therefore, was not intended to apply to situations in which neither purpose could be served. When it is necessary, as in the present case, to determine whether the language of the statute should be construed as applicable to a new type of enterprise, it becomes material to inquire whether either of these purposes would be served by such construction.

In a Solicitor's opinion, dated June 15, 1934 (M-27702), it was held that the United States does not acquire exclusive jurisdiction over land purchased for subsistence homesteads. The Attorney General, in an opinion to the Secretary of the Interior, dated July 18, 1934, reached the same conclusion. In the Solicitor's opinion it was expressly stated that subsistence homesteads do not come within the enumeration of "needful buildings" in Article I of the Constitution. Therefore, State consent to such a purchase must be ineffective as a transfer of jurisdiction. Moreover, no reason appears why the United States should desire exclusive jurisdiction over a site which is to be a residential community of private persons.

The argument of comity also fails when applied to subsistence homesteads. Temporary holding of title by the United States as a device for relieving the economic distress of citizens of a State and enabling those citizens to acquire homes could not reasonably be considered offensive to that State under any circumstances.

The reason of the statute considered in conjunction with the nature of subsistence homesteads seems to require the conclusion that subsistence homesteads are not among the "public buildings" to which the statute has application.

It remains to examine any applicable authorities. Because the phrase "public buildings" is used in many connections with varying meaning, constructions of the phrase as used in statutes other than the one under immediate consideration are of little value. Recently, however, the Attorney General had occasion to consider Section 255 in connection with acquisitions of land by Public Works Emergency Housing Corporation for the erection of low-cost housing projects authorized under Section 203 of the National Industrial Recovery Act. He concluded that his approval of title was prerequisite to such a purchase. (Opinion rendered to the Secretary of Interior, February 7, 1934.) It did not appear in that case that low-cost housing projects were to be temporary acquisitions or holdings of the United States or that the structures were to be erected for sale to private persons. Indeed, construction of low-cost housing is in itself an authorized Federal project. In contrast, the aiding of private purchasers is the sole purpose of subsistence homestead projects.

It is also to be noted that, aside from any statutory provision, the safeguarding of Federal expenditures for the acquisition of land, by a preliminary examination of title by legal officers of the Government, seems proper in any event as a necessary administrative precaution. In the case of Federal Subsistence Homesteads Corporation I am advised that payment is being made by the corporation to the Department of Justice for the service of examining the title of land acquired by the corporation. This practice seems to indicate that the service in question is one obtained pursuant to the dictates of sound administration rather than rendered in compliance with a statutory requirement.

Since the matter of State consent was not before the Attorney General when he rendered his opinion of February 7, 1934, and since subsistence homestead projects seem distinguishable from Federal housing projects, it is believed that the present issue is not concluded by that opinion.

It is my opinion that Federal Subsistence Homesteads Corporation may expend appropriated money for the construction of subsistence homesteads without first obtaining the consent of the State wherein the project is located.

Approved, August 17, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

DEVISE OF RESTRICTED INDIAN LANDS UNDER SECTION 4,
WHEELER-HOWARD ACT

Opinion, August 17, 1934

RESTRICTED INDIAN LANDS—DEVISE BY INDIAN—CONSTRUCTION OF STATUTES—
WORDS AND PHRASES—SEC. 4, WHEELER-HOWARD ACT.

In section 4 of the Wheeler-Howard Act, limiting the class of persons to whom may be devised restricted Indian lands, it is provided that "in all instances such lands or interests shall descend or be devised * * * to any member of such tribe or of such corporation or any heirs of such member." *Held*, That the phrase, "heirs of such member", therein employed, should be construed to mean "heirs of the testator", such construction being reasonable, consistent with legal usage, and in harmony with the general plan and expressed intent of Congress.

MARGOLD, *Solicitor*:

My opinion has been requested upon the proper construction of section 4 of the Wheeler-Howard Act (48 Stat. 984, 985) in so far as this section limits the class of persons to whom an Indian may devise restricted lands.

The relevant language of this section declares:

Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe, or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: * * *

The question of what persons other than members of the testator's tribe may lawfully be designated as devisees of his restricted property, where such property is subject to the terms of the Wheeler-Howard Act, is raised by the ambiguity of the last two words in the passage above quoted, namely, "such member." If "such member" refers to the testator himself, then the class of nonmembers entitled to receive restricted Indian property will be limited to those who through marriage, descent or adoption have acquired a relationship to the testator sufficient to constitute them heirs at law.

If the words "such member" be construed to mean *any member to whom the property in question might be devised*, then, apparently, nonmember heirs of other Indians than the testator might be made devisees of the testator's restricted property.

In the third place, the phrase "such member" might be construed to refer to *a member who is a devisee under the will in question*.

While a strictly grammatical construction might lead to the conclusion that "such member" referred to the preceding phrase "any member of such tribe or of such corporation" and thus would seem to justify either the second or the third interpretation of the phrase in question suggested above, I am of the opinion that such a construction cannot be reasonably maintained and that the first interpretation advanced above is the proper one, i. e., that the testator may devise to his own heirs regardless of their membership or non-membership in any Indian tribe or corporation, but that outside the circle of heirs, the testator may devise only to fellow-members of his tribe or corporation.

The third construction advanced above, namely, that under the section in question the class of proper devisees includes, in addition to all members of the testator's tribe or corporation, all nonmembers who happen to be heirs of those members benefiting from the will, seems to reduce to meaninglessness. If A devises property to B, *B has no heirs if he is alive*, and on the other hand, if B is dead at the time the will takes effect, B's heirs take by substitution, and an express devise to them is, therefore, unnecessary. In either case a statutory grant of power to devise property not only to B but to B's heirs would be without meaning.

A similar difficulty arises if we attempt to construe the phrase "such member" as referring to all those members of the Indian tribe who might be devisees themselves, i. e., all members of the tribe except the testator. The living members of the tribe have no heirs. The only possible beneficiaries of this construction would be, therefore, the nonmember heirs of those members of the tribe who have died prior to the execution of the will. While this is a legally possible construction, it is not one which commends itself to reflective judgment. Congress certainly did not intend to give the privilege of receiving a devise of restricted land to all non-Indians who might be the heirs of any of the deceased members of the Indian tribe to which the testator belonged, and to exclude from this privilege the heirs of the testator himself. Certainly Congress was not considering the condition of non-Indians having no subsisting relationship with the decedent or with any living member of his tribe but who might nevertheless show some right of inheritance from an Indian member of the tribe long deceased.

The circumstances under which the phrase "or any heirs of such member" was inserted in the Wheeler-Howard Bill indicate the proper meaning to be attached to that phrase. Early drafts of the legislation (*e. g.*, H. R. 7902, Title III, Sec. 5, April House Committee Print; S. 2755, Sec. 4, May Senate Committee Print), both in the House and in the Senate, limited the privilege of inheriting

restricted property to the members of the testator's tribe, in accordance with the fundamental purpose of the legislation to conserve Indian lands in Indian ownership and to prevent the further checkerboarding of Indian lands through the acquisition of parcels of such lands by persons not subject to the authority of the Indian tribe or reservation. To this limitation the objection was urged that in some cases the heirs of a deceased Indian would not be members of the tribe or corporation to which the deceased had adhered, and that it would be unfair to deny such natural heirs the right to participate in a devise of property. The House Committee on Indian Affairs, therefore, added to the clause first considered the phrase "or any heirs of such member." (H. R. 7902, Sec. 4, as reported to the House). Independently, the Senate Committee on Indian Affairs added to the draft under its consideration a parallel phrase more restricted in scope, "or the Indian heirs of such member." (S. 2755, Sec. 4, Committee Print No. 2; S. 3645, Sec. 4, as reported to the Senate). It seems clear that the purpose of these legislative afterthoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely, the case of an Indian testator desiring to divide his estate by will among those who would, in the absence of a will, have been entitled to share in the estate, namely, his own heirs.

That the Chairman of the House Committee on Indian Affairs so construed the phrase here in question is indicated by his explanatory statement to the House of Representatives:

Section 4 stops a dangerous leak through which the restricted allotted lands still in Indian ownership pass therefrom. Upon the death of an allottee the number of heirs frequently makes partition of the land impractical, and it must be sold at partition sale, when it generally passes into the hands of whites. This section endeavors to restrict such sales to Indian buyers or to Indian tribes or organizations. It, however, permits the devise of restricted lands to the heirs, whether Indian or not. (Cong. Rec. June 15, 1934, p. 12051.)

It requires no strained construction of language to interpret the phrase "or any heirs of such member" in accordance with this intent and purpose. The phraseology of section 4 suffers from the looseness of syntax incident to the agglutinative process of amendment. Grammatical rules, such as that requiring a definite antecedent for the word "such", are not always religiously observed in the closing days of a Congressional session. In the phrase "heirs of such member" the reference of the word "such" is supplied not by any clear grammatical antecedent but by the fact that the "member" chiefly considered throughout the section, though never expressly named, is the testator. This is not the only instance in the statute where the word "such" cannot be construed by simple

application of the rules of grammar. (See the initial words of Sec. 17.)

To conclude, legal usage requires that the phrase "heirs of such member" must refer to the heirs of one who is deceased. *Nemo est haeres viventis*. The only deceased person considered in the section is the testator. Evidence of the intent of Congress indicates that it is the testator's heirs that are being considered. I am of the opinion that the phrase "heirs of such member" should properly be construed to mean "heirs of the testator."

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EXTENSIONS OF TIME FOR PAYMENTS ON HOMESTEAD ENTRIES OF CEDED INDIAN LANDS

[Circular No. 1334, supplemental to Circular No. 1326]*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 20, 1934.

THE SECRETARY OF THE INTERIOR:

Reference is made to Department instructions dated August 2, 1934 (A. 17780), relative to granting extensions of time for payments on homestead entries of ceded Indian lands. The instructions refer to the act of May 21, 1934 (48 Stat. 787), and read in part as follows:

The Department is of the opinion that the act of 1934 was intended to furnish relief for entrymen on ceded Indian lands who merely needed time to make payments of purchase price. For that purpose the proviso to the act may be treated as independent of the remainder of the act and it will read:

"That any entryman holding an unperfected entry on ceded Indian lands * * * shall not be entitled to extension of time for the payment of any installment of the purchase price of the land except upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted hereunder."

With such construction of the act the hereinbefore quoted portion of the regulations under said act (Circular No. 1326) may be interpreted harmoniously by making the application for relief mean application for extension of time to submit final proof and to pay purchase price, or to make payment of any installment of the purchase price.

Attention is called to the fact that under existing laws entrymen on ceded Indian reservations in some cases may be granted an exten-

* See Circular No. 1326, at page 515.

sion of time for payment of the purchase price, or a portion thereof, upon payment of interest in advance at the rate of 5 per cent per annum. See instructions contained in "Circulars and Regulations of the General Land Office", dated January, 1930, pages 673 to 728, inclusive.

In order to secure uniformity in computing the interest payments, the following procedure is suggested and will be adopted by this office if approved by the Department:

1. Interest on unpaid installments will be computed under the act of May 21, 1934, at the rate of 4 per cent per annum from the date the payments originally became due, unless extended, or from the extended date, if the payments have heretofore been extended, to and inclusive of the date of the expiration of the period of the extension authorized by the act of May 21, 1934. Where interest at the rate of 5 per cent, or other rate, has heretofore been paid and an extension of time for payment granted, the interest will not be recomputed at 4 per cent under the act of May 21, 1934. An extension of time may be granted under the act of May 21, 1934 to the 1934 anniversary of the date of entry or to December 31, 1934, at the election of the entryman.

2. Where extensions of time for payments are desired beyond December 31, 1934, and where they may be granted under existing laws upon the payment of interest in advance at the rate of 5 per cent per annum, or other rate, interest will be computed under such laws from December 31, 1934, to the expiration of the period of the extension.

ANTOINETTE FUNK,
Acting Commissioner.

Approved, August 20, 1934:

T. A. WALTERS,
First Assistant Secretary.

NORTHERN PACIFIC RAILWAY COMPANY LIEU LANDS

Opinion, August 20, 1934.

NORTHERN PACIFIC RAILWAY COMPANY—LAND GRANT—PATENTS FOR LIEU LANDS—ACTS OF MARCH 2, 1899, AND JUNE 25, 1929; SEC. 9.

Under section 9 of the Act of June 25, 1929, it is provided:

That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined:

Held, That in the light afforded by the legislative history of the Northern Pacific land grants, and in view of pending litigation in the courts, said section must be interpreted as requiring the Secretary of the Interior to withhold all patents for *lieu lands* otherwise issuable to the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, until the determination of the litigation authorized in the 1929 Act.

MARGOLD, *Solicitor*:

You have inquired whether, in my opinion, the Act of June 25, 1929 (46 Stat. 41) prevents the issuance of patents by the Secretary of the Interior at this time to the Northern Pacific Railway Company for lieu lands selected by the railway under the Act of March 2, 1899 (30 Stat. 993). The controlling section of the Act of June 25, 1929, reads in full as follows:

SEC. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and *he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined.* Provided, That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto. [Emphasis added.]

The relation of the italicized language to lieu land selections under the 1899 statute must be determined in the light of a considerable legislative history.

The Act of July 2, 1864 (13 Stat. 365) created a corporation, the Northern Pacific Railroad Company. By the terms of that act and the supplemental provisions of the Joint Resolution of May 31, 1870 (16 Stat. 378), the Northern Pacific Railroad was granted a vast quantity of land along its right of way from Lake Superior to Puget Sound with the privilege of indemnity selections beyond the primary zone of the grant. Thereafter, Congress enacted a number of statutes which related in varying particulars to these grants. One of those enactments was the Act of March 2, 1899. This statute created Mt. Rainier National Park and permitted the railroad to surrender to the United States so much of its land grant as lay within the newly created park and the surrounding forest reserve, and to select and receive patents for lieu lands located elsewhere on the public domain. The surrender thus authorized has been made but the lieu selection rights have not yet been exhausted. Since the passage of the Act of June 25, 1929, the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, has made certain lieu selections and is seeking patents for the selected lands. Under the terms of the Act of June 25, 1929, these patents

must be withheld, if the Act of March 2, 1899, is contemplated by and included within the phrase "legislative enactments supplemental * * * (to the Act of July 2, 1864 and the Joint Resolution of May 31, 1870), or connected therewith."

The controversy which resulted in the passage of the Act of June 25, 1929, was precipitated by a contention of the Northern Pacific Railway that its land grant was deficient in acreage, and that the railway was entitled to select and receive indemnity lands within national forests. An investigation of this claim by the Department of Agriculture and the Department of the Interior revealed evidence of failure of the railway to perform certain undertakings incumbent upon it under the land grant statutes, evidence of improper selections and classifications of land and other evidence of error and irregularity, all of which seemed to require adjustment and accounting in a court of equity. These matters were first set out in some detail in a letter from the Forester of the Department of Agriculture to the Commissioner of the General Land Office, dated January 12, 1924. Thereafter, pursuant to recommendations of the President, the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture, Congress ordered an investigation of the Northern Pacific Railway land grants by a joint congressional committee. See Joint Resolution of June 5, 1924 (43 Stat. 461). That joint resolution contained the following stipulation:

That the Secretary of the Interior is hereby directed to withhold until March 4, 1926, his approval of the adjustment of the Northern Pacific land grants under the act of July 2, 1864, and the joint resolution of May 31, 1870, and he is also hereby directed to withhold the issuance of any further patents and muniments of title under the said act and the said resolution or any legislative enactments supplemental thereto or connected therewith, until after Congress shall have made a full and complete inquiry into the said land grants and the acts supplemental thereto for the purpose of considering legislation to meet the respective rights of the Northern Pacific Railroad Company and its successors and the United States in the premises.

The similarity of the quoted language to language subsequently appearing in Section 9 of the statute of June 25, 1929, gives considerable significance for present purposes to a report on the joint resolution submitted to the Chairman of the Committee of the House of Representatives on Public Lands by the Secretary of the Interior on February 27, 1924. In this report the Secretary of the Interior stated that "for purposes of reference the acts of Congress under which this grant was made and directing the manner of its adjustment, are recited at the outset." He then listed "Acts of Congress Constituting the Grant." Following that enumeration he listed "Acts of Congress Regulating Adjustment of the Grant." Under this latter heading the Secretary listed the Act of March 2, 1899.

It is also significant that at the hearings upon this resolution before the Committee of the House of Representatives on Public Lands at the 1st Session of the 68th Congress, the principal objection of the railway to the adoption of the resolution was that the language above quoted would prevent perfecting of title in areas outside of indemnity limits and outside the national forests. It seems, therefore, that in the joint resolution the reference to enactments supplemental to or connected with the primary land grant was intended to embrace the Act of March 2, 1899.

After the passage of this resolution and pursuant to its terms a joint congressional committee conducted an extensive investigation of the Northern Pacific land grants. More than 5,000 pages of hearings and related documents (hereinafter cited as "Record") were printed under the title "The Northern Pacific Land Grants". Those hearings were organized procedurally around the letter of the Forster which has already been mentioned. That letter (Record, pages 9-27) raised 22 issuable questions, the 13th of which concerned "the great additional values received by the Northern Pacific under the Act of March 2, 1899, the Act of July 1, 1898, and extensions thereof and other so-called 'relief Acts'." This issue was discussed at length in the hearings. (See Record, pages 1005-1011, 2339-2350, 5129-5132.)

At the conclusion of those hearings, the joint committee recommended and Congress passed the Act of June 25, 1929. In construing this act it must be considered that the issues raised on behalf of the United States and considered by the committee were much broader than the claim of the Northern Pacific Railway to indemnity selections. It was contended by the Department of Agriculture that the United States was entitled to declare a forfeiture of primary grants for breach of conditions subsequent, and that a court of equity should consider claims of the United States growing out of such defaults and out of improper and fraudulent mineral classifications and other mistaken and erroneous action in connection with the grants. (See Record, part 11.) To permit judicial consideration of these claims, Congress provided in Section 5 of the Act of June 25, 1929:

The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies; and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to

whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. * * * The United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

That suit is now pending. It was to maintain the *status quo* during such litigation that Congress enacted Section 9. Lieu selections under the 1899 act were considered by the joint committee and are within the scope of the authorized suit. The intention of Congress to withhold patents to lieu lands seems clear.

I am not unmindful that the Assistant Secretary of this Department has advised the Commissioner of the General Land Office on two occasions that exchanges of land under the 1899 statute are not within the prohibition of Section 9. (See Instructions dated June 22, 1929 and July 18, 1929, respectively.) The rationale of these instructions is revealed in the following language:

Manifestly, it was the purpose of Congress to withhold the issuance of further patents on account of the railroad land *grant* only. The selections here in question were not made on account of the grant. Neither the act of March 2, 1899, *supra*, nor the two private relief acts referred to was intended to operate as an aid in the adjustment of the railroad grant and neither of them is in modification of or supplemental to the grants by the act of July 2, 1864, *supra*, and the joint resolution of May 31, 1870, *supra*. As to the lands which the railroad company was authorized to relinquish or reconvey to the United States under the acts of 1899, 1921, and 1923, its title is assumed to be perfect. As to said lands its grant had already been adjusted, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. The transactions proposed are ones of equal exchange. The selections authorized are not indemnity selections in any proper sense but are lieu selections or lands received in exchange for lands relinquished and reconveyed to the United States. In the opinion of the Department, it was not the intention of Congress to prohibit or prevent the consummation of these exchanges. (Instructions of July 18, 1929.)

The legislative history of the Act of June 25, 1929, seems not to have been considered in these instructions; nor is any mention made of the apparent purpose of Section 9 to retain in *statu quo* the subject matter of the litigation authorized in Section 5, litigation in which the parties are entitled to have adjudicated "all questions of law and fact presented to the joint congressional committee".

Another circumstance, not considered heretofore, is that the proviso which concludes Section 9 exempts from the operation of that section claims not derived through grants to the Northern Pacific Railroad Company. The addition of this specific exception militates strongly against any construction of the section which would add another exception by implication. (*Inclusio unius est exclusio alterius.*)

It seems unnecessary to consider the technical meaning of the phrase "supplemental act." Patents under acts "connected with" the primary granting statutes are to be withheld as well as those issuable under "supplemental" acts. Certainly, the 1899 statute is "connected with" the primary granting acts.

It is my opinion that Section 9 of the Act of June 25, 1929, requires that the Secretary of the Interior withhold all patents for lieu lands, otherwise issuable to the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, until the determination of the litigation authorized in the 1929 act.

Approved, August 20, 1934:

T. A. WALTERS,

First Assistant Secretary.

STATE OF ARIZONA: CONTRACT FOR WATER FROM COLORADO RIVER

Opinion, August 30, 1934

STATE OF ARIZONA—BOULDER CANYON PROJECT ACT—COLORADO RIVER COMPACT— STATUTORY CONSTRUCTION.

By the terms of Section 4(a) of the Act of December 21, 1928, commonly known as the Boulder Canyon Act, it is provided that the State of California shall have, each year, for beneficial consumptive use, not to exceed 4,400,000 acre-feet of water from the lower basin of the Colorado River; in accordance with Article III(a) of the Colorado River Compact, and it is further provided that no person shall obtain said water from the Colorado River except by contract entered into with the Secretary of the Interior and approved by that official. *Held*, That the provisions of the Act, considered in the light of the compact, must be interpreted as forbidding the Secretary from entering into a contract for the storage of water in the reservoir contemplated which could render impossible of fulfillment the allotment yearly to the State of California of 4,400,000 acre-feet of water.

MARGOLD, *Solicitor*:

You have informally referred to me the development of a contract for the delivery, to the State of Arizona, of water for use under the provisions of the Colorado River Compact and the act of December 21, 1928 (45 Stat. 1057), commonly known as the Boulder Canyon Project Act.

Arizona, acting through its Colorado River Commission, pursuant to Chapter 3 of the 1929 Session Laws of Arizona, has prepared a form of contract intended to be executed by the Commission and the Secretary of the Interior, which provided by the first paragraph of Article 11 and subparagraph (a) that:

11. From storage available in the reservoir created by the Boulder Dam, the United States will deliver under this contract each calendar year, at points of diversion at or below Boulder Dam on the Colorado River, so much water as may be necessary to enable the beneficial consumptive use for irrigation and potable purposes in Arizona of 2,800,000 acre-feet per annum, subject to the following provisions:

(a) Projects and water users in Arizona of the waters covered by this contract shall have the exclusive right to withdraw and divert any water in Boulder Canyon Reservoir accumulated to their credit (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said Arizona projects and users, provided that total withdrawals from Boulder Canyon Reservoir, including withdrawals of such accumulated waters under this contract, shall not exceed in any calendar year 2,800,000 acre feet, provided further that accumulations shall be subject to such conditions as to accumulation, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion and the determination thereof by the Secretary shall be final, provided further that the maximum accumulation hereunder shall decrease in amount in direct proportion to the decrease from any cause in the rated capacity of the reservoir, and provided further that the United States of America reserves the right to make similar arrangements with users in Arizona and in other states without distinction in priority and to determine the correlative relations between the projects and such users resulting therefrom.

A question has arisen concerning the authority of the Secretary to include subparagraph (a) in the contract. It is my opinion that such provision is inhibited by the terms of the act and the Colorado River Compact.

I

The Secretary's authority to make the proposed contract is set out in section 5 of the act, which provides:

That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act.

No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

* * * * *

A further limitation on this authority is found in section 13 (c) of the act, which provides:

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries; or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

It is obvious under these provisions that the Secretary's authority to make any contract with respect to the waters of the Colorado River must be ascertained from the terms of section 4 (a) of the act and from the Colorado River Compact.

II

Section 4 (a) of the act provides:

This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures * * * until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity * * *.

Particular attention is directed to the provision that California shall have not to exceed 4,400,000 acre-feet of water for beneficial

consumptive use *each year* out of the waters apportioned to the lower basin by Article III (a) of the compact. While the language of section 4 (a) of the act as to California's apportionment is "not to exceed," it is the obvious intent of that provision and of the act to apportion all this annual beneficial consumptive use to California each year if it is physically available. To hold that no right is given California by this provision is to hold that regardless of available waters, the Secretary could contract with other users to the derogation of California's apportionment, leaving it no water, save what it might have acquired by prior appropriation.

While this provision is not a grant to California of this water, it is nevertheless a specification of apportionment for beneficial consumptive use *each year*, which specification limits the authority of the Secretary in making contracts for the sale and delivery of waters to users in other States.

III

To determine what the specification with respect to California's apportionment means, section 4 (a) of the act must be considered in connection with Article III (a) of the compact, that article being the basic specification for section 4 (a) of the act. Article III (a) and (b) of the compact provide:

(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any right which may now exist.

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

* * * * *

This provision apportions the waters of the Colorado River system between the upper and lower basins. California's apportionment is based on the annual beneficial consumptive use allotted to the lower basin. It will be noted that nothing in this section purports to divide the storage capacity in the lower basin and in Boulder Reservoir, or to divide the annual flow of the river, but that the only division made is of annual beneficial consumptive use. This being true, the result is that California's right given by section 4 (a) begins anew each year, and is a right to its apportionment of beneficial consumptive use out of available water, irrespective of the source of such waters in the river.

IV

It remains to be determined if subparagraph 11 (a) of the form of contract tendered by the State of Arizona is violative of these pro-

visions of the act and compact and, therefore, beyond the authority of the Secretary so to contract. To test the effect of this paragraph, it is necessary to assume a case where the available water from all sources in a given year is less than 7,500,000 acre-feet, after deducting whatever might be available as accumulated storage under provisions of a contract purporting to create such storage right. Thus, if the water available in a given year was 7,500,000 acre-feet, of which 1,000,000 acre-feet were claimed as reserved storage under a provision like subparagraph 11 (a), only 6,500,000 acre-feet would be available for apportionment that year for beneficial consumptive use, the inability to release all available water being solely by reason of the storage clause in the contract supposed. To this extent, the contract would interfere with the apportionment to California of the specified beneficial consumptive use for that year.

I conclude, therefore, that subparagraph 11 (a) of the proposed contract is violative of the Boulder Canyon Project Act and the Colorado River Compact, and that the Secretary is without authority to approve its inclusion in the contract.

Approved, August 30, 1934:

OSCAR L. CHAPMAN,
Assistant Secretary.

ELECTRIC POWER IN CONNECTION WITH O'SHAUGHNESSY DAM, YOSEMITE NATIONAL PARK

Opinion, September 5, 1934.

NATIONAL PARKS—ELECTRIC POWER—SEC. 4, ACT OF DECEMBER 19, 1913—AUTHORITY OF SECRETARY OF THE INTERIOR.

The authority conferred upon the Secretary of the Interior by section 4 of the Act of December 19, 1913, commonly called the Raker Act, requiring his approval of plans and specifications in connection with the proposed construction of reservoirs, dams, power plants, and kindred structures of permanent character in national parks in the State of California, does not include authority to attach to the procedural permit a condition that electric power developed at a dam site within the park shall, upon demand, be made available to the Government, at cost, for use in such park.

MARGOLD, *Solicitor:*

The city and county of San Francisco, California, have requested that you approve plans and specifications for the enlargement of O'Shaughnessy Dam in Yosemite National Park and issue a formal permit for the proposed construction. In that connection my opinion has been requested concerning your authority to include in such a permit a condition that electric power developed at the dam site shall upon demand be made available to the Government at cost for use in the park.

O'Shaughnessy Dam was originally constructed as part of a continuing project for the impounding of water and development of power under authority conferred upon the city and county of San Francisco by the Act of December 19, 1913 (38 Stat. 242). It is presently proposed that the dam be enlarged, and to finance such an undertaking the city and county of San Francisco obtained a loan and grant from the Public Works Administration. The Act of December 19, 1913, commonly called the Raker Act, defines the procedure to be followed in undertaking such construction. In this connection it is noted that Congress by general legislation has expressly reserved to itself exclusive control over the authorization of such projects within national parks. (41 Stat. 1063.) The present submission of plans and specifications to the Secretary of the Interior is occasioned and made necessary solely by the following provision contained in section 4 of the Raker Act:

That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences, and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

The quoted language clearly shows that your sole function upon the present submission of plans is the approval or disapproval of architectural design. The issuance of a permit to proceed with construction is no more than an appropriate formal method of indicating such approval. It is my opinion, therefore, that you have no authority to attach to such a permit a condition concerning the furnishing of power to the Government.

Although I find no authority for the issuance of the suggested conditional permit, it is to be noted that the Raker Act does vest in the Secretary of the Interior a considerable control over the sale of power developed in the course of the project in question. Except in the event that prices are fixed by the law of California, the Secretary of the Interior is authorized to determine the rates to be charged for the sale of power. (See section 9, subparagraphs m, n, o.) Certainly the city and county of San Francisco will be bound by prices so fixed in any sale of power to the United States as well as in a sale for private use. Moreover, the cited subparagraphs require that the power project be developed progressively up to a required minimum capacity of sixty thousand horsepower. Under these circumstances, there seems no substantial danger that the United States may find itself unable to procure needed power from the source in question at a reasonable rate.

Approved, September 5, 1934:

OSCAR L. CHAPMAN,

Assistant Secretary.

PUERTO RICAN INSPECTION OF IMPORTED CATTLE—ACTS OF
ISLAND LEGISLATURE.

Opinion, September 17, 1934

CONGRESS—LEGISLATIVE AUTHORITY—TERRITORY CEDED TO UNITED STATES.

Congress has full and complete legislative authority over territory ceded to the United States by treaty. (*DeLima v. Bidwell*, 182 U. S. 1, 196.)

TERRITORIES—PUERTO RICO—ORGANIC ACT—LEGISLATIVE AUTHORITY OF ISLAND LEGISLATURE.

Section 9 of the Organic Act of Puerto Rico, in providing that "the statutory laws of the United States not locally inapplicable * * * shall have the same force and effect * * * as in the United States," reserves paramount power of legislation to Congress and limits the power of the Puerto Rican legislature to the enactment of legislation which does not conflict with acts of Congress and the Constitution of the United States, and from this it follows that where acts of Congress conflict with acts of the Territorial Legislature, the former must prevail.

TERRITORIES—PUERTO RICO—LEGISLATION—FEDERAL AUTHORITY AND ISLAND AUTHORITY.

The Cattle Contagious Diseases Act of February 2, 1903, authorized the Secretary of Agriculture to take measures to have inspected cattle entering United States territory from foreign countries or from one State or Territory to another, and further provided that animals thus inspected might be transported into any State or Territory without further inspection under other authority. An act of the Legislature of Puerto Rico, approved April 23, 1931, provided that before bovine cattle should be permitted to enter the island they must be subjected to a tuberculin test. *Held*, That the act of the Puerto Rican Legislature is valid and enforceable only as to cattle which have not been certified and inspected under authority of the Secretary of Agriculture.

MARGOLD, *Solicitor*:

My opinion has been requested as to the validity of the act of the Puerto Rican legislature approved April 23, 1931 (Laws of Puerto Rico, 1931, page 276), which provides that every head of bovine cattle landed in Puerto Rico shall have been submitted, prior to leaving the port of shipment, to a tuberculin test and must be accompanied by documents showing that such test was made and that the reaction was not positive.

Congress has full and complete legislative authority over territory ceded to the United States by treaty. *DeLima v. Bidwell* (182 U. S. 1, 196). Following the cession of Puerto Rico to the United States by Spain, Congress, pursuant to this authority, enacted the Organic Act of Puerto Rico (39 Stat. 956) which provides in section 37 thereof that the authority of the Puerto Rican legislature, "shall extend to all matters of legislative character not locally inapplicable."

Section 9 of the Organic Act provides "that the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States * * *." This section reserves paramount power of legislation to Congress and limits the power of the Puerto Rican legislature to the enactment of legislation which does not conflict with Acts of Congress and the Constitution of the United States. Indeed, this ultimate power would remain in Congress even in the absence of the specific reservation. *Maynard v. Hill* (125 U. S. 191, 204).

The obvious purpose of the Puerto Rican act under consideration is to guard against the introduction into Puerto Rico of cattle infected with tuberculosis. It is an inspection law intended to safeguard the public health and, therefore, it is clearly a valid exercise of the police power of the Puerto Rican legislature unless it conflicts with a law or laws enacted by Congress.

By the act of February 2, 1903 (32 Stat. 791), Congress authorized the Secretary of Agriculture "to take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another * * *." The act further provides that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or livestock and found them free from infectious, contagious or communicable disease, "such animals so inspected and certified may be shipped, driven, or transported * * * into and through any State or Territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture."

In view of the status of Puerto Rico as a completely organized, though unincorporated, Territory (see 36 Ops. Atty. Gen. 326), and in view of the specific provision of section 9 of the Organic Act, the application of this statute to the introduction of cattle into Puerto Rico seems clear. The Department of Agriculture has so interpreted the statute and now maintains inspectors in Puerto Rico charged with the enforcement of the act and the regulations promulgated thereunder.

The question which is presented for determination is whether the Puerto Rican legislation conflicts with the foregoing act of Congress and is thereby rendered invalid.

This identical question was considered by the Supreme Court of the United States in *Mintz v. Baldwin* (289 U. S. 346). Although that case arose under the commerce clause of the Constitution the

problem of conflict between local legislation and the act of February 2, 1903, *supra*, was the same as in the instant case, since it is also true that under the commerce clause Federal legislation is paramount and local legislation is invalid if in conflict therewith. The case involved the validity of a State cattle inspection law which was similar to the Puerto Rican act now under consideration, and it was held that the act of 1903 excluded local cattle inspection legislation only to the extent that such legislation could not be made to apply to cattle inspected and certified by Federal inspectors. Mr. Justice Butler, who wrote the opinion, stated:

Plaintiff's cattle were not inspected by, and no certificate was issued under, federal authority. Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of state power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures.

It necessarily follows from this decision of the Supreme Court that the Puerto Rican act of April 23, 1931, is valid and enforceable as to cattle landed in Puerto Rico which have not been inspected and certified by an inspector of the Bureau of Animal Industry, but the act is invalid and may not be enforced as to cattle landed in Puerto Rico which have been so inspected and certified.

Approved, September 27, 1934:

T. A. WALTERS,

First Assistant Secretary.

H. LESLIE PARKER ET AL. (ON MOTION FOR REHEARING AND PETITION).

Decided September 18, 1934.

MINING CLAIM—OIL AND GAS LANDS—OIL PLACER—DISCOVERY—EVIDENCE.

In support of an application for mineral patent to two oil placer claims, the evidence showed the drilling of three wells from 1916 to 1923 to stratum of sand in which showings of considerable gas and water were encountered, but as to which no tests of production were made and the wells were abandoned and all drilling discontinued until 1930, when the mineral claimants, under the provisions of the leasing act of February 25, 1920, obtained permission to drill a test well to deeper sands, in which oil and gas in commercial quantities were encountered. *Held*, That the mineral claimants did not rely upon the alleged discoveries in the three wells first mentioned, but realized the need of further tests and accordingly drilled to deeper sands, and that the placer locations were invalid for lack of discovery.

MINING CLAIM—OIL AND GAS LANDS—CLAIMS UNDER GENERAL MINING LAW AND UNDER LEASING ACT—WAIVER.

Acquiescence by the Department in the course of action of mineral claimants in surrendering, under the provisions of the leasing act, all but two claims out of 50 located under the provisions of the general mining law, and retaining mining title to these two claims for further development and proof of validity, did not constitute a waiver by the Department of the usual requirements for earning patent thereto under the general mining law.

MINING CLAIM—OIL AND GAS LANDS—DEPARTMENTAL DECISION CITED AND APPLIED.

Rule in *Oregon Basin Oil and Gas Company* (50 L. D. 244), on rehearing (50 L. D. 253), followed.

ICKES, *Secretary*:

By decision of February 23, 1933 [54 I. D. 165], the Department affirmed the decision of the Commissioner of the General Land Office, dated June 9, 1932, rejecting the application of H. Leslie Parker, M. D. Wheeler, S. B. Wheeler, L. S. Worthington, R. S. Rhoades and Calvert C. Kirk, for patent to two oil placer claims described as Middy No. 16, embracing the SE $\frac{1}{4}$ Sec. 14, and Middy No. 21, embracing the NE $\frac{1}{4}$ Sec. 23, T. 35 N., R. 77 W., 6th P. M., Wyoming.

On March 31, 1933, counsel for the claimants filed a motion for rehearing and petition for the exercise of the supervisory authority of the Secretary with respect to the said decision. Numerous errors of law and fact are assigned in support of the petition, directed, in substance, to the three principal objections found by the Department to the allowance of the claims, viz:

1. Lack of discovery of valuable deposits of mineral prior to the date of the mineral leasing act of February 25, 1920.
2. Lack of diligence in exploratory work looking to discovery, and failure of discovery at any time for the benefit of the claims.
3. That the discovery of a valuable deposit of oil in well 11A, which was drilled in the year 1930 on Middy No. 21, cannot be credited to the placer claims, because it was drilled under a permit issued under the leasing act to one Boyer, and that the circumstances of the case, including the transfer of the permit to some of these claimants and the agreement thereunder for drilling the test well 11A, worked estoppel to deny the validity of the said permit, or to claim the discovery in that well for the benefit of either of the placer claims.

The record of the hearing in the case has been most carefully reviewed in the light of the allegations of error. No material misstatement of fact in the former decision has been disclosed. Moreover, no specific error is alleged other than failure to give proper weight to certain features of the evidence and failure to reach certain conclusions for which contention is made. Therefore, the finding

of facts as recited at length in the former decision will be accepted as a fair and sufficient statement as basis for reconsideration without extensive reiteration.

The record shows beyond dispute that large sums of money were expended in the drilling of wells on these two claims, and it is also shown that prior to the date of the mineral leasing act of February 25, 1920 (41 Stat. 437), the Shannon sand had been reached and that some gas, and at least indications of oil, had been found therein at a depth of about 2430 feet.

Middy No. 16 (SE $\frac{1}{4}$ Sec. 14) was located on December 21, 1916, based on alleged discovery of oil in a hole 50 feet deep. No reliance is now placed on that alleged discovery. In January, 1917, M. N. Wheeler obtained a lease from the locating group for the exploration of their claims. He contracted with the Producers Oil Company for the drilling of a test well on some part of the said claims Middy Nos. 16 and 21. Under that contract a well was drilled on Middy No. 16 to a depth of 3,800 feet. Wheeler testified at the hearing with respect to the alleged discovery in the Shannon sandstone that "I observed considerable evidence of gas, and occasional rainbow colors. The gas occurred as bubbles, froth, or what we now term cut mud. That was in considerable quantity, extended across the entire fluid stream, and made a very distinct odor." He further stated that he lighted some of the bubbles, and that they "would explode in puffs"; that the conditions were such as to justify the expectation of having a commercial well by proper casing and removal of the water. But the well was not tested. The witness stated that his observations with respect to this well caused him to devote much time and money in further development of the field. However, it does not appear that his interest was so much because of the alleged deposits found in the Shannon sand; but was more because of hopes of finding rich deposits in the deeper sands. This well was abandoned in the fall of 1918 because of inability to drill further, and no other well was drilled on this claim.

In December, 1919, the Midwest Refining Company, acting under contract with Wheeler, started drilling a well on Middy No. 21 (NE $\frac{1}{4}$ Sec. 23). The contract required drilling to the Wall Creek sand, or to a depth of 4500 feet. At a depth of 2430 feet the first layer of the Shannon sand was penetrated and water was found. After passing through 20 or 25 feet of sand a layer of shale 7 or 8 feet thick was found, and then a second lens of the Shannon sand, 10 to 15 feet thick was encountered,

and when they struck the lower bench, gas started to show whenever they would bail. There were occasional bubbles when they were not bailing. This gas was in considerable quantity, in that it was visible to the eye, and it could be lighted and would burn several feet in the air.

Water was within 200 feet of the derrick floor. Witness (Wheeler) stated that his experience in drilling such wells was that such show of gas thus under water pressure indicated "considerable quantities" when it was properly cased. Asked what he meant by "considerable quantities," he stated, "Oh, half a million to five million feet, in one case twelve million." No test, however, was made, as it would have been necessary to dry up the hole. This well was drilled to about 2700 or 2730 feet, when the hole became crooked and had to be abandoned. The rig was skidded over, and a new well started nearby on the same claim, Middy No. 21. At about 2430 feet the Shannon sand was struck in this new well. It appeared in two levels, the upper one approximately 20 feet thick, and no showing of oil or gas apparent, then 7 or 8 feet of shale, then the second level of the sand, 10 to 15 feet thick, where a showing of gas similar to that in the other abandoned adjacent well was found. "It would burn as it did in No. 1." This well was drilled to 4822 feet. The Wall Creek sand was encountered, and "A very minor show of gas, and later on there was a heavy oil, dead in character, found—just small showings on the sump." This well was abandoned in August, 1923. The drilling company apparently considered the findings in these wells of no importance, as it failed to avail itself of the options provided in the drilling contract, and the contract was abandoned.

The persons most interested and active in the promotion of these claims are M. N. Wheeler and H. Leslie Parker, and their opinions with respect to these so-called discoveries are shown in certain affidavits which they made and submitted for the purpose of obtaining extensions of permits which they held in the same field under the leasing act. In an affidavit made by M. N. Wheeler on July 31, 1926, in connection with permit application Cheyenne 037046, he referred to the first well (on Middy No. 16) "in which substantial showings of oil and gas were discovered, but not sufficient for profitable production, and said well was abandoned on account of drilling difficulties."

With regard to the other two wells (on Middy No. 21), he stated that after abandonment of the first well,

affiant procured an operating agreement with the Midwest Refining Company for the drilling of a test well of not less than 4500 feet in depth in said field, and drilling was commenced on said test well early in the year 1920, and continued until drilling difficulties made it necessary to skid the rig and start a new hole in 1921, after the first hole had encountered a showing of natural gas in the geological horizon locally known as the Shannon sand; that the second well was drilled diligently at a depth of more than 4800 feet, reaching the top of the First Wall Creek or Frontier sand, and although showings of oil and gas has been found it was not sufficient in amount for profitable production, and the said well was abandoned by the Midwest

Refining Company on account of drilling difficulties in 1923; thereupon the Midwest Refining Company surrendered its operating agreement to affiant.

Similar affidavits were made in several other cases including Cheyenne 037047, wherein Mr. Wheeler referred to the efforts of himself and H. Leslie Parker in the exploration of the Midway Field and other nearby fields; reciting what they had done,

in their efforts to procure the testing of the lands in such three fields, and notwithstanding the discouraging results so far, are still desirous of testing said lands in said three fields, and believe that if a well is drilled thereon to sufficient depth to reach the Wall Creek sands, production of oil and gas in paying quantities will be obtained.

H. Leslie Parker, in an affidavit dated May 31, 1929, filed in connection with permit Cheyenne 037050, referring to the well drilled on Middy No. 16, said:

and on account of drilling difficulties, the said well was abandoned, having procured only showings of oil and gas, which showings were not tested, but were cased off to enable deeper drilling; that said showings have never been tested to prove or disprove profitable production.

He also referred to the other two wells, the showings of gas found therein, the abandonment of same, and

nevertheless, and notwithstanding the discouraging results so far, affiant still believes that a still deeper test well will find oil and gas in the deeper formations.

He then listed the names of the deeper sands where he hoped to find profitable oil and gas at depths from 5131 to 6730 feet, and discussed the improvements in drilling equipment since the old wells were drilled, and the discoveries in other fields. He concluded with the following significant statement:

Therefore, because of the above mentioned vast improvement in the technique of drilling and the availability of casings sufficient to stand the immense pressures at such great depths and because of the proving in the adjacent Salt Creek and Big Muddy Fields of the practicability of electrically operated rotary drilling outfits, and because of the only recently available source of the necessary electric power, and because of the proving of the oil and gas bearing possibilities of the Dakota, Lakota, first and second Morrison, and the first, second and third Sundance sands in the Salt Creek Field, affiant has been able to induce the Midwest Refining Company, the Salt Creek Producers Association, the Mountain Producers Association, and others, to enter into an operating agreement providing for the drilling of a fourth test well in the Midway Field at a point to be decided by the geologic departments of the said companies, and of sufficient depth to test the third Sundance sand at the approximate great depth of more than 6800 feet.

Said drilling agreement is now being reduced to writing and provides for the development of said Midway Field upon a Unit, or Group Development Plan, which plan will be submitted to the Department of the Interior, as an amendment to this application for an extension of time.

Said Group Development Plan provides for the development of this permit—

	<i>Acres</i>
Cheyenne Serial No. 037050.....	1904.34
Cheyenne Serial No. 037047.....	1920
Cheyenne Serial No. 037046.....	2400
Cheyenne Serial No. 037026.....	160

as well as Two Oil Placer Mining Claims and several tracts of Homestead Lands upon which there is no mineral reservation to the United States.

Therefore, it will be necessary to procure an extension of time in which to commence drilling on said permit in order to keep said permit in good standing until June 30th, 1930.

Affiant further states that the above mentioned Unit or Group Development Plan is in all respects in full accord with the oil conservation policy recently announced by the Department of the Interior.

That, in affiant's opinion, the further expenditure of the very large sum necessary to drill to the very great depth of the known producing oil horizon, as herein mentioned, will prove the occurrence of oil and gas in commercial quantities within the said Midway Field, which opinion is concurred in by the geologic departments of the above mentioned companies, and evidenced by the willingness of said companies to participate in the drilling of the test well to depths greater than the three wells already drilled by the affiant and associates in the said Midway Field.

Affiant submits that the good faith of himself and associates is evidenced by the fact that they have spent fourteen years of unrelenting efforts and the drilling of the said three wells at a cost of several hundreds of thousands of dollars, and by the willingness of the said companies to join said affiant and associates in drilling a test well to a depth of 6800 feet or more, which is sufficient proof to establish equities upon which to warrant the Department of the Interior in granting additional time in which to thoroughly test the deepest oil and gas horizons in the said Midway Field.

It is apparent that none of the parties concerned in these claims relied upon the alleged discoveries, in the three wells above described, as sufficient for proving title under the placer locations. They realized the need for further tests, and in *deeper sands*. But no further actual exploration took place until 1930, when well No. 11A (on Middy No. 21) was commenced under a cooperative agreement with the approval of the Department. In the meantime, the Department had issued a permit to Stacey E. Boyer, Cheyenne No. 048864 under the leasing act, embracing these lands. The said permit was assigned to M. N. Wheeler and H. Leslie Parker and the latter assigned his interest therein to his wife. Application for lease has been made on this permit based on the discovery made in well No. 11A.

It is urged that the Department became committed to the recognition of these two placer claims in August, 1920, after the date of the leasing act, when representatives of the group of locators came to Washington and surrendered all but these two of their 50 locations and accepted permits in lieu thereof under the leasing act, and were permitted to retain these two for development and proof under the locations. Assuming the circumstances to be as stated, there may have appeared at that time no sufficient reason for adverse proceed-

ings against these claims; but acquiescence of the officials of the Land Department in that transaction did not constitute a waiver of the usual requirements for earning patents under the placer mining laws. In view of the thorough consideration of this case in the former decision, both as to the law and the facts, no extensive discussion of the provisions of the placer mining laws is deemed necessary.

In the case of *Chrisman v. Miller* (197 U. S. 313, 323), the Court said:

There must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.

In that case the claim was based on the alleged discovery by one Barieu who testified that

the oil comes out and floats over the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was just dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water.

The Court's comment on that testimony was that it did not overthrow the finding of the lower court that there was no discovery; that "it does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration". And, further, the Court said: "There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploration for petroleum." The Court also repudiated the doctrine, relied upon, in part, in this case, that the mere willingness on the part of the locator further to expend his labor and means is a fair criterion by which to judge the sufficiency of discovery.

With respect to the argument that the alleged indications of oil and gas found in the Shannon sand should be accepted as proof of discovery of the richer deposits later found in the lower and different stratum, it is sufficient to cite the similar and well considered case of the *Oregon Basin and Gas Company* (50 L. D. 244, 253). In that case, on rehearing, it was held:

To support a mining location, the discovery upon which the validity of the location is based must be of the particular deposit actually discovered within the limits of the claim for the reasonable prospect of the development of which into a valuable mine the evidence warrants further expenditure of time and money.

The fact that developments outside of a mining location, or that geological deductions indicate the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered, sufficient to warrant expenditures in the development of the claim, does not constitute a valid discovery of mineral upon which to predicate a right to a patent.

That decision was sustained by the courts. See 6 Fed. 2d, 676, and 273 U. S. 660.

Upon very careful consideration of the evidence in the case, the Department is convinced that the former decision reached a correct conclusion. Accordingly, the motion and petition are denied.

Motion and Petition Denied.

SANTA TERESA LAND COMPANY

Decided September 18, 1934

PRIVATE LAND CLAIM—CORRECTION OF SURVEYS—JURISDICTION OF GENERAL LAND OFFICE AND COURT OF PRIVATE LAND CLAIMS.

It is true in general that the General Land Office has authority to correct Government surveys after patent has been issued, and that courts do not have this right, but it is without authority to pass upon the validity and extent of a private land grant confirmed and surveyed under decree of the Court of Private Land Claims, or to determine the validity of the decree and survey, its jurisdiction, after approval of the survey, being limited to the ministerial duty of issuing patent, all other matters being solely within the jurisdiction of the courts.

PRIVATE LAND CLAIM—ACT OF MARCH 3, 1891—JURISDICTION OF COURT OF PRIVATE LAND CLAIMS—SURVEYS AND THEIR CORRECTION.

Congress, in the exercise of its authority over public lands, by the Act of March 3, 1891, created the Court of Private Land Claims, and in sections 7 and 10 of the act empowered said court not only to determine the validity of titles but to determine that the surveys executed conformed to its decrees, errors made being subject to correction by appeal.

PRIVATE LAND CLAIM—LACHES.

The survey of a private land claim was approved in 1904, patent was issued in 1909, and objection was not made until 1933, although the alleged deficiencies in the area of the survey were apparent on the face of it from the day of its approval. *Held*, That consideration of the case could properly be denied upon the ground of laches.

CASES CITED AND APPLIED; CASES DISTINGUISHED.

Applied: *United States v. Peralta* (99 Fed. 618, 102 Fed. 1006; *Ely's Administrators v. Magee* (34 L. D. 506); *Santa Teresa Grant* (37 L. D. 480). Distinguished: *Stoneroad v. Stoneroad* (158 U. S. 240); *Russell v. Maxwell Land Grant Co.* (158 U. S. 253); *Hugh Stephenson, or Brazito Grant* (36 L. D. 117).

WALTERS, *First Assistant Secretary*:

Charles R. Loomis, president of and attorney for Santa Teresa Land Company, has appealed from a decision of the Commissioner of the General Land Office dated March 30, 1933, denying its application for investigation and resurvey of the Santa Teresa Grant in New Mexico, on the ground that the General Land Office has no authority to determine whether the survey, as executed and approved,

conforms to the decree of the Court of Private Land Claims and can issue no patent save in conformance to the approved survey.

The land in question was part of the territory purchased by the United States from Mexico by the Gadsden Treaty. The Court of Private Land Claims, created by the act of March 3, 1891 (26 Stat. 854) to adjudicate titles of private land within this territory, found that title to the Santa Teresa Grant was valid, the tract being designated in the decree by area and by recital of three natural boundaries, one being the Rio Grande as it ran in 1853. A survey was made which was approved by the court on June 14, 1904. The survey purported to designate the course of the Rio Grande as of 1853, and thereby included an area of land subsequently determined to be in Texas (*New Mexico v. Texas*, 283 U. S. 788; 276 U. S. 558; 276 U. S. 557; 275 U. S. 279), and beyond the jurisdiction of the Court of Private Land Claims. Other errors involving larger areas are alleged to be apparent in the approved survey which, together with the errors in the location of the river, resulted in a loss of approximately 60 per cent of the area of the original grant as described in the decree. However, over the objection of the State of Texas and at the request of the then claimants to the Santa Teresa Grant, a patent was issued on August 16, 1909, to the land described in the approved survey. No appeal was taken from the decision of the court either as to the decree or as to the approval of the survey.

The land alleged to have been erroneously excluded from the survey is now held as public domain by the Government. The appellant seeks to have a resurvey according to the decree and to have patent issued to it for such land, now in the public domain, which by the resurvey may prove to be part of the Santa Teresa Grant.

In support of its request, the appellant contends:

1. That title vested in the claimants to the Santa Teresa Grant by the decree of the court to the area described in the decree as being within well defined and ascertainable natural boundaries, as against the Government, regardless of any survey;
2. That the survey approved by the court was not in conformance with its decree; and
3. That the General Land Office has authority to correct the alleged errors by making the survey conform to the decree.

This appeal can be disposed of by answering the third contention of the appellant. It is generally true, as contended by the appellant, that the General Land Office has the right to correct Government surveys after patent has been issued, and that courts do not have this right. *Stoneroad v. Stoneroad* (158 U. S. 240); *Russell v. Maxwell Land Grant Co.* (158 U. S. 253); *Adam v. Norris* (103 U. S. 591). However, Congress, in the exercise of its authority over public land, expressly provided the procedure for correcting surveys of

land within the jurisdiction of the Court of Private Land Claims. Sections 7 and 10 of the act of March 3, 1891, wherein such provisions were made, are in part as follows:

Sec. 7. The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, * * *

Sec. 10. That whenever any decision of confirmation shall become final, the clerk of the court in which the final decision shall be had shall certify that fact to the Commissioner of the General Land Office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries, and area of the tract confirmed. The said Commissioner shall thereupon without delay cause the tract so confirmed to be surveyed at the cost of the United States. * * * * * and the said court shall thereupon determine if the said survey is in substantial accordance with the decree of confirmation. If found to be correct, the court shall direct its clerk to indorse upon the face of the plat its approval. If found to be incorrect, the court shall return the same for correction in such particulars as it shall direct. When any survey is finally approved by the court, it shall be returned to the Commissioner of the General Land Office, who shall as soon as may be cause a patent to be issued thereon to the confirmer. (Italics supplied.)

The duties of the Commissioner of the General Land Office under this act were considered in the case of *Ely's Administrators v. Magee* (34 L. D. 506), where it was held that his sole duty was to issue a patent according to the approved survey. This decision was followed in the *Santa Teresa Grant* case (37 L. D. 480), which case concerned the grant now in question. It was held that the Commissioner was without authority to pass on the validity and extent of the survey, the sole duty being to issue a patent. That position was urged by the then claimants of the Santa Teresa Grant, who must necessarily have been the appellant's predecessors in interest. The Department, in adopting their contentions, said:

The act of March 3, 1891, invested the Court of Private Land Claims with exclusive jurisdiction, subject to appeal to the Supreme Court, to determine as to the validity, extent and boundaries of Mexican and Spanish grants in the States and Territories named in the act, so far as concerns the interest of the United States. (*Ainsa v. New Mexico and Arizona Railroad Company*, 175 U. S., 76, 80.)

* * * * *

The Commissioner has no power to determine as to the correctness of that survey, or to adjudicate and determine any question whatever. His duties are purely ministerial. He is required to transmit the survey to the court immediately upon the receipt thereof with or without objections thereto, and it is the exclusive province of the court to determine if said survey is in substantial accordance with the decree of confirmation and any objections filed thereto.

This interpretation carries out the manifest intention of the act. The court there created was empowered not only to determine the validity of titles but to determine that the surveys conformed to its decrees. Errors were subject to correction by appeal and no authority was given to the General Land Office to correct or change surveys once approved by the court.

A Federal case, in a situation analogous to the one at hand, supports the conclusion reached by the Department: *United States v. Peralta* (99 Fed. 618, 102 Fed. 1006). A petition was filed with the court demanding that the Government convey land in accordance with a decree of confirmation of a Spanish and Mexican land grant. A patent had been issued in accordance with a survey approved by the court, but which the petitioner alleged was not in conformance with the court's decree. The court held that the approval of the survey by the court was a final adjudication of the petitioner's right, saying:

In the Fossat or Quicksilver Mine Case, 2 Wall. 649, 712, 17 L. Ed. 739, objections were made to the survey and location on the ground, among others, that the proceedings under the act of 1860 were not judicial, but purely executive and ministerial. It was therefore contended that the appeal from the order or the decree of the district court regulating the survey and location ought not to be entertained, because the court could only determine the validity of the grant, leaving its survey and location to the executive department of the government. Mr. Justice Nelson, in delivering the opinion of the court, in reply to these propositions said:

"We need only refer to the opinion of this court in the present case the second time it was before us, as presenting a conclusive refutation of these several positions. The fundamental error in the argument is in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment, as much so as the execution of any other judgment or decree rendered by the court. This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction. * * *"

The statutes empowering the court to approve surveys in that case—the act of March 3, 1851, as amended—were less explicit as to the power of the court than was the act of March 3, 1891.

The case of *Hugh Stephenson, or Brazito Grant* (36 L. D. 117) is not authority for the contention of the appellant that the General Land Office may change an approved survey. All that case held was that the General Land Office could resurvey the boundaries of a Congressional grant which antedated a decree of the Court of Private Land Claims concerning an adjoining tract, where there was a conflict in the boundaries of the two tracts. Inasmuch as the Court of Private Land Claims had no jurisdiction over land

already disposed of by Congress, a resurvey of the Congressional grant was not in derogation of the jurisdiction of that court. See *United States v. Baca* (184 U. S. 653).

It appears that the Court of Private Land Claims ceased to exist on June 30, 1904, under the act of March 3, 1903 (32 Stat. 1144). In accordance with this act, the papers and records of the court were to be returned to the Department of the Interior. From this it might be argued that the Department took over the functions of the court. However, no such provision was made in the statute, nor was any provision made whereby the Department was to act in an appellate capacity as to matters theretofore adjudicated by the court. But granting that the Department had authority either as the court or in an appellate capacity, nevertheless, because no appeal was taken from the approval of the survey, the matter became *res judicata*. *United States v. Peralta, supra*.

The two departmental decisions above cited distinctly hold that the Department is without jurisdiction to question a survey approved by the Court of Private Land Claims. These decisions are in line with adjudicated cases, and in the absence of conflicting authorities, the departmental decisions are controlling in this case.

Even if the Department had authority, irrespective of the act of March 3, 1891, to go behind surveys approved by the court, which it has not, it would seem proper to refuse the demands of the appellant because of laches. The survey was approved in 1904; patent was issued in 1909; no objection was made until 1933, although the alleged deficiencies in the area of the survey were apparent on the face of it from the day of its approval. See *Williams v. United States* (92 U. S. 457). Cf. *Peralta v. California* (182 Fed. 755).

Nor could the appellant's contention that title was vested in its predecessors in interest irrespective of any survey aid it if such contention could be considered in this appeal. The appellant's predecessors in interest did not appeal from the approval of the survey and were active in seeking issuance of a patent in accordance with that survey, although the facts as to the alleged deficiency in area were then as apparent as now, the patent issued to them stating that it conveyed an area of 8,478.51 acres, whereas the appellant alleges that the area should be 17,755 acres, and the facts as to the location of the Rio Grande as of 1853 were then ascertainable and were then known to be in dispute. Long acquiescence in title or patent effectively bars relief. *Williams v. United States* (92 U. S. 457); *United States v. Hancock* (133 U. S. 193); *Sanchez v. Deering* (270 U. S. 227).

In view of all the foregoing, the decision of the Commissioner of the General Land Office must be and it is hereby *Affirmed.*

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15

2. The provisions of the act of June 25, 1910, as amended, for determining Indian heirs and for the administration of the restricted property of deceased Indians, are applicable to the natives of Alaska, and where the estate of a deceased native of that Territory consists of reindeer which were restricted from sale, the Secretary of the Interior is empowered to administer the estate and he may, if he sees fit, remove the restrictions and dispose of the reindeer and pay the money over to the heirs, but an employee of the Reindeer Service has no such authority-----

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4. Congress has conferred upon the Secretary of the Interior the authority to make regulations and to impose restrictions with respect to reindeer owned by the United States in the Territory of Alaska that have been or may be transferred to the natives and to act in behalf of the natives in such connection, and enforcement thereof may be had in a proper case by suit to recover the animals illegally transferred, or the value thereof-----

15

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6. While in earlier times the view prevailed that the natives of Alaska did not bear the same general relation to the Government as that borne by the American Indians, such view is no longer entertained, the contrary view receiving support from acts of Congress and the decisions of courts of the United States, which hold, generally, that the laws of the United States with respect to Indians within the territorial limits of the United States are applicable generally to the natives of Alaska-----

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7. In line with the national policy of permitting the aborigines to be controlled in their internal and social affairs by their own laws and customs, the courts, both State and Federal, when called upon to consider the validity of marriage and divorce by so-called "Indian custom", have almost uniformly upheld them on the theory that the National Government has recognized the autonomy of the Indians in such matters and thus removed them from the realm of State law in this respect-----

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40

10. As to what tribes of Alaskan natives were included within the term, "uncivilized tribes", as employed in Article III of the treaty under which Alaska was ceded to the United States (15 Stat. 593), it was held, in *In re Mtnook* (2 Alaska Reports, 200, 221), that they "were those independent pagan tribes who acknowledged no allegiance to Russia, and lived the wild life of their savage ancestors"; and this includes those natives who, today, live under primitive conditions in regions remote and difficult of access, influenced by superstition, and following the crude customs inherited from their ancestors. By the terms of the treaty of cession, these tribes were to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country"-----

40

11. There is no provision of law forbidding marriages between Alaskan natives according to native custom, and in the absence of a definite expression upon the subject by Congress, in whom the paramount authority over these people rests, marriages among them should be accorded the same legal recognition and sanctity which the courts of this country have uniformly extended to similar relations among the American Indians-----

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1. By the terms of section 4 (a) of the act of December 21, 1928, commonly known as the Boulder Canyon Act, it is provided that the State of California shall have, each year, for beneficial consumptive use, not to exceed 4,400,000 acre-feet of water from the lower basin of the Colorado River, in accordance with Article III (a) of the Colorado River Compact, and it is further provided that no person shall obtain said water from the Colorado River except by contract entered into with the Secretary of the Interior and approved by that official. *Held*, that the provisions of the act, considered in the light of the compact, must be interpreted as forbidding the Secretary from entering into a contract for the storage of water in the reservoir contemplated which could render impossible of fulfillment the allotment yearly to the State of California of 4,400,000 acre-feet of water----- 593

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5. By the terms of section 4 (a) of the act of December 21, 1928, commonly known as the Boulder Canyon Act, it is provided that the State of California shall have, each year, for beneficial consumptive use, not to exceed 4,400,000 acre-feet of water from the lower basin of the Colorado River, in accordance with Article III (a) of the Colorado River Compact, and it is further provided that no person shall obtain said water from the Colorado River except by contract entered into with the Sec-

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retary of the Interior and approved by that official. <i>Held</i> , That the provisions of the act, considered in the light of the compact, must be interpreted as forbidding the Secretary from entering into a contract for the storage of water in the reservoir contemplated which could render impossible of fulfillment the allotment yearly to the State of California of 4,400,000 acre-feet of water-----	593	1. A valid claim for damages under the terms of the act of December 28, 1922 (42 Stat. 1066), arises where, without negligence on the part of the claimant, his property is injured through the negligent operation of an automobile by an employee of the United States acting within the scope of his employment, and the amount of the claim does not exceed \$1,000-----	209
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such expenses are incurred, where such employees have been detailed for special services with such other establishment -----

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233

District of Columbia.

1. Request having been made by the ostensibly proper parties, the United States, by duly constituted agent, is warranted in executing a quitclaim deed to real property which, in 1794, with good title thereto, it sold to private parties, through its commissioners empowered to do so, and was paid in full, the deed, if executed and delivered, never being recorded, leaving record title to the property standing in the name of the United States -----

319

2. The Director of National Parks, Buildings and Reservations, by virtue of authority conferred upon him by Executive order of June 10, 1933, succeeds to the authority originally conferred by Congress upon the commissioners empowered to sell and convey lots of the Government in the District of Columbia, insofar as authority to convey title on behalf of the United States is concerned, including execution of a quitclaim deed -----

319

Donation.

See *National Parks, Buildings and Reservations*, 5, 6.

Due Process.

See *Constitution of the United States*, 2.

Electric Power.

1. Electric energy produced by a power plant to be erected on the Hetch Hetchy site by the city and county of San Francisco may be legally sold by the municipality to a privately owned electric utility company only upon condition that such power will be consumed by the company and not resold or redistributed, since the act of Congress granting the site, etc. (38 Stat. 242), contains a prohibition against the grantees' selling or letting to any private corporation the right to sell or sublet the electric energy sold or given to it by said grantees -----

316

2. The authority conferred upon the Secretary of the Interior by section 4 of the act of December 19, 1913, commonly called the

Electric Power—Continued:

Page

"Raker Act", requiring his approval of plans and specifications in connection with the proposed construction of reservoirs, dams, power plants, and kindred structures of permanent character in national parks in the State of California, does not include authority to attach to the procedural permit a condition that electric power developed at a dam site within the park shall, upon demand, be made available to the Government, at cost, for use in such parks.

597

3. Electrical energy generated on an Indian reservation by a power plant constructed out of tribal funds and operated as an adjunct to or in connection with an Indian commercial activity is not taxable under section 616 of the act of June 6, 1932 (47 Stat. 266), the lands being tribal and unallotted, and the Indians wards of the Government -----

219

4. Electrical energy, generated by a power plant constructed out of tribal funds and operated in connection with Indian mills on an Indian reservation, when furnished to non-Indians, is taxable under the Internal Revenue Act of June 6, 1932 -----

219

Employees, Department of the Interior.

See *Attorneys, Agents, Etc.*

Equitable Rights.

See *School Lands*, 3.

1. An examination of the cases wherein the Department, following erroneous action in canceling entries, selections, and other filings, has later declined to reinstate them, discloses that there were commonly present in such cases elements of affirmative acquiescence in the decision sought to be vacated, laches in passively permitting the initiation of adverse rights, or other equitable bar -----

113

Evidence.

1. Where expert opinion evidence conflicts as to whether the deposits of sodium borates in question were natural evaporation residues dissolved in and accumulated by surface ground-water drainage or were hot springs products of fumarolic type, and such opinions are no more than theory and assumption and no

Evidence—Continued.

way proved, if the adoption by the Department of the more plausible and probable theory would run counter to the conclusion of eminent scientists on a highly technical question, and subject a mining claimant to the probable loss of all benefits from his explorations and development at large cost made on the faith of an opposing theory, the Department will adopt the latter theory in disposing of the case-----

Page

Exchange of Lands.

1. Instructions of August 3, 1932, exchange of lands in San Juan, McKinley, and Valencia counties, New Mexico, under act of March 3, 1921. (Circular No. 1284)-----

183

2. Instructions of April 1, 1933, exchange of lands in New Mexico under act of June 15, 1926. (Circular No. 1295)-----

21

3. In an exchange of lands in national forests under the terms of the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), a relinquishment to the United States under the provisions of the act of June 4, 1897 (30 Stat. 36), with no application for other lands in lieu thereof, leaves the transaction incomplete and does not pass clear and complete title to the base lands to the United States, equitable rights therein remaining in the profferer-----

200

4. Before the United States will consummate an exchange of lands in national forests, it must be fully satisfied as to the title to the land relinquished, and accordingly will require that the abstract of title submitted be extended, where necessary, to show good title at date of acceptance. The Department's instructions of February 13, 1925 (51 L. D. 51), insofar as in conflict with this decision, are overruled-----

36

Extensions of Time.

See *Homestead*, 5, 16.

Federal Administrative Officers.

1. The head of an Executive Department of the Federal Government is authorized to enter into a contract for transportation of Government freight over the lines of a common carrier at a rate

Federal Administrative Officers—Continued.

Page

lower than that in the schedule filed with the Interstate Commerce Commission-----

489

Federal Constitution.

See *Constitution of the United States*.

Federal Emergency Administration of Public Works.

See *Public Works Administration*.

Federal Officers and Employees.

See *Attorneys, Agents, Etc.; Claim for Damage; National Parks, Buildings, and Reservations; Patent Rights to Invention*.

1. In view of the provisions of the act of March 5, 1917 (39 Stat. 1106), forbidding, under penalty, the receipt by any Federal officer or employee of any salary in connection with his services as such officer or employee from any source other than the United States Government, except as may be contributed out of the treasury of a State, county, or municipality, the National Park Service is without authority to accept a donation of money conditioned upon its application to the salary of one of its employees-----

497

Federal Subsistence Homesteads.

See *Homesteads*, subheading, "*Subsistence*."

Final Proof.

See *Homestead*, 15, 16.

Fines.

See *National Parks, Buildings, and Reservations*, 10-12.

Fish and Game.

See *Indians and Indian Lands, 14-16; Migratory Birds and Treaty; Yellowstone Park*.

1. The power to preserve fish and game within its borders is inherent in the sovereignty of a State (citing *Geer v. Connecticut*, 161 U. S. 519; *Ward v. Racehorse*, 163 U. S. 504, 507)-----

418

2. The power of each State to regulate fishing in its rivers includes authority to restrict the devices and types of tackle which fishermen generally employ-----

418

36

Fish and Game—Continued.

3. A regulation of fishing, imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intentment or operation a denial to a privileged Indian community of its right to fish, is not violative of a provision of a treaty with the Indians (see 12 Stat. 951; 45 Stat. 1158) under which they are guaranteed "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory"-----

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418

4. A reasonable construction of a provision of a treaty with Indians guaranteeing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory", does not include authority to construct what is known as a willow weir or willow dam in the channel of the Columbia River, for the purpose of holding the salmon run, and in disregard of the State laws and regulations-----

419

5. A Yakima Indian is not exempt from the general laws of the State of Oregon requiring a license in order to sell fish caught in the Columbia River and to pay a poundage tax on such sales, when sold at any place within the jurisdiction of the State-----

419

Five Civilized Tribes.

See *Indians and Indian Lands*, 16½-23.

Five-Day Week.

See *Wages and Hours of Labor*.

Flood Control.

See *Soil Erosion Service*.

Fractional Parts of Legal Subdivisions.

1. An agricultural application for a fractional part of a legal subdivision of land classified as agricultural will not be allowed where the remaining part is covered by a surveyed mining claim for which no application for patent has been filed, unless the agricultural applicant submits a satisfactory affidavit, corroborated by two witnesses, showing that the land within the mining location is in fact mineral in character, or following an adjudication that the mining claim was valid from the

Fractional Parts of Legal Subdivisions—Continued.

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228

evidence adduced in a contest proceeding between the agricultural and mineral claimant, as prescribed in sections 101, 105-108, of the General Mining Regulations.

Fur Farming, Alaska.

1. Regulations of September 2, 1933, governing fur farming in Alaska (Circular No. 1312, superseding Circular No. 1271, and amending Circulars Nos. 491 and 1108)-----

286

General Leasing Act (Mineral).

See *Mineral Leasing Act; Mining Claim; Oil and Gas Lands, etc.*

Georgetown Indian Reservation.

See *Indians and Indian Lands*, 6-8.

Government Contracts (U. S.).

See *National Parks, Buildings and Reservations; Reclamation; Soil Erosion Service; Transportation*.

1. There is no authority of law under which an administrative officer of the United States may grant relief from the terms of the undertaking of a successful bidder upon a contract to furnish supplies to the United States, by increasing the price for which the supplies are sold, after the sale to the Government has been completed-----

271

2. An adjustment of prices on completed contracts has not been provided for in the National Industrial Recovery Act, or by other legislation, and only by legislation could administrative officers be clothed with powers to increase the price for which goods are sold to the Government, after the sale has been completed-----

271

3. If acceptance of a bid is made by officers of the Government, on its behalf, within the period stated in the bid, a binding contract is completed and the bidder will be required to furnish the supplies at the price stated in his bid; but if a condition arises whereby the time period stated in the bid has expired, the acceptance of the bid thereafter does not make a binding contract unless the bidder subsequently executes a formal contract-----

271

Government Contracts (U. S.)—	Page	Government Contracts (U. S.)—	Page
Continued.		Continued.	
4. There is no authority of law to require the successful bidder on a contract for the supply of material to the Federal Government to assume, in the performance of the engagement he has entered into, additional and more onerous conditions which would entail increased expense not contemplated when the advertisement was issued and the bid accepted-----	279	Government is to be released from all liability due to such failure of allotment or appropriation-----	432
5. The Executive order of August 10, 1933, in pursuance of the National Industrial Recovery Act, required that bidders, in the execution of contracts, shall comply with all provisions of the applicable approved code * * * for the trade or industry * * * concerned, or, in the absence of such a code, with the provisions of the blanket code, covering all industries, promulgated under authority of section 4 (A) of the National Industrial Recovery Act. <i>Held</i> ; that where specifications were issued prior to the Executive order, and the accepted bidder is unwilling to execute a contract under the added conditions named in the codes, all bids should be rejected and readvertisement made, with a definite statement in the advertisement relative to the provisions of the Executive order named-----	280	9. The Act of June 12, 1906 (34 Stat. 255), provides that no contract or purchase on behalf of the United States shall be made "unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year * * *"	282
6. In view of the requirements of the Executive orders issued to give effect to the National Industrial Recovery Act, Federal administrative officers are without authority to accept bids or to execute formal contracts on behalf of the United States unless provision is made therein for compliance with said orders-----	280	10. Services and supplies may be procured on behalf of an establishment of the United States Government without competitive bidding in instances where special skill and experience are more important than a low price and it is believed these cannot be assured by competitive bidding-----	408
7. The authority to reject bids is reserved to the United States; objections by other bidders could not properly be made because the provisions of the Executive order when included in the contract would increase the burden imposed upon the low bidder-----	280	"Government Land." See <i>Colonial National Monument (Yorktown), Virginia.</i>	
8. In the construction of public works, a contract by the Government for an entire structure is valid, even though funds are not at the time available for its completion, if in the contract it is provided that in the event the necessary allotment or appropriation of funds for completion of the structure should not be made, the		Grazing and Grazing Lands. See <i>Taylor Grazing Act.</i> 1. A withdrawal of public lands for the purpose of reserving them for use as federally regulated grazing lands is a withdrawal for a public purpose, and is analogous to a withdrawal under section 10 of the act of December 29, 1916 (39 Stat. 862), to provide for stock-raising homesteads-----	353
		2. Persons whose use of public lands rests merely upon the sufferance of the United States do not come within the purview of the exception contained in an order of withdrawal that it shall be subject "to all valid existing rights", the sole "right" of those so using the lands being to graze stock thereon at the sufferance of the United States-----	353
		3. Specific legislative authorization for regulation by the Secretary of the Interior of grazing upon public lands withdrawn for a Federal grazing district is not necessary, his designation in the Executive order being sufficient. Such designation is consonant with the Secretary's general jurisdiction over the public lands of the United States; and by virtue of this gen-	

Grazing and Grazing Lands— Page
Continued.

eral authority he may prescribe such rules and regulations as are necessary to effectuate the purposes for which the withdrawal and reservation are made.-----

353

Hearing.

See *Practice.*

Heirs or Legal Representatives.

See *Wyandotte Scrip, 1.*

Hetch Hetchy Power Site.

1. Electric energy produced by a power plant to be erected on the Hetch Hetchy site by the city and county of San Francisco may be legally sold by the municipality to a privately-owned electric utility company only upon condition that such power will be consumed by the company and not resold or redistributed, since the act of Congress granting the site, etc. (38 Stat. 242), contains a prohibition against the grantees' selling or letting to any private corporation the right to sell or sublet the electric energy sold or given to it by said grantees.-----

316

Highways, Federal Aid.

1. While there is no law authorizing the removal of gravel from the public domain for public roads or highways, except as provided in the Federal Highway Act, in view of the fact that public roads and highways are a public benefit, it has been the policy of the Department to interpose no objection to the removal of such material from the public domain by State and county officers for road construction purposes, and this without payment therefor, so long as there is no substantial damage to the property; and a practice has long obtained permitting an entryman to sell sand or gravel for this purpose from the lands embraced in his claim, the purchase money being held in escrow pending final disposition of his claim.-----

294

Holding Companies.

1. Corporations holding stock of a corporation submitting the successful bid on a contract between the United States and a construction company will be acceptable as sureties if their assets, independently of the stock of the bidding

Holding Companies—Continued. Page

corporation, are collectively in excess of double the amount of the stipulated liability.-----

13

Home Owners' Loan Corporation.

1. Unless the provisions of the Home Owners' Loan Act of 1933 evince some intent on the part of Congress to except the Home Owners' Loan Corporation from the general administrative scheme embraced in the act of March 1, 1919, for the allotment of space to Government departments, etc., it is without authority to contract independently for space in a privately owned building in the District of Columbia.-----

325

2. A provision in the Home Owners' Loan Act of 1933 that "the Corporation * * * shall determine its necessary expenditures under this act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds", does not relieve the Office of National Parks, Buildings and Reservations of the obligation of allotting to the Corporation space in some building or buildings in the District of Columbia owned or leased by the United States.-----

325

3. The act of February 27, 1925 (43 Stat. 1008), specifically enumerates the forms of investment of Indian funds the Secretary of the Interior is authorized to make, and nowhere in the act are bonds of the Home Owners' Loan Corporation mentioned by name nor can they be regarded as falling within any of the classes of investments enumerated in said act.-----

341

4. Bonds of the Home Owners' Loan Corporation are not United States bonds, but are direct obligations of the Corporation, the liability of the United States extending only to guaranteeing the interest, with no responsibility whatever as to the principal; accordingly, an investment in bonds of the Home Owners' Loan Corporation would not be a compliance with the terms of the act of February 27, 1925, directing the Secretary of the Interior to invest the funds of restricted Osage Indians in United States bonds; nor do they come within

Home Owners' Loan Corporation—Continued.

the scope of the statute by regarding them as a form of first mortgage real estate investment, since the act of 1925 contemplates direct investment of the Indians' funds in first mortgages, while the loans made by the Corporation represent investments in its own behalf, the notes and mortgages taken by it being the means by which to raise funds to retire its bonds -----

341

Homestead.

Generally.

1. Instructions of March 3, 1932, "Information for Prospective Homesteaders." (Circular No. 1264) -----

127

2. Regulations of June 13, 1933, agricultural entry of lands withdrawn, classified, or reported as valuable for sodium and/or sulphur (Circular No. 1303) -----

227

3. Instructions of September 22, 1933, regarding agricultural entry of lands withdrawn as valuable for minerals subject to lease -----

305

4. Regulations of June 15, 1934, to govern absences from homestead lands on account of economic conditions (Circular No. 1326) -----

515

5. Instructions of August 20, 1934, to govern extensions of time for payments on homestead entries of ceded Indian lands (Circular No. 1334) -----

587

6. Applications and proofs of a homestead entryman are *ex parte*, not adversary, and if he misrepresents the facts which it is his duty to disclose and obtains a patent based thereon, when there was a preexisting valid mining location on the ground, he may be declared a trustee for the benefit of the locator at the suit of the latter -----

47

7. It is incumbent upon an applicant who seeks to enter or select land under the nonmineral public land laws to furnish evidence of its condition as to prior occupation and appropriation -----

47

8. An application for a homestead entry which excludes an alleged mining claim from a legal subdivision and requests a segregation survey without disclosing a basis for the segregation is merely an application for indefinite fractions of the subdivision, incapable of definition in areal extent and location, and is not subject to allowance -----

47

Homestead—Continued.

Generally—Continued.

9. When a homestead entry is allowed upon the faith of an affidavit by the homesteader that the land is not occupied or appropriated under the mining laws, the burden of proof will be upon one claiming adversely under an alleged mining location to show that the entry was not rightfully allowed -----

47

10. Where the homestead entryman, in his answer to a contest, disclaims any interest in the ground within certain mining claims insofar as they overlap his entry, and asks for the exclusion of the same from his entry to the extent of conflict, but questions the extent of conflict alleged, the mineral contestant is relieved of the burden of proving the validity of his claim, leaving only the question of the extent of conflict to be litigated -----

48

11. Where the plat and field notes of a mineral survey, of which the Land Department takes official notice, *prima facie* establishes a conflict between a mining claim and a homestead entry, such evidence will be regarded as conclusive unless successfully impeached -----

48

12. The water rights acquired and safeguarded by section 2339, Revised Statutes, are distinct from any right in the land itself, and the existence of such rights is no bar to acquisition of the land under subsequent homestead entries or locations, but all patents granted or homesteads allowed are subject to any vested accrued rights that may have been acquired under or recognized by this section -----

144

13. Land that has been cut off by avulsion from a tract of land owned by the United States abutting on a watercourse retains its status as public land, but one who has held and occupied it for many years under claim or color of title may acquire title thereto under the act of December 22, 1928, or under some other applicable public-land statute as against one attempting to enter it under the homestead law -----

102

Application.

14. Instructions of July 11, 1933 homestead applications for lands in patented private land claims (Circular No. 1305) -----

246

Homestead—Continued.

Final Proof.

15. Instructions of July 28, 1933, as to furnishing data concerning military service in connection with final proofs (Circular No. 1307)_____ 263

16. Regulations of August 22, 1933, extensions of time for homestead and desert-land proofs (Circular No. 1311, superseding Circulars 1269 and 1288)----- 274

Forest.

See 28, 29, *infra*.

Military service.

17. Instructions approved March 31, 1933, *in re* credit to homestead settlers and entrymen for military service in Indian wars extended to soldiers' widows (Circular No. 1296)----- 199

18. Instructions of July 28, 1933, as to furnishing data concerning military service in connection with final proofs (Circular No. 1307)----- 263

Reclamation.

19. While the law does not contemplate that an irrigation district shall permanently hold a Reclamation homestead bid in by it at tax sale and receive patent thereto, there is no Federal law which requires such a district to divest itself, within a fixed period to be determined by the Secretary of the Interior, of its interest in said lands; but its retention should be limited to a reasonable time, to be governed by the circumstances of each case--- 256

Residence.

20. Where an entryman is a single person without family, the physical occupation and personal presence must be that of himself, but this Department has repeatedly held that the home of an entryman is presumptively where his family resides, and absence from the entry of the entryman for the purpose of maintaining his family, though in some instances covering several unbroken years, is excusable and does not break the continuity of residence where his family continued to reside upon the homestead----- 426

21. "Actual residence" under the homestead laws, means physical occupation of the premises; it means precisely the same thing as

Homestead—Continued.

Residence—Continued.

actual inhabitancy for seven months each year, subject to proper credit for military service. 426

22. The expressions "have actually resided" and "actual permanent residence", as used in sections 2291 and 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), contemplate the performance of actual residence as distinguished from constructive residence----- 426

Second.

23. Regulations of August 5, 1933, amending Circulars Nos. 354 and 474, relative to second homesteads and desert-land entries (Circular No. 1308)----- 269

24. Regulations of July 18, 1934, governing second homestead entries, Act of June 21, 1934 (Circular No. 1328)----- 545

Soldiers' Additional.

25. No right of additional entry under sections 2306 and 2307 of the Revised Statutes inures to the minor children of a soldier who never made a homestead entry and whose widow had remarried prior to and was the wife of another at the date of adoption of the Revised Statutes, notwithstanding the fact that such widow, during her widowhood and prior to the adoption of the Revised Statutes, may have made a homestead entry for less than 160 acres of land----- 1

26. Under the provisions of section 2307 of the Revised Statutes, the minor children of the soldier are disqualified to make a soldier's additional entry if the soldier's widow remarried prior to June 22, 1874, the date of the adoption of the Revised Statutes, even though prior thereto and after the death of the soldier she had made an original homestead entry of less than 160 acres----- 3

Stock-raising.

See *Mining Claim*, 3-6.

27. Instructions of July 11, 1933, stock-raising homestead entries in geologic structures of producing oil or gas fields. (Circular No. 1304)----- 242

28. One who perfects a forest homestead under the act of June 11, 1906, for less than the allowed acreage, is not thereby disqualified from later making a stock-raising

Homestead—Continued.

Stock-raising—Continued.

homestead entry of additional lands to the aggregate permitted, and such later entry should be considered and treated as an original and not an additional entry, and accordingly not subject to the conditions and limitations of an additional entry----- 463

29. The act of March 4, 1923, is not exclusive in operation and has relation to additional entries outside of national forests when the original entry is of forest lands of the character subject to designation under the enlarged or stock-raising homestead act; and said act does not prohibit the making of original stock-raising homestead entries based upon the additional homestead rights provided for in section 6 of the act of March 2, 1889, and the act of April 28, 1904----- 463

30. The essential prerequisites to the allowance of a stock-raising homestead entry are that the tracts applied for be unappropriated, unreserved public land, designated as stock-raising land, and supported by an affidavit to the effect that no part of the land is claimed, occupied, or being worked under the mining laws--- 47

31. Allowance of an entry under the stock-raising homestead act of lands designated under that act and free from record appropriation and contest, after compliance with the law and regulations, is not erroneous because of the existence of matters which would have rendered it invalid, but which did not appear----- 47

32. Lands abutting on a stream the entire flow of which is insufficient to supply the priorities for irrigation already established and which are not therefore susceptible to irrigation may be designated under the stock-raising homestead act, if otherwise of the character contemplated by the act----- 83

Subsistence.

See *State Laws*, 71.

33. Federal subsistence homesteads are financed under authority of section 208 of Title II of the National Industrial Recovery Act, and Federal Subsistence Homesteads Corporation, organized under the laws of the State of Delaware, is the agency established to carry out the purposes

Homestead—Continued.

Subsistence—Continued.

of the act, under an authorized procedure, and is wholly financed and controlled by the United States Government----- 498

34. The real and personal property of Federal Subsistence Homesteads Corporation, being property owned by the United States, may not be taxed by a State; and the formal interposition of the corporate entity, the Federal Subsistence Homesteads Corporation, should not prevent property acquired in the name of the corporation from being considered property of the United States for purposes of taxation----- 499

35. The Federal Subsistence Homesteads Corporation is a Delaware corporation, organized pursuant to an order of the Secretary of the Interior for the purpose of carrying out the powers vested in the President of the United States and "such agencies as he may establish", by section 208 of the National Industrial Recovery Act (48 Stat. 195), the Secretary being made sole stockholder of the corporation----- 390

36. The Federal Subsistence Homesteads Corporation may take as security for a loan any quantity of the stock of a corporation formed by prospective homesteaders, and also the right to vote such stock, without causing the borrower to become a Federal instrumentality----- 390

37. The subsistence homesteads plan adopted to give effect to section 208 of the National Industrial Recovery Act contemplates ultimate fee simple title in the homesteader, so that lands donated by a State to the United States, to be used for subsistence homesteads and "allied projects", with the condition subsequent that when such use shall cease, the lands shall revert to the State, should not be accepted on behalf of the United States, for the reason that the condition incorporated is incompatible with the subsistence homesteads plan----- 540

38. The Federal Subsistence Homesteads Corporation, being wholly financed and controlled by the United States Government and serving no function other than aiding in the purchase of subsistence homesteads by individuals as provided by section 208 of the Na-

Homestead—Continued.

Subsistence—Continued.

tional Recovery Act, does not fall within the category of corporations which it was the intention of Congress should be barred from acquiring or controlling lands within Reclamation projects; nor does the statutory limitation of individual holdings to 160 acres apply to such a corporation-----

566

39. Employees of Federal Subsistence Homesteads Corporation being employees of the United States and the corporation wholly directed and controlled by the Secretary of the Interior and the members of his departmental staff, are entitled to the benefits of the Employees' Compensation Act in the same degree as persons rendering similar services for the United States without the interposition of the corporate entity-----

500

40. Livestock, implements, seed, fertilizer and household effects may be embraced in the concept of a "subsistence homestead", taking into account the employment of the designation in section 208 of the National Industrial Recovery Act, the expressed purposes of the act, and the connotations of the individual words composing the expression-----

500

41. The function of aiding in the purchase of subsistence homesteads as provided for in section 208, chapter 90, of the National Industrial Recovery Act (48 Stat. 119, 205), is broad enough to embrace sale of homestead plots and sale of community structures to cooperatives of homesteaders and also the loan of operating capital to any such cooperative duly obligated to conduct or aid in community enterprises-----

568

42. Generally, undertakings reasonably calculated so to improve the economic status of homesteaders that they will be better able to pay for them, or undertakings reasonably calculated to create an environment appropriate for a residential community under presently accepted standards of living, are embraced within the conception of aiding in the purchase of subsistence homesteads-----

569

43. An agreement between Federal Subsistence Homesteads Corporation and local authorities that such benefits as roads, school facilities, fire protection, etc., shall

Homestead—Continued.

Subsistence—Continued.

be provided in a particular manner, would involve an undertaking different from any duty legally incumbent upon the local authorities and would accordingly be a contract upon legally sufficient consideration-----

500

44. Among the powers legally exercisable by Federal Subsistence Homesteads Corporation are payment of cash to secure binding options on land, and employment of local attorneys and title companies to prepare abstracts of title, etc-----

500

45. The broad discretion under which the subsistence homestead section of the National Industrial Recovery Act is administered may not be employed to override a rule and policy so firmly established as that which prohibits insurance of Government property-----

500

46. The Federal Subsistence Homesteads Corporation may construct and equip schools, community buildings, roads, and other community facilities, and dispose of them by sale or such dedication as will make them available to a subsistence homestead community-----

569

47. The Federal Subsistence Homesteads Corporation may not lend financial aid to private enterprises to be conducted within subsistence homestead communities for profit and not primarily for the benefit of the homesteaders-----

569

48. Section 208, chapter 90, of the National Industrial Recovery Act does not contemplate that community buildings or facilities shall be supplied to homesteaders gratuitously, but requires that the cost thereof shall be repaid into the subsistence homestead revolving fund-----

569

49. The right of the pledgee to vote pledged stock is not incompatible with the relation of debtor and creditor, such right being an essential element of the value of the pledge as collateral and recognized by the courts as a proper part of a credit transaction-----

390

50. The transactions provided for by the terms of the authority granted the Federal Subsistence Homesteads Corporation are *bona fide* loans, and any such loan as is proposed would be an "expenditure of appropriated funds"-----

390

51. The Federal Subsistence Homesteads Corporation may lease

Homestead—Continued.

Subsistence—Continued.

plots to teachers, social workers, and technicians who serve a subsistence homestead community.....

Page
569

52. The Federal Subsistence Homesteads Corporation may permit such temporary occupancy of land acquired for a subsistence homestead project as it may deem expedient whenever it has been administratively determined that such property is not immediately useful for subsistence homestead purposes.....

569

53. Interest earned by subsistence homestead expenditures must be covered into the Treasury of the United States as "miscellaneous receipts".....

569

54. The acquisition and temporary holding of title and construction of the buildings of a residential community are preliminary steps taken by Federal Subsistence Homesteads Corporation to aid private persons in the purchase of subsistence homesteads.....

580

55. Houses and related structures built by Federal Subsistence Homesteads Corporation in the various States are not within the purview of section 255, title 40, U. S. Code, which section contemplates purchases of land over which the United States shall thenceforth have exclusive jurisdiction, such as forts, arsenals, etc., whereas the authority of Federal Subsistence Homesteads Corporation to buy land and erect buildings has no existence apart from a duty to transfer the completed homesteads to private purchasers for residential use.....

580

56. A subsistence homestead does not become taxable by the State until the homesteader shall have become entitled to a deed under the provisions of his contract with Federal Subsistence Homesteads Corporation.....

499

57. The acquisition and temporary holding of title by Federal Subsistence Homesteads Corporation, followed by resale to homesteaders, is substantially a security device adopted as a convenient alternative for the usual purchase money and construction loan secured by mortgage on premises acquired directly by a prospective home owner.....

499

58. Local authorities have power to arrest persons found in subsistence homesteads as a neces-

Homestead—Continued.

Page

Subsistence—Continued.

sary incident of the jurisdiction of the State over such homestead sites; and the relationship of the United States to a subsistence homestead project is not such as to interfere with the acquisition by homesteading families of citizenship in the city, county, and State in which the homestead site is located, or the right to vote.....

500

Hours of Labor.

See *Wages and Hours of Labor.*

Hunting.

See *Yellowstone Park, 1-6.*

Incontiguous Tracts.

See *Mineral Leasing Act, 2, 3.*

Indemnity.

See *School Lands, 2-5.*

Indian Irrigation Projects.

See *Statutory Construction, 3.*

Generally.

1. Indian irrigation projects are constructed pursuant to special acts of Congress and annual appropriations from the Treasury, and the moneys resulting from payment of construction charges, etc., are returned to the Treasury as general funds, whereas the Reclamation Act fund is in fact a revolving trust fund, money expended therefrom being returned thereto by the owners of the lands benefited, to be again expended in connection with Reclamation Act projects.....

90

2. The limitation on salary of the consulting engineer of the Indian Irrigation Service, provided by the act of February 28, 1929 (45 Stat. 1406), is without application to salaries paid from funds allotted for construction work by the Administrator of Public Works from funds made available under the terms of the National Industrial Recovery Act.....

411

3. The employment of consulting engineers in the Indian Reclamation Service, where compensated from the Public Works fund of the National Industrial Recovery Administration, must be in conformity with the Executive order of November 18, 1933, or the Classification Act of 1923 as amended.....

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Indian Irrigation Projects—Con. Page

Generally—Continued.

4. The restrictions imposed by the special act of Congress of February 28, 1929 (45 Stat. 1406), authorizing the Secretary of the Interior to employ engineers and economists for consultation purposes on important reclamation work, apply only to employment authorized by that act, and do not bar the establishment of new or additional positions in the service and payment therefor from funds allotted from the Public Works fund.----- 411

5. The employment of consulting engineers in the Indian Reclamation Service, where compensated from the Public Works fund of the National Industrial Recovery Administration, must be in conformity with the Executive order of November 18, 1933, or the Classification Act of 1923 as amended.----- 411

6. It would be unusual to say that Congress intended, by the act of February 14, 1920 (41 Stat. 408), to declare as irrigable all land for which water for irrigation purposes can be delivered, and the Secretary of the Interior would not be justified in determining that land was irrigable if it was not arable and susceptible of economic cultivation with the use of irrigation water.----- 195

7. If, before the irrigable area of a reclamation project is determined and construction charges fixed, experience in actual cultivation and irrigation of known areas demonstrates that a crop cannot be economically produced thereon, such areas should be eliminated in the final determination of irrigable area, even though land "to which water for irrigation purposes can be delivered"----- 195

Cost, Charges, Apportionment.

8. Congress, in the act of August 1, 1914 (38 Stat. 582), having authorized and directed the Secretary of the Interior to act in determining the per acre charge for irrigation of lands within Indian reclamation projects, impliedly gave him authority to determine the estimated cost of the project and the total area that can be irrigated.----- 195

9. The act of August 1, 1914 (38 Stat. 582), directing the Secretary of the Interior to apportion

Indian Irrigation Projects—Con. Page

Cost, Charges, Apportionment—Con. the cost of irrigation projects constructed for Indians in accordance with the benefits received by each individual Indian, requires him, in effect, to make an apportionment of the cost of such irrigation works upon a per acre basis based upon benefits received.----- 195

10. In order to fix charges upon irrigated lands within Indian reclamation projects the Secretary of the Interior must determine the estimated cost of the project and the total area that can be irrigated, which factors supply the basis for such charges.----- 195

11. The act of July 1, 1932 (47 Stat. 564), contained a proviso that "the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessment shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished." *Held*, that the surrounding circumstances afford clear warrant for the conclusion that Government Indian irrigation projects were meant, and not irrigation projects within the purview of the Reclamation Act.----- 90

12. Under the authority vested in him, the Secretary of the Interior may amend any notice fixing the amount and date of payment of charges so as to change the amount of the charge, and may also defer the time when the payment falls due, but when the charges thus fixed fall due, he is given no authority to extend them.----- 336

13. Congress has not granted to the Secretary of the Interior general authority to extend the time of payment, after they fall due, of either the operation and maintenance charge or the construction charge on Indian irrigation projects, and legislation passed by it from time to time, notably the act of February 13, 1931 (46 Stat. 1093), clearly indicates that it considers the Secretary is without such authority, except with Congressional sanction previously given; and this, furthermore, has been the view of the Department, since where such authority has been required, appropriate legislation from Congress has been obtained.----- 336

Indians and Indian Lands.

Page

See *Alaska Natives; Fish and Game*, 3-5; *Statutory Construction*, 11X16; *United States, Reversion of Title to*, 1.

Generally.

1. The act of February 27, 1925 (43 Stat. 1008), specifically enumerates the forms of investment of Indian funds the Secretary of the Interior is authorized to make, and nowhere in the act are bonds of the Home Owners' Loan Corporation mentioned by name nor can they be regarded as falling within any of the classes of investments enumerated in said act.

341

2. The Government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. Whether the transaction takes the form of a treaty or a statute is immaterial. The important considerations are that there should be the essentials of a binding agreement between the Government and the Indian and the resulting vesting of a property right in the Indian.

65

3. Section 10 of the act of June 25, 1910 (36 Stat. 855), authorizing the Secretary of the Interior, under certain conditions, to issue patents to individual Indians for village lots occupied by them, contemplates lots occupied at the time in existing villages, and not lots in villages in prospect.

72

4. Where an Indian reservation is virtually abandoned as such by the Indians in favor of another reservation, by satisfying the allotment right thereon and living elsewhere, the land so abandoned becomes, in effect, the land of the United States, and it and the timber thereon become subject to disposition by the United States, and money derived from the sale of such timber should be covered into the Treasury of the United States, not as Indian money, but miscellaneous receipts.

72

4½. Where the grant of a right-of-way to a railroad company across Indian lands creates a possibility of reversion in the Indians, and the Indian title is later extinguished in favor of the United States by treaty, the right of reversion passes to the United States and inures to its benefit.

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Indians and Indian Lands—Con. Page

Allotments.

5. By the passage of the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205), there appears a clear intent upon the part of Congress to restore Indian trust allotment lands upon which fee simple patents had issued to the same status "as though fee patents had never been issued."

65

6. The Indians of the Georgetown (or Shoalwater) Band, being members of one of the "tribes of fish-eating Indians on the Pacific coast", are, under the terms of the act of March 4, 1911 (36 Stat. 1345), entitled to allotments on the Quinalt Indian Reservation.

71

7. Where Indians, entitled to allotments on one reservation, elect to take them on another, under authority of law, such taking exhausts the right, under the well-settled rule that no Indian is entitled to dual privileges or double benefits either as a member of two tribes or otherwise. *Mandler v. United States* (52 Fed. 2d, 713).

72

8. In the matter of allotments of land, Indian children take the status of their parents, and, like them, are entitled to allotments and should be allotted. *Halbert v. United States* (283 U. S. 753).

72

9. The acts of February 26, 1927, and February 21, 1931, authorizing the Secretary of the Interior to cancel patents in fee issued by him to Indian allottees upon his own initiative and without request or consent on the part of the Indian, make no provision for conditional cancellation of such patents, which form of cancellation would also be inconsistent in principle with the purpose of such acts, which is to restore the land to the same status as though such fee patent had never issued and to issue a new trust patent having the form and legal effect of one issued under the provisions of the act of February 8, 1887, and amendments thereto.

160

10. The language of the act of February 26, 1927, and of the supplemental act of February 21, 1931, evinces an intent on the part of Congress that patents in fee simple issued to Indian allottees before the expiration of the trust period or authorized extensions

Indians and Indian Lands—Con. Page

Allotments—Continued.

thereof should not be canceled by the Secretary of the Interior if the land involved is not free of liens attaching subsequent to issuance of the fee simple patent... 161

11. Where an Indian allottee applied for cancellation of the patent in fee issued to him by the Secretary of the Interior upon that official's initiative and without the Indian's application or consent, and the allotment has since become subject to an oil and gas royalty interest, cancellation of the fee patent is not authorized... 161

Cherokees.

See 23, 26-28, *infra*.

Chippewas.

See 12, 13, *infra*.

Devises and Wills.

12. An Indian's disposal of an allotment by will is an alienation within the meaning of the provisions contained in the restricted fee patents issued to the Chippewa Indians under the Treaty of September 30, 1854, and approval of such wills by the President is effective to remove all restrictions against alienation of such lands in the hands of the devisees... 555

13. The act of June 25, 1910, as amended by the act of February 14, 1913, requiring, among other things, approval by the Secretary of the Interior of a will of a Chippewa allottee devising lands held under a restricted fee patent issued pursuant to the Treaty of September 30, 1854, deals only with Indians alive or who might thereafter come into being, and contains nothing, express or implied, indicating intention to embrace within its terms the will of an Indian who died prior to its enactment... 555

Electrical Energy.

See 66, 67, *infra*.

Fishing and Game Rights.

14. A regulation of fishing, imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intentment or operation a denial to a privileged Indian community of its right to fish, is not violative of a provision of a treaty with

Indians and Indian Lands—Con. Page

Fishing and Game Rights—Con.

the Indians (see 12 Stat. 951; 45 Stat. 1158) under which they are guaranteed "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory"----- 418

15. A reasonable construction of a provision of a treaty with Indians guaranteeing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory", does not include authority to construct what is known as a willow weir or willow dam in the channel of the Columbia River, for the purpose of holding the salmon run, and in disregard of the State laws and regulations... 419

16. A Yakima Indian is not exempt from the general laws of the State of Oregon requiring a license in order to sell fish caught in the Columbia River and to pay a poundage tax on such sales, when sold at any place within the jurisdiction of the State... 419

Five Civilized Tribes.

16½. Restrictions applicable... 382

17. Service in the schools of the Five Civilized Tribes prior to the act of June 28, 1898, was not service performed for the United States, and service in those schools between that date and the date on which the act of April 26, 1906, which placed the control thereof under the Secretary of the Interior, became effective, is creditable under the civil service retirement act only where the appointment was made by that official or by his authority... 109

18. The act of January 27, 1933 (47 Stat. 777), insofar as it relates to the creation of trusts out of the restricted property of Indians of the Five Civilized Tribes, is without application to life insurance policies or annuity contracts... 310

19. Had Congress in mind insurance or insurance companies when it enacted section 2 of the act of January 27, 1933, the authority granted would not have been confined, as it was, to the creation of "trusts", to be administered by "incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees"----- 310

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Five Civilized Tribes—Continued.

20. In a policy of insurance and in annuity contracts no trust is created, the relations of the parties being those of debtor and creditor, the premiums paid belonging absolutely to the insurer, in consideration for which it binds itself to pay a given sum or sums according to the terms of the policy it has issued to the insured....

310

21. While the authority granted the Secretary of the Interior by section 2 of the act of January 27, 1933, being confined to trusts, does not contemplate or include life-insurance policies or annuity contracts, it does not follow that the Secretary is nowhere clothed with authority to permit Indians of the class named in the act to purchase annuities or life insurance out of restricted funds, section 1 of said act placing such funds under his jurisdiction and control until April 26, 1956, "subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds * * * belong, under such rules and regulations as said Secretary may prescribe", thus conferring a broad discretionary power upon the Secretary over expenditure of the funds of these Indians, including authority to permit any such Indian to purchase life insurance or an annuity if the Secretary determines it is for his benefit to do so.....

310

22. The act of January 27, 1933 (47 Stat. 777), insofar as it relates to lands belonging to members of the Five Civilized Tribes in Oklahoma, is not intended to be given retroactive scope or operation, from which it follows that where an allottee of the Five Tribes died prior to April 26, 1931, at which time his entire allotment was restricted and tax exempt, leaving heirs of one-half or more but less than the full blood, his allotted land passed to his heirs unrestricted and the restrictions were not reimposed by said act of January 27, 1933.....

382

23. Under authority of successive treaties with the Cherokee Nation, these Indians passed and administered their own laws, including statutes of descent, until October 1, 1898, and by the act of May 2, 1890 (26 Stat. 81), the laws of Arkansas were extended

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Five Civilized Tribes—Continued.

to Indian Territory. *Held*, that upon the death, intestate, in 1888, of an Indian adopted into the Cherokee Nation, the statutes of descent of the Cherokee Nation would govern her estate, and upon the death of her husband, also adopted into the Cherokee Nation, in 1901, the laws of Arkansas relative to descent and distribution would control.....

298

Former Indian Lands, Restoration.

23½. Instructions of September 19, 1934 (submitted Aug. 10, 1934), to govern restoration of lands formerly Indian to tribal ownership.....

559

Georgetown (Shoalwater) Band.

See 6-8, *supra*.

Inheritance.

24. The absence, in an Indian tribe, of any law, rule, or custom of inheritance, would not preclude a member of said tribe who had obtained adoption into another tribe, the latter having laws of inheritance, from obtaining the benefit of inheritance, even though the property involved was a benefit conferred only upon members of the tribe abandoned.....

297

25. Upon the death of an Indian, the right of inheritance in his property is controlled by the laws, usages, and customs of the tribe or nation of which he is at the time a member, whether by birth or adoption.....

297

26. A Shawnee Indian woman entitled to share in the appropriation made by Congress (act of Dec. 22, 1927) in settlement of Civil War claims of certain Shawnees, was adopted, together with her husband, into the Cherokee Nation, where she died intestate and without issue in 1883, leaving a husband surviving, who died in 1901. *Held*, that the tribal laws of the Cherokee Nation covering inheritance, at the date of her death, applied in her case, and that her approved claim against the Government, although originating while she was a member of the Shawnee tribe, would be governed, in the matter of inheritance, by said laws of the Cherokee Nation.....

298

27. Under authority of successive treaties with the Cherokee Na-

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Inheritance—Continued.

tion, these Indians passed and administered their own laws, including statutes of descent, until October 1, 1898, and by the act of May 2, 1890 (26 Stat. 81), the laws of Arkansas were extended to Indian Territory. *Held*, that upon the death, intestate, in 1888, of an Indian adopted into the Cherokee Nation, the statutes of descent of the Cherokee Nation would govern her estate, and upon the death of her husband, also adopted into the Cherokee Nation, in 1901, the laws of Arkansas relative to descent and distribution would control

298

28. In section 4 of the Wheeler-Howard Act, limiting the class of persons to whom may be devised restricted Indian lands, it is provided that "in all instances such lands or interests shall descend or be devised * * * to any member of such tribe or of such corporation or any heirs of such member." *Held*, that the phrase, "heirs of such member", therein employed, should be construed to mean "heirs of the testator", such construction being reasonable, consistent with legal usage, and in harmony with the general plan and expressed intent of Congress

584

29. The act of January 27, 1933 (47 Stat. 777), insofar as it relates to lands belonging to members of the Five Civilized Tribes in Oklahoma, is not intended to be given retroactive scope or operation, from which it follows that where an allottee of the Five Tribes died prior to April 26, 1931, at which time his entire allotment was restricted and tax exempt, leaving heirs of one-half or more but less than the full blood, his allotted land passed to his heirs unrestricted and the restrictions were not reimposed by said act of January 27, 1933

382

30. The act of January 27, 1933, bears no indication that it was intended to be retroactive in operation and hence does not take from the county courts of Oklahoma the jurisdiction theretofore exercised by them over conveyances by fullblood Indian heirs of lands or interests therein inherited by them prior to January 27, 1933

383

Life Insurance and Annuity.

See 18-21, *supra*.

Navajo Reservation.

30½. Instructions of April 26, 1933, lands in Utah added to Navajo reservation

205

Oil and Gas Rights.

See 10, *supra*.

31. While in the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205), the express limitations upon the authority of the Secretary of the Interior to cancel patents in fee to Indian allottees do not include one forbidding such cancellation where the allottee has conveyed an interest in oil and gas royalty rights since patent in fee was issued, such conveyance would bring the case within the spirit, if not the letter, of the inhibition contained in said acts

160

32. An oil and gas lease made under authority of section 2 of the act of May 27, 1908 (35 Stat. 312), contained provisions that it should run for five years from date of approval, which was November 3, 1920, "and as much longer thereafter as oil or gas is found in paying quantities;" that the lessee should pay as royalty on each gas-producing well \$300 per annum in advance, to be calculated from the date of commencement of utilization; and that, if the gas well should prove unprofitable commercially, and the lessee desired to retain certain gas-producing privileges, he should pay a rental of \$100 per annum, in advance, calculated from the date of discovery of gas, on each gas-producing well. *Held*, That no gas well having produced commercially since the year 1926, the mere payment by the lessee of \$100 annually, under the clause of the lease which makes provision for retention of gas-producing privileges in an unprofitable well, would not operate to extend the lease beyond the fixed or primary period of five years, an extension of the lease requiring, as a prerequisite, production of oil or gas in paying quantities

422

Osage Tribe.

33. An act of Congress (act February 27, 1925, 43 Stat. 1008) intended to permit greater latitude

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in the investment of the surplus funds of Osage Indians contained language which, if given literal application, would preclude the Secretary of the Interior from investing the funds of such Indians, if resident in Oklahoma, in bonds of the United States Government, and in other respects would work hardship to such Indians generally, whether resident in Oklahoma or not. <i>Held</i> , That the presence of this language in the statute should not preclude the Secretary from investing these funds in bonds of the United States Government, should he deem such action in the interest of the Indians.....	260	which the period of exemption terminated on June 28, 1931.....	105
34. Bonds of the Home Owners' Loan Corporation are not United States bonds, but are direct obligations of the Corporation, the liability of the United States extending only to guaranteeing the interest, with no responsibility whatever as to the principal; accordingly, an investment in bonds of the Home Owners' Loan Corporation would not be a compliance with the terms of the act of February 27, 1925, directing the Secretary of the Interior to invest the funds of restricted Osage Indians in United States bonds; nor do they come within the scope of the statute by regarding them as a form of first mortgage real estate investment, since the act of 1925 contemplates direct investment of the Indians' funds in first mortgages, while the loans made by the Corporation represent investments in its own behalf, the notes and mortgages taken by it being the means by which to raise funds to retire its bonds.....	260	Papago Lands.	
35. The provision in the act of March 2, 1929, which extended until January 1, 1959, the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency had not issued had reference only to such Indians as were not holding certificates of competency on the former date, but as to those having certificates of competency outstanding on that date which were subsequently revoked the taxation of their homesteads is to be governed by subsection 7 of section 2 of the act of June 28, 1906, under	341	36. <i>Held</i> , That under dominion of Spain and Mexico the Papago Indians did not have title in fee to the lands they occupied; that in 1853, through the Gadsden Purchase, the United States acquired title to these lands, subject to an Indian right of occupancy of an area not exactly determined; that no interests in minerals was accessory or incidental to whatever surface rights the Indians may have enjoyed; that complete and unincumbered title to minerals in the land was formerly vested in the Mexican State and passed to the United States upon cession of the territory; that the appropriate manner of protecting the Papagos in their possession is a matter exclusively of political cognizance.....	359
		37. It was accepted legal theory of the European nations which colonized America that upon discovery of any new lands complete jurisdiction and ownership became vested in the sovereign to whom the discoverer owed allegiance, from which it follows that all rights or titles to lands once a part of Mexico, vested in private persons, severally or in groups, must derive their legal character from the Spanish crown or succeeding proprietors.....	359
		38. Spanish and Mexican law are decisive of the question of the title under which the lands of the Papago Indians are held.....	359
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		40. A claim of tribal ownership of a large land area cannot be established without a fixing of boundaries, and ownership by village communities can be established only if such communities can be defined.....	359
		41. By confirming the acts of Spanish officers in granting lands which were in Indian possession, United States courts, Federal and State, have accorded recognition to the doctrine that title to lands held by Indians in Mexico was not a fee simple title.....	359

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Papago Lands—Continued.

Patent in Fee—Cancellation.

42. Since the cession to the United States of the territory which embraces the Papago lands, the courts in this country have recognized the ownership of mines by Spain and Mexico before the cession as well as the succession of the United States to that ownership, and the Supreme Court has stated expressly that under Spanish law minerals in Indian lands were the property of the Crown; also the Executive and Legislative branches of the Federal Government have likewise recognized the succession of the Federal Government to the ownership of mines in what was formerly Spanish and Mexican territory-----

359

43. Certain laws of the Spanish regime are incompatible with recognition of ultimate title in the Indians, as, for instance, the law (Law 23, Book 4, Title 7, "Compilation of the Indies") permitting Spaniards to make new settlements in Indian territory, peaceably, if possible, but otherwise if necessary-----

360

44. The Executive order of February 1, 1917, reserving lands for the Papago Indians, excepted mineral deposits and provided that the reservation area should be open to entry and location under the mining laws of the United States-----

360

45. Even if prescriptive right, as against the Crown, resulting from immemorial possession, was recognized by the Spanish law, an appropriate formal procedure was necessary to a complete title. Case of *Carino v. The Insular Government of the Philippine Islands* (212 U. S. 449, 461) distinguished-----

360

46. The Indian right of surface occupancy within the exterior boundaries of the Papago Indian Reservation, Arizona, is quite independent of the mineral or non-mineral character of the land-----

437

47. The presence, in an administrative recommendation (see 45 L. D. 537), of an observation that "ample protection will be given the Indians in the occupation and use of their mineral lands", is no sufficient basis for an inference that the Department has ruled or should now rule that Indian surface rights are restricted to non-mineral lands-----

437

48. While in the acts of February 26, 1927 (44 Stat. 1247), and February 21, 1931 (46 Stat. 1205), the express limitations upon the authority of the Secretary of the Interior to cancel patents in fee to Indian allottees do not include one forbidding such cancellation where the allottee has conveyed an interest in oil and gas royalty rights since patent in fee was issued, such conveyance would bring the case within the spirit, if not the letter, of the inhibition contained in said acts-----

160

49. The acts of February 26, 1927, and February 21, 1931, authorizing the Secretary of the Interior to cancel patents in fee issued by him to Indian allottees upon his own initiative and without request or consent on the part of the Indian, make no provision for conditional cancellation of such patents, which form of cancellation would also be inconsistent in principle with the purpose of such acts, which is to restore the land to the same status as though such fee patent had never issued and to issue a new trust patent having the form and legal effect of one issued under the provisions of the act of February 8, 1887, and amendments thereto----

160

50. Where an Indian allottee applied for cancellation of the patent in fee issued to him by the Secretary of the Interior upon that official's initiative and without the Indian's application or consent, and the allotment has since become subject to an oil and gas royalty interest, cancellation of the fee patent is not authorized-----

161

51. The language of the act of February 26, 1927, and of the supplemental act of February 21, 1931, evinces an intent on the part of Congress that patents in fee simple issued to Indian allottees before the expiration of the trust period or authorized extension thereof should not be canceled by the Secretary of the Interior if the land involved is not free of liens attaching subsequent to issuance of the fee simple patent-----

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Shawnees.

See 26, *supra*.

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Swinomish Indians.

52. The Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), passed to give effect to the treaty between the United States and Great Britain, proclaimed by the President on December 8, 1916 (39 Stat., pt. 2, p. 1702), is applicable to Indians and Indian reservations, the treaty and statute containing no provision excluding Indians or Indian reservations from their operation, and the treaty expressly mentioning concessions to Indians not extended to any other race-----

517

53. The privilege of hunting given to the Swinomish and other Indian tribes by the treaty of January 22, 1855, known as the Treaty of Point Elliott, does not extend to the reservation lands, but is confined to the undisposed of and unappropriated public lands of the United States, there being no necessity for making a specific reservation with respect to the reservation lands at the time this treaty was entered into-----

517

54. The right of the Indians who were parties to the Treaty of Point Elliott to hunt on their reservation lands was not based upon any provision of the treaty, but was a right already existing in them and not granted away by the treaty-----

518

55. The Migratory Bird Treaty Act, insofar as it restrains the Indians from taking and killing the class of game to which it applies, is based upon the power of Congress, as the lawmaking authority, to prescribe game laws restricting the Indians in their rights of hunting on reservation lands-----

518

56. Primarily, the States, both as trustees of the rights of their people and in the exercise of their police power, have control over the right to reduce wild game to possession; but this rule is without application to Indian reservations, and Congress, having paramount authority over such reservations and the Indians occupying them, may provide game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting-----

518

Timber Sale.

See *Constitution of the United States, 2.*

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57. Where an Indian Reservation is virtually abandoned as such by the Indians in favor of another reservation, by satisfying the allotment right thereon and living elsewhere, the land so abandoned becomes, in effect, the land of the United States, and it and the timber thereon become subject to disposition by the United States, and money derived from the sale of such timber should be covered into the Treasury of the United States, not as Indian money, but miscellaneous receipts-----

72

58. A paper and pulp company's contract with Indians to purchase timber from them contained a provision affording the company administrative recourse against economically unreasonable stumpage prices, by price reduction, which provision formed a substantial consideration for the company's contractual promises. *Quære:* Whether a later statute if construed to deprive the company of such administrative recourse for a price reduction would not violate the "due process" clause of the Fifth Amendment to the Federal Constitution-----

401

59. The act of March 4, 1933 (47 Stat. 1568), which merely authorizes and directs the Secretary of the Interior, with the consent of the Indians and the purchasers, to modify timber sale contracts, cannot properly be construed to modify, by its own operation and without the consent of the purchaser, a contract provision for price reduction-----

401

60. Consideration of the background and legislative history of the act of March 4, 1933, and the language of the act itself, leads to the conclusion that the act should not be construed so as to require consent of the Indians involved to a modification of a contract which, by its own terms, may be modified without the Indians' consent-----

401

61. A contract must be viewed and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them, and, once ascertained, the intention of the parties must be given effect, sacrific-

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ing, if necessary, the literal meaning in order that the major purpose may not fail.....	546
62. A provision in a contract between an Indian tribe and a logging company required that before a reduction could be made in the stumpage price paid to the Indians it must be established that the logging "is being conducted" at a loss. <i>Held</i> , That by the use in the contract of the words "is being conducted" it was not intended that the means of proof should be limited to logging then and there actually being performed, but that it would be permissible to establish by other means that logging could not be conducted on the land at a profit unless a reduction was made in the price to be paid the Indians....	546
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63. The courts and the Commissioner of Internal Revenue have set up an implied inhibition against the collection of the Internal Revenue tax from Indian wards.....	218
64. General acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them; and wherever they and their interests have been the subject affected by legislation, they have been named and their interests specifically dealt with.....	219
65. To the extent of participation in income from property which still remains within the ownership of an Indian tribe as a whole, restricted Indians should not be taxed under the Federal revenue acts, since to such extent it appears not the intention of Congress.....	219
66. Electrical energy, generated by a power plant constructed out of tribal funds and operated in connection with Indian mills on an Indian reservation, when furnished to non-Indians, is taxable under the Internal Revenue Act of June 6, 1932.....	219
67. Electrical energy generated on an Indian reservation by a power plant constructed out of tribal funds and operated as an adjunct to or in connection with an Indian commercial activity is not taxable under section 616 of the act of June 6, 1932 (47 Stat.	

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266), the lands being tribal and unallotted, and the Indians wards of the Government.....	219
68. Immunity from taxation by a State or a political division thereof is one of the vested rights ordinarily incident to land in an Indian trust patent status. <i>United States v. Rickert</i> (188 U. S. 432).....	65
69. There can be no serious question of the authority of Congress to remove restrictions upon the alienation of allotted Indian lands with or without the Indians' consent, but this must be distinguished from depriving Indian allottees of the immunity from taxation conferred upon them by their trust patents. The Coeur d'Alene Indians were guaranteed nontaxable land for 25 years succeeding issuance of trust patent, and this was a property right which, once vested, could be divested only by due process of law. (Citing <i>United States v. Benewah County</i> , 290 Fed. 628.).....	65
70. In a trust patent issued to a Coeur d'Alene Indian December 16, 1909, for allotted lands within the Coeur d'Alene reservation, it was declared, in conformity with the governing statute, that the United States would hold the legal title in trust for 25 years, after which, unless the period were extended by the President, the fee would be conveyed discharged of the trust and free of all charges and incumbrances. <i>Held</i> , that a fee simple patent, issued to the heirs of said Indian, although in furtherance of an act of Congress, did not render the lands covered by said patent subject to taxation by the State of Idaho or a political subdivision thereof.....	65
71. Where lands were ceded by the Coeur d'Alene Indians to the United States in accordance with an agreement, ratified by Congress, that a portion thereof "should be held forever as Indian land and as homes for the Coeur d'Alene Indians," and allotments in severalty of portions thereof were made to Indians under the general allotment act of February 8, 1887, and trust patents issued, said land is impressed with a trust status from the date of the original trust patent, with all the	

- Indians and Indian Lands—Con.** Page
- Taxability—Continued.**
- rights incident thereto, including immunity from taxation by the State or its political subdivisions. 65
72. The provision in the act of March 2, 1929, which extended until January 1, 1959, the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency had not issued had reference only to such Indians as were not holding certificates of competency on the former date, but as to those having certificates of competency outstanding on that date which were subsequently revoked, the taxation of their homesteads is to be governed by subsection 7 of section 2 of the act of June 28, 1906, under which the period of exemption terminated on June 28, 1931. 105
- Trusts.**
- See 5, 9, 49, *supra*.
- Wheeler-Act Regulations.**
- See 23½, *supra*.
- Yakimas.**
- See 14-16, *supra*.
- Injury.**
- See *Claim for Damage; National Parks, Buildings, and Reservations*, 13-18.
- Insane Persons.**
- See *St. Elizabeths Hospital*.
- Insurance Policies, Indian.**
- See *Indians and Indian Lands*, 18-21.
- Internal Revenue.**
- See *Indians and Indian Lands*, 63-67.
- Interpretation of Statutes.**
- See *Statutory Construction*.
- Inventions.**
- See *Patent Rights to Invention*.
- Irrigation District.**
- See *Indian Irrigation Projects; Reclamation*.
1. While the law does not contemplate that an irrigation district shall permanently hold a Reclamation homestead bid in by it at tax sale and receive patent thereto, there is no Federal law
- Irrigation District—Continued.** Page
- which requires such a district to divest itself, within a fixed period to be determined by the Secretary of the Interior, of its interest in said lands; but its retention should be limited to a reasonable time, to be governed by the circumstances of each case.----- 256
2. The Federal statutes relative to the payment of debts and demands due the United States do not require the acceptance of money only in the settlement of such debts and demands, and accordingly the proper administrative official representing the United States may, where it would be to the interest of the United States, accept a "call" warrant for indebtedness of an irrigation district under its contract with the United States Reclamation Service for operation and maintenance of storage works, such warrant to be held by the United States until paid ----- 264
- Islands.**
- See *Arkansas River Islands*.
- Jurisdiction of Department.**
- See *Administrative Jurisdiction; Bedloe's Island; State Courts; State Laws*.
- Labor Policies.**
- See *Wages and Hours of Labor*.
- Laches.**
- See *School Lands*, 1.
- Lease.**
- See *Airport; Mineral Leasing Act; Oil and Gas Lands*.
- Leasing Act.**
- See *Mineral Leasing Act; Oil and Gas Lands*.
- Loans.**
- See *Homestead*, 33-58.
- Marriage and Divorce.**
- Marriage by Custom.**
1. There is no provision of law forbidding marriages between Alaskan natives according to native custom, and in the absence of a definite expression upon the subject by Congress, in whom the paramount authority over these people rests, marriages among them should be accorded the same legal recognition and sanctity

Marriage and Divorce—Con.

Marriage and Customs—Continued.

which the courts of this country have uniformly extended to similar relations among the American Indians -----

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40

2. The validity of a particular marriage, in any given case, must be determined by the facts and conditions appearing, and no specific rule governing all cases can be laid down-----

40

3. Although the Territorial Legislature of Alaska has passed laws regulating marriage among the inhabitants of the Territory, such laws are similar in character to those of American commonwealths, which, nevertheless, have recognized the validity of marriages among the Indians by tribal custom-----

40

4. By the weight of legal authority, wardship alone is not sufficient to render valid a marriage or divorce by Indian custom, but at the time of such marriage or divorce it must appear that the parties thereto have retained their tribal relations, and that no Federal statute intervened. Such marriage or divorce is not in fact a common-law marriage, but possessed of the legal force of a ceremonial marriage between whites-----

40

Meandered Lands, Wisconsin.

7. Regulations of December 8, 1932, regarding Wisconsin lands erroneously meandered (Circular No. 994, reprint)-----

107

Migratory Birds and Treaty.

1. The Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), passed to give effect to the treaty between the United States and Great Britain, proclaimed by the President on December 8, 1916 (39 Stat., pt. 2, p. 1702), is applicable to Indians and Indian reservations, the treaty and statute containing no provision excluding Indians or Indian reservations from their operation, and the treaty expressly mentioning concessions to Indians not extended to any other race-----

517

2. The privilege of hunting given to the Swinomish and other Indian tribes by the treaty of January 22, 1855, known as the Treaty of Point Elliott, does not extend to the reservation lands, but is confined to the undisposed

Migratory Birds and Treaty—Continued.

Page

of and unappropriated public lands of the United States, there being no necessity for making a specific reservation with respect to the reservation lands at the time this treaty was entered into-----

517

3. The right of the Indians who were parties to the Treaty of Point Elliott to hunt on their reservation lands was not based upon any provision of the treaty, but was a right already existing in them and not granted away by the treaty-----

518

4. The Migratory Bird Treaty Act, insofar as it restrains the Indians from taking and killing the class of game to which it applies, is based upon the power of Congress, as the lawmaking authority, to prescribe game laws restricting the Indians in their rights of hunting on reservation lands-----

518

5. Primarily, the States, both as trustees of the rights of their people and in the exercise of their police power, have control over the right to reduce wild game to possession; but this rule is without application to Indian reservations, and Congress, having paramount authority over such reservations and the Indians occupying them, may provide game laws to restrict the Indians in their natural and immemorial rights of fishing and hunting-----

518

Military Service.

1. Instructions of March 31, 1933, *in re* credit to homestead settlers and entrymen for military service in Indian wars extended to soldiers' widows (Circular No. 1296)-----

199

2. Instructions of July 28, 1933, as to furnishing data regarding military service in connection with final proofs (Circular No. 1307)---

263

Mineral Lands.

See *Homestead*, 2, 3, 7.

Generally.

1. Instructions of May 4, 1933, mining locations in Prescott National Forest (Circular No. 1298)---

207

2. Public land subject to entry as mineral must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of-----

475

3. There is marked unanimity of opinion among authorities that

Mineral Lands—Continued.

Generally—Continued.

to overcome the presumption that a patent to public land was issued upon sufficient evidence, clear, unequivocal, and convincing proof must be produced, and, in consideration of the mineral character of the land, not only must it satisfactorily appear that the land was known mineral land at the time the patentee's rights would have otherwise vested, but it must be more valuable for mineral than for agricultural or other purposes.

4. Relinquishment of a homestead entry as to part of a forty-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of the General Mining Regulations.

5. Where deposits of colemanite and ulexite have been located as placer upon reliance upon a practice in the Land Department to permit the patenting of lands containing such minerals solely as placer locations, the placer claimants should not have their rights assailed because the deposits might more appropriately be deemed lode in form and character.

6. The term "sodium borate" in section 23 of the Leasing Act of February 25, 1920 (41 Stat. 437), related to the character of the deposit as found in the ground; therefore, the fact that the products produced from kernite, a sodium borate mineral, such as borax and boric acid, are chiefly valuable for their boron content, does not exclude kernite from the purview of the act.

7. Copper and iron veins exposed on the surface of land inducing a surmise that they were more or less certain indicia of the presence of valuable copper deposits in underlying but unexplored formations of limestone are insufficient to impute a fraudulent intent to the State to acquire valuable mineral lands under selections made thereof under its grant of non-mineral lands.

Mineral Leasing Act.

See *Mineral Lands; Mining Claim.*

1. Considering the circumstances that led to the enactment of section 23 of the General Leasing

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Mineral Leasing Act—Con.

Page

Act (see 41 Stat. 448) as disclosed in the proceedings before the Public Lands Committees of Congress, by the phrase in that section reading "dissolved in and soluble in water and accumulated by concentration" was meant natural evaporation residues dissolved in and accumulated by surface or groundwater drainage in the form of brines and later crystallized.

2. As used in sections 13 and 14 of the Mineral Leasing Act of February 25, 1920 (31 Stat. 437), the expressions "compact" and "reasonably compact" relate to squares, so that, to be "compact", the selection of primary lease acreage must be in the form of a square wherever possible, and where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square in dimensions would conform to the statutory requirement.

3. Where the land embraced in a permit is composed of two or more inconiguous tracts, the permittee should be required first to choose the tract from which acreage for primary lease is desired, and he should be required to make his entire selection for a lease, insofar as possible, from the chosen tract. When the area of the chosen tract is exhausted the permittee should be required to select any additional acreage to which he is entitled from the permitted tract nearest thereto, taking first the portion thereof nearest to the first chosen tract. If the permittee is entitled to lease for additional acreage after two tracts have been exhausted, he should be required to select such additional acreage from the tract second nearest to the first chosen tract, then from the tract third nearest, and so forth.

Mining Claim.

See *Homestead*, 6-10.

Generally.

1. Instructions of July 21, 1932, in regard to mining claims on the public domain (Circular No. 1278).

2. An application for a homestead entry which excludes an alleged mining claim from a legal subdivision and requests a segregation survey without disclosing a basis for the segregation is merely

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Mining Claim—Continued.

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Generally—Continued.

an application for indefinite fractions of the subdivision, incapable of definition in areal extent and location, and is not subject to allowance-----

47

3. A requested exclusion of a mining claim from a stock-raising homestead entry is an admission by the entryman of its present existence, but not necessarily of its validity-----

47

4. The allowance of an application for a stock-raising homestead entry, in which the applicant requests the exclusion of an unsegregated mining claim, upon condition that patent would not issue until a segregation survey should be made and final certificate conformed thereto, is without authority of law and has no legal effect-----

48

5. If a mineral claimant brings a contest against a regularly allowed homestead entry and uses an official mineral survey of his claim as evidence of the existence of conflict, the survey is not conclusive as to the location of his claim and the entryman has the right to impeach it in the Land Department, if not made in accordance with the law and regulations or if it is fraudulent or erroneous-----

48

6. The allowance of a mineral entry for land embraced within a stock-raising homestead entry, though the latter may be voidable, is contrary to well settled rules, and it is unnecessary to disregard them in order that the mineral claimant may bring a contest to an issue against the stock-raising entry-----

48

7. The fact that the records of the Land Department show that a tract of public land is free from claim of any kind is not conclusive that the land has not been validly appropriated under the mining laws-----

47

8. A valid mining location, so long as it is maintained in accordance with the mining law, segregates the land therein from the public domain and confers an exclusive possessory right upon the locator-----

47

9. When a homestead entry is allowed upon the faith of an affidavit by the homesteader that the land is not occupied or appropriated under the mining laws, the burden of proof will be upon one

Mining Claim—Continued.

Page

Generally—Continued.

claiming adversely under an alleged mining location to show that the entry was not rightfully allowed-----

47

10. Where the homestead entryman, in his answer to a contest, disclaims any interest in the ground within certain mining claims insofar as they overlap his entry, and asks for the exclusion of the same from his entry to the extent of conflict, but questions the extent of conflict alleged, the mineral contestant is relieved of the burden of proving the validity of his claim, leaving only the question of the extent of conflict to be litigated-----

48

11. Where the plat and field notes of a mineral survey, of which the Land Department takes official notice, *prima facie* establish a conflict between a mining claim and a homestead entry, such evidence will be regarded as conclusive unless successfully impeached-----

48

12. Applications and proofs of a homestead entryman are *ex parte*, not adversary, and if he misrepresents the facts which it is his duty to disclose and obtains a patent based thereon, when there was a preexisting valid mining location on the ground, he may be declared a trustee for the benefit of the locator at the suit of the latter-----

47

13. Where expert opinion evidence conflicts as to whether the deposits of sodium borates in question were natural evaporation residues, dissolved in and accumulated by surface ground-water drainage or were hot springs products of fumarolic type, and such opinions are no more than theory and assumption and no way proved, if the adoption by the Department of the more plausible and probable theory would run counter to the conclusion of eminent scientists on a highly technical question, and subject a mining claimant to the probable loss of all benefits from his explorations and development at large cost made on the faith of an opposing theory, the Department will adopt the latter theory in disposing of the case-----

183

14. An agricultural application for a fractional part of a legal subdivision of land classified as agricultural will not be allowed

Mining Claim—Continued.

Generally—Continued.

where the remaining part is covered by a surveyed mining claim for which no application for patent has been filed, unless the agricultural applicant submits a satisfactory affidavit, corroborated by two witnesses, showing that the land within the mining location is in fact mineral in character, or following an adjudication that the mining claim was valid from the evidence adduced in a contest proceeding between the agricultural and mineral claimant, as prescribed in sections 101, 105-108, of the General Mining Regulations.

15. Where, following contest duly allowed, an entryman with notice of such contest does not meet and respond to its allegations, but relinquishes to the United States, such action must be taken as a confession of the truth of the charges, and the contestant is under no burden to prove such facts as would entitle his opponent to a segregation survey; but as between the Government and the mineral claimant there is no presumption that the mining claim is valid.

16. While the existence of valuable timber on a mining claim, though in a national forest, in no way qualifies the locator's rights under the mining law if he has a valid claim, it is a proper element for consideration in determining the weight and credibility to be attached to the testimony in determining the character of the land; and the fact that the tract contains some valuable timber and timber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States.

17. Failure to record a notice of desire to hold an oil shale placer mining claim in accordance with the provisions of the act of May 18, 1933 (48 Stat. 72), does not, *ipso facto*, work a forfeiture, but it is necessary, in order to terminate the claim, following failure to comply with the legal requirements, that there be on behalf of the United States at least some form of challenge of the valid existence of the claim.

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Mining Claim—Continued.

Generally—Continued.

17½. One who is granted permission to drill a test well under the provisions of section 13 of the Oil and Gas Leasing Act, who does not at the time disclose that he is a claimant under the placer mining laws, is estopped from afterwards making such claim.

Annual Assessment Work.

18. Instructions of May 25, 1933, suspending annual assessment work on mining claims. (Circular No. 1300)

19. Instructions of May 24, 1934, regarding suspending annual assessment work on mining claims; act of May 15, 1934. (Circular No. 1325)

Coowners.

20. A coowner who relocated a mining claim, whether with the acquiescence of the other coowners or not, does so in derogation and not in affirmance of his own previous estate in the prior location, and will not be permitted to include in his estimate of the value of the improvements required as a condition precedent to patent any of the labor done or improvements made by the original location.

21. The fiduciary relationship between cotenants of a mining claim is not terminated by the relocation of the claim by one coowner unless there has been an abandonment, or, by reason of laches, the relocation has become immune from attack by the adverse possession law of the State in which the claim is situated.

22. While a relocation of a mining claim made for the purpose of closing out coowners is questionable, the safer procedure being by forfeiture under the mining statute, yet it is valid at law, subject, however, to the equities of the cotenants.

Discovery.

23. The mere making within a period of several years geophysical examinations to determine the structure of an area including an oil placer to which claim is asserted, and endeavors to induce oil companies to employ their financial resources in drilling further test wells on the claims, do not constitute diligent prosecution of work within the meaning of the mining laws.

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Mining Claim—Continued.

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Discovery—Continued:

24. In support of an application for mineral patent to two oil placer claims, the evidence showed the drilling of three wells from 1916 to 1923 to stratum of sand in which showings of considerable gas and water were encountered, but as to which no tests of production were made and the wells were abandoned and all drilling discontinued until 1930, when the mineral claimants, under provisions of the leasing act of February 25, 1920, obtained permission to drill a test well to deeper sands, in which oil and gas in commercial quantities were encountered. *Held*, That the mineral claimants did not rely upon the alleged discoveries in the three wells first mentioned, but realized the need of further tests and accordingly drilled to deeper sands, and that the placer locations were invalid for lack of discovery-----

601

24½. In the proof required in oil and gas claims, geologic inferences cannot be allowed to prevail over the results of actual tests made of the sand penetrated-----

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Location.

See 25-35, *infra*.

Lode or Placer.

25. A deposit of high calcium content, especially valuable for the burning of lime and the manufacture of Portland cement, that exists in lode form with well-defined walls and in such quantity and situation as to render it economically practical to mine and devote to commercial uses, is subject to location as a lode or vein under the mining law-----

80

26. The test to be applied to determine how mineral deposits should be secured under the mining law is the form and character of the deposits, that is, if they are in veins or lodes in rock in place they must be located as lode claims, but if they are loose or scattered throughout the ground they are then subject to location only under the placer mining laws. *Webb v. American Asphaltum Company* (157 Fed. 203)-----

80

27. Where deposits of colemanite and ulexite have been located as placer upon reliance upon a practice in the Land Department

Mining Claim—Continued.

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Lode or Placer—Continued.

to permit the patenting of lands containing such minerals solely as placer locations, the placer claimants should not have their rights assailed because the deposits might more appropriately be deemed lode in form and character-----

183

28. Sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly located as a placer claim, may be disposed of for use not only on Federal aid highways but for other lawful purposes-----

294

29. In an application for placer mineral patent, the evidence in support thereof, adduced at a hearing called, consisted of little more than the finding of a few fine colors of gold and some black sand in soil and disintegrated bedrock on slopes and high lands, and the principal witness for the applicant admitted that 89 pans from 15 holes on the land showed only a fraction of a cent in gold per cubic yard. *Held*, That this showing does not justify the conclusion that there are valuable deposits of mineral upon the surface of the claim, within the purview of the statute-----

306

30. It is well settled that a placer discovery will not sustain a lode location, nor a lode discovery sustain a placer location, and *a fortiori*, a mere possibility of a lode discovery will not sustain a placer claim-----

306

Mill Site.

31. A mill site appurtenant to a lode is a "location" under the mining laws of the United States-----

251

32. The statute is silent as to the manner of locating mill sites, but it is not unreasonable to suppose that a location thereof should be made substantially as in the case of a mineral claim; and this is recognized as the usual practice in the Department and in the courts-----

251

33. Neither the execution nor posting of a notice of location of a mill site is necessary to the inception of a right thereto under the mineral-land laws of the United States, it being sufficient that the land embraced within the mill site is used in good faith in

Mining Claim—Continued.

Mill Site—Continued.

connection with *bona fide* mining and milling purposes, coupled with a *bona fide* attempt to survey it and mark its boundaries-----

251

34. Mill sites come within the prohibitions of the act of May 27, 1908 (35 Stat. 317, 365), forbidding further location of claims under the mineral-land laws of the United States in Mount Rainier National Park, but excepting from this inhibition rights theretofore acquired in good faith under said mineral-land laws-----

252

35. Where a mining company, in good faith, made use of land within the Mount Rainier National Park for a mill site in connection with *bona fide* mining operations and was prevented from surveying and marking its boundaries by agents of the United States, prior to the passage of the act of May 27, 1908, it acquired a right, under the proviso to said act and the mineral-land laws of the United States, to the land as a mill site claim, the act of May 27, 1908, while forbidding future location of mining claims within the park area, excepting from this inhibition rights theretofore acquired in good faith under the mineral-land laws of the United States----

252

Marketability.

36. In the solution of the question whether lands containing a given mineral substance are subject to location and purchase under the mining laws, the test is the marketability of the product, which test has been consistently applied by the courts-----

294

Sand and Gravel.

See *Highways, Federal Aid.*

37. No logical reason appears for discriminating between deposits of sand and gravel, if marketable at a profit, and other low-grade deposits of wide distribution, used for practically the same or similar purposes, which meet this test-----

294

38. Sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly located as a placer claim, may be disposed of for use not only on Federal aid highways but for other lawful purposes-----

294

Moratorium Act, April 1, 1932.

See *Reclamation, 2.*

Page

Mount McKinley National Park.

1. The act of June 30, 1932 (47 Stat. 446), contains no express provision under which transfer of any of the funds appropriated for the Alaska Road Commission may be made to the appropriation for national park roads within a national park-----

211

2. From the terms of the act of February 17, 1933 (47 Stat. 820), making appropriation for the Alaska Road Commission for the fiscal year 1934, it is clear that no portion of the funds thereby made available may be used for maintenance work on a road within a national park in Alaska, since such funds are required to be expended under the provisions of the act of June 30, 1932 (47 Stat. 446), the terms of which are not intended to apply to roads within national parks, nor to relate to the use of appropriations specifically made for the construction and maintenance of roads within national parks-----

211

3. The projects of the Alaska Road Commission and the roads and trails in national parks are included in the general classes enumerated as "public works" in the act of March 20, 1933 (48 Stat. 8), continuing in force section 317 of the Economy Act, approved June 30, 1932 (47 Stat., 382, 411), which section provided, with certain qualifications, that "not to exceed 12 per centum of any appropriation for an executive department * * * may be transferred, with the approval of the Director of the Budget, to any other appropriation * * * under the same department, to be used for public works." Such legislation would seem to supply authorization for transfer to the appropriation for roads and trails in national parks some portion of the sum appropriated for the Department of the Interior for the fiscal year 1934-----

211

Mount Rainier National Park.

See *Mining Claim, 34.*

National Forests.

See *National Monuments, 1.*

1. Instructions of May 4, 1933, mining locations in Prescott National Forest (Circular No. 1298)-----

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National Forests—Continued.

2. In an exchange of lands in national forests under the terms of the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), a relinquishment to the United States under the provisions of the act of June 4, 1897 (30 Stat. 36), with no application for other lands in lieu thereof, leaves the transaction incomplete and does not pass clear and complete title to the base lands to the United States, equitable rights therein remaining in the profferer.

36

3. Before the United States will consummate an exchange of lands in national forests, it must be fully satisfied as to the title to the land relinquished, and accordingly will require that the abstract of title submitted be extended, where necessary, to show good title at date of acceptance.

36

National Industrial Recovery.

See *Government Contracts; Homesteads*, subtitle "*Subsistence*"; *National Parks, Buildings and Reservations; Public Works Administration*.

National Monuments.

See *National Parks, Buildings, and Reservations*.

1. Executive Order No. 6166 (dated June 10, 1933, effective 60 days later), issued under authority of the act of March 3, 1933 (47 Stat. 1489), which, among other things, transferred administration of national monuments located in national forests from the Department of Agriculture to the Office of National Parks, Buildings and Reservations, contained the proviso, "except that where deemed desirable there may be excluded from this provision any * * * reservation which is chiefly employed as a facility in the work of a particular agency." *Held*, That in the absence of any action taken regarding this proviso during the 60-day period following June 10, 1933, the order became effective on August 10, 1933, and the status of this agency and others within the scope of the order became crystallized, so that subsequent changes could be effected only through further action by the President or Congress.

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National Parks, Buildings, and Reservations.

Page

See *National Monuments*, 1.

Generally.

1. The Secretary of the Interior, as such, is without authority to approve and make effective plans submitted by the Director of the Office of National Parks, Buildings, and Reservations, for changing the hours of labor from 30 to 40 per week, upon work in National Parks, within the scope of the Federal Emergency Administration of Public Works, his authority in this connection being that conferred upon him as head of the Federal Emergency Administration of Public Works.

328

2. Nothing in the National Industrial Recovery Act or the regulations adopted to give it effect forbids payment by Government check for work performed with funds granted by the Federal Emergency Administration of Public Works; but where, owing to difficulties in the way of cashing checks, such method of payment would work a hardship, the purpose of the regulations would seem to require payment in cash.

328

Carlsbad Caverns.

3. By the terms of the act of August 1, 1888 (25 Stat. 857), the sanction of Congress is necessary to a purchase of land or its condemnation on the part of the United States, and that body has not authorized the Secretary of the Interior to thus acquire property in connection with the water system of the Carlsbad Caverns National Park.

282

4. Under the provisions of Section 203 of the National Industrial Recovery Act, the Administrator of Public Works, or such other agency as the President may designate or create, is vested with authority to acquire by purchase or the exercise of eminent domain real or personal property in connection with the construction of any project coming within the purview of the Federal Emergency Public Works Administration. *Held*, that in the exercise of this authority, the Administrator of Public Works is authorized to acquire private property and a right-of-way in connection with the water system of the Carlsbad Caverns National Park, in the absence

National Parks, Buildings, and Reservations—Continued.

Carlsbad Caverns—Continued.

of some other agency designated by the President under the National Industrial Recovery Act----- 282

Donations.

5. In view of the provisions of the act of March 5, 1917 (39 Stat. 1106), forbidding, under penalty, the receipt by any Federal officer or employee of any salary in connection with his services as such officer or employee from any source other than the United States Government, except as may be contributed out of the treasury of a State, county, or municipality, the National Park Service is without authority to accept a donation of money conditioned upon its application to the salary of one of its employees----- 497

6. In accordance with well established principles of statutory construction, the act of June 5, 1920, permitting donations in aid of national parks, and the act of March 5, 1917, forbidding Federal employees receiving other than Government salary for Federal services, should both be given operation, the two acts not being unavoidably incompatible, and repeal by implication not being favored in law----- 497

Employees; Park Police.

See *Wages and Hours of Labor*, 4, 5.

7. The order of the Secretary of the Interior of August 23, 1933, requiring that all work performed with funds granted by the Federal Emergency Administration of Public Works shall be subject to the labor policies and wage requirements prescribed by said organization, embraces work performed in national parks, whether under contract or by the Government's own forces----- 327

8. By subsection (b) of section 3, Article II, Circular No. 1, it is provided that, if work is located at points remote and inaccessible, 40 hours' work in one week shall be permitted after it is determined by the State Engineer (P. W. A.), prior to advertisement, that the work is remote and inaccessible; and this regulation vests authority in the State Engineer (P. W. A.) for determining whether 40 hours shall constitute a week's

National Parks, Buildings, and Reservations—Continued.

Employees; Park Police—Con.

work on any designated project with authority lodged in the Federal Emergency Administration of Public Works to modify such regulation----- 327

9. To be legally effective, a change from or waiver of the statutory 30-hour work week prescribed by the National Industrial Recovery Act and the Federal Emergency Administration of Public Works, as applied to national parks, must be authorized by officials of the latter organization or the State Engineer (P. W. A.), in such persons residing the duty of determining whether it is impracticable or infeasible to do the work required on the 30-hour week basis or to substitute therefor the 40-hour week authorized in Circular No. 1 and the rules and regulations approved August 9, 1933----- 328

10. No statutory authority exists for the imposition of fines upon members of the United States Park Police who violate the park regulations imposed to govern their conduct, and no particular regulations are prescribed, violation of which shall constitute a punishable offense----- 302

11. The "charge and control" of the park police authorized by the Executive order of June 10, 1933, to give effect to the act of March 3, 1933 (47 Stat. 1517), includes the power of appointment, with its incident, the power of suspension and removal, but does not include the power to fine, such power not being incident to the power of appointment----- 302

12. The ordinary and reasonable interpretation of the act of July 1, 1898 (30 Stat. 570), makes it one relating to the admission of the public to park grounds, their conduct therein, and the extent of supervision over such grounds in that connection, and not to policing. It supplies no warrant for assessing fines against the members of the park police force for offenses against the regulations peculiar to them as members of that force----- 302

Injury to Property.

See *Claim for Damage*, 1.

13. An employee of the United States, in the course of employment for and on behalf of the

National Parks, Buildings, and Reservations—Continued.

Injury to Property—Continued.
 United States, negligently caused injury to the automobile of a private citizen lawfully in the Platt National Park, Oklahoma, the damage amounting to \$8.45. *Held*, That a claim for this amount, under the circumstances shown, comes within the scope of the act of December 28, 1922----- 287

14. The scope of the act of December 28, 1922, does not embrace claims for personal injury, but only claims for damage to or loss of privately owned property---- 287

15. By the terms of the act of December 28, 1922 (42 Stat. 1066), the head of an Executive Department of the United States Government, acting on its behalf, is authorized to "consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property, where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment", the amount found due to be certified to Congress as a legal claim for payment, but no claim to be considered unless presented within one year from the date of its accrual.----- 300

16. An employee of the United States, in the course of employment for and on behalf of the United States, negligently caused injury to the private automobile of a private citizen lawfully upon the public highway, the damage amounting to \$275.76, to cover repairs. *Held*, That a claim for this amount, under the circumstances shown, comes within the scope of the act of December 28, 1922----- 300

17. Under the terms of the act of December 28, 1922 (42 Stat. 1066), an injury is compensable only if it was caused by the negligence of an officer or employee of the United States while acting within the scope of his employment.----- 347

18. In order to warrant a recovery of damages under the act of December 28, 1922, it must be established that there was a breach of duty which was the efficient cause of the accident result-

National Parks, Buildings, and Reservations—Continued.

Injury to Property—Continued.
 ing in damage, and that the claimant himself did not neglect any duty which, if performed, would have prevented the accident.----- 348

19. A motorist following another vehicle along the highway must keep his automobile under such control and at such a distance behind the leading vehicle as will enable him to cope with the exigencies of ordinary travel.----- 348

Office of.

See *National Monuments, I.*

20. The act of March 1, 1919 (40 Stat. 1269), in express terms gives to the Public Buildings Commission control of the allotment of space in buildings leased by the United States as well as in publicly owned buildings, and by Executive Order No. 6166, promulgated June 10, 1933, all functions of this Commission were transferred to the Office of National Parks, Buildings and Reservations----- 324

21. The Director of National Parks, Buildings and Reservations, by virtue of authority conferred upon him by Executive order of June 10, 1933, succeeds to the authority originally conferred by Congress upon the commissioners empowered to sell and convey lots of the Government in the District of Columbia, insofar as authority to convey title on behalf of the United States is concerned, including execution of a quitclaim deed----- 319

22. Request having been made by the ostensibly proper parties, the United States, by duly constituted agent, is warranted in executing a quitclaim deed to real property which, in 1794, with good title thereto, it sold to private parties, through its commissioners empowered to do so, and was paid in full, the deed, if executed and delivered, never being recorded, leaving record title to the property standing in the name of the United States.----- 319

Raker Act.

23. The authority conferred upon the Secretary of the Interior by section 4 of the act of December 19, 1913, commonly called the Raker Act, requiring his approval of plans and specifications

National Parks, Buildings, and Reservations—Continued.	Page	New Mexico—Continued.	Page
Raker Act—Continued.		1. Instructions of April 1, 1933, exchange of lands in New Mexico under Act of June 15, 1926 (Circular No. 1295)-----	200
in connection with the proposed construction of reservoirs, dams, power plants, and kindred structures of permanent character in national parks in the State of California, does not include authority to attach to the procedural permit a condition that electric power developed at a dam site within the park shall, upon demand, be made available to the Government, at cost, for use in such park-----	597	Nonmineral Lands.	
Yosemite.		See <i>Timber and Timber Sale</i> , 3.	
24. The basis and extent of the jurisdiction of the United States Government over privately owned lands within the Yosemite National Park are established by the act of October 1, 1890 (26 Stat. 651); act of February 7, 1905 (33 Stat. 702); act of June 2, 1920 (41 Stat. 731); California Laws of 1919, chapter 51-----	483	1. Copper and iron veins exposed on the surface of land inducing a surmise that they were more or less certain indicia of the presence of valuable copper deposits in underlying but unexplored formations of limestone are insufficient to impute a fraudulent intent to the State to acquire valuable mineral lands under selections made thereof under its grant of nonmineral lands-----	475
25. The power of policing privately owned lands within the exterior boundaries of the Yosemite National Park is incident to the cession of exclusive jurisdiction over said lands made to the Federal Government by the State of California, no exception as to jurisdiction over privately owned lands being made in said cession--	483	Northern Pacific Land Grants.	
26. Under the act of June 2, 1920 (41 Stat. 731), and regulations issued pursuant thereto, there are provisions for proper control of unsanitary conditions, disorderly conduct, the carrying of firearms, keeping of domestic animals, etc., on privately owned land in Yosemite National Park--	483	1. Under section 9 of the act of June 25, 1929, it is provided: "That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the act of July 2, 1864, and the joint resolution of May 31, 1870, and other acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this act shall have been finally determined": <i>Held</i> , That in the light afforded by the legislative history of the Northern Pacific land grants, and in view of pending litigation in the courts, said section must be interpreted as requiring the Secretary of the Interior to withhold all patents for <i>lieu lands</i> otherwise issuable to the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, until the determination of the litigation authorized in the 1929 act-----	588
Navigable Waters.		Notice.	
See <i>Arkansas River Islands; Riparian Rights</i> , 3.		See <i>Contest</i> , 1, 2.	
Negligence.		Occupancy.	
See <i>Claim for Damage; National Parks, Buildings, and Reservations</i> , 13-19.		See <i>Indians and Indian Lands</i> , 36.	
Newell, South Dakota, Lots.		Office Space Allotment.	
1. Regulations of November 20, 1933, governing sale of lots within Belle Fourche Project (Circular No. 1315)-----	331	See <i>Public Buildings</i> .	
New Mexico.			
See <i>School Lands; Timber and Timber Sale</i> , 1, 4.			

Officers and Employees.

See *National Parks, Buildings, and Reservations; Wages and Hours of Labor.*

Oil and Gas Lands—Act of February 25, 1920.

1. Regulations of October 19, 1932, regarding bonds in connection with oil leases (Circular No. 1290)-----

85

2. Opinion of Secretary of the Interior, July 12, 1933, in Humble Oil and Refining Company-----

247

Generally.

3. One who elects to take an oil and gas permit is bound by such election, and rights under the mining laws which might otherwise be asserted must be deemed abandoned-----

166

4. A grant by the United States purporting to convey a quarter section of public land over which a railroad right-of-way had previously been granted under the act of February 18, 1888 (25 Stat. 35), carries with it, in the absence of further exception or reservation, the entire interest left in the United States, so that an application by the railroad company's successor for a lease, under the act of May 21, 1930 (46 Stat. 373), of the oil and gas deposits under the railroad right-of-way, may not be granted..

393

5. Acquiescence by the Department in the course of action of mineral claimants in surrendering, under the provisions of the Leasing Act, all but two claims out of 50 located under the provisions of the general mining law, and retaining mining title to these two claims for further development and proof of validity, did not constitute a waiver by the Department of the usual requirements for earning patent thereto under the general mining law-----

602

6. The action of a State in granting an oil and gas lease of lands embraced within an uncompleted school indemnity selection list is tantamount to an oil and gas classification, within the meaning of the act of July 17, 1914 (38 Stat. 509), when the prospective oil and gas value is confirmed by the Geological Survey, or from other sources-----

175

7. Where interests in oil and gas lands comprised within the public domain, whether operating

Oil and Gas Lands—Act of February 25, 1920—Continued.

Generally—Continued.

agreements or actual permits and leases, were obtained originally under the so-called "relief sections" of the Leasing Act, and are sold, the purchaser acquires the interest purchased, unless it be an interest in a prospecting permit under section 19 of the Leasing Act, free from any charge under the acreage limitations of section 27, and this whether the holder of the interest conveyed was an original holder or an assignee----

371

8. An application for patent to an oil placer claim based upon a discovery of oil in a certain well thereon must be rejected, where the well was drilled under the authority of an oil and gas permit granted under the Leasing Act of February 25, 1920-----

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See *Mining Claim*, subheading, "Discovery."

Section 13.

9. Regulations of July 15, 1932, extension of time on oil and gas prospecting permits, under act of June 30, 1932 (Circular No. 1277)-----

7

10. Instructions of January 31, 1933, assignments, etc., of interest in oil and gas prospecting permits-----

149

11. Instructions of March 2, 1933, abandonment of wells on oil and gas prospecting permit lands (Circular)-----

179

12. Regulations of January 5, 1934, revising oil and gas form of permit (Circular No. 1316)----

346

13. Regulations of March 29, 1934, governing simultaneous applications for oil and gas prospecting permits (Circular No. 1320)-----

400

14. Regulations of July 31, 1934, to govern assignments of interests in oil and gas permits (Circular No. 1331)-----

549

15. Under the Department's instructions of May 1, 1924, lands located within one mile of the exterior boundaries of Naval Petroleum Reserves Nos. 1 and 3 are not subject to filing under section 13 of the act of February 25, 1920 (41 Stat. 437)-----

312

16. The fact that there are instances where oil and gas permits under section 13 of the act of February 25, 1920, have been erroneously granted in the past, sup-

Oil and Gas Lands—Act of February 25, 1920—Continued.	Page	Oil and Gas Lands—Act of February 25, 1920—Continued.	Page
Section 13—Continued.		Section 13—Continued.	
plies no justification for later similar erroneous action.....	313	22. The common law rule which declares a deed to one that is dead at the time of its execution to be a nullity is subject to exception, and, assuming that the rule applies to oil and gas prospecting permits as well as to deeds, it is within the exception where the Department issues a permit to an applicant knowing him to be dead at the time and where the intention was by the formal use of his name as permittee to confer rights upon existing persons who are to succeed to his property.....	150
17. An application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is, in effect, a mere request that a license be granted and confers upon the applicant no interest in the lands or the mineral deposits therein.....	333	23. While an applicant for an oil and gas prospecting permit acquires no property right by virtue of such application that he can transmit or that can pass to others on his death, yet nothing contained in the Leasing Act or in any other law prevents the Secretary, in the exercise of his discretion and in the absence of a valid intervening claim, from recognizing that the deceased applicant was entitled to such equitable consideration as would warrant the granting of a permit to those who would succeed to or have an interest in his property.....	150
18. Neither the Leasing Act of February 25, 1920, nor the regulations issued thereunder, give exclusive segregative effect to an application for a prospecting permit, and a permittee, in default under the regulations, resulting in cancellation of his permit, but able to show substantial equities, may, upon proper application, have his permit reinstated, to the exclusion of the claims of mere permit applicants.....	333	24. In the absence of any adverse claim, irregularity in the showing as to citizenship of an applicant for an oil and gas prospecting permit at the time the permit was granted may be waived by the Department and such irregularity cannot be taken advantage of by a subsequent applicant nor will a failure to comply with the law which is apparent from the records be ground for protest.....	150
19. The basic conditions authorizing the grant of a prospecting permit under section 13 of the Oil and Gas Leasing Act are that the deposits belong to the United States and the land applied for is not within the geologic structure of an oil and gas field, and an application under this section is inconsistent and incompatible with a vested right to the oil and gas deposits under the Mining Law by virtue of the discovery of valuable deposits of oil thereon.....	166	25. The issuance through oversight of an oil and gas permit for prospecting land within a producing oil field will not compel a subsequent erroneous classification of the field and the granting of another permit for prospecting other lands on the structure.....	192
20. The term "producing oil or gas field", as used in section 13 of the Leasing Act, must be construed to include areas in which there has been production and which will continue to produce oil or gas, and the fact that there has been a cessation of production and abandonment of wells in a given field is not of itself sufficient to warrant a redefinition of the structure or the revocation of the classification of the field in the absence of a proper showing persuasive that the area does not in fact contain valuable deposits of oil or gas.....	192	26. Where interests in Government lands are in the form of agreements held by a corporation organized for the operation, drilling, or production of lands held by others under oil and gas prospecting permits, such interests pass, by a sale thereof, unincumbered by the acreage limitations of section 27 of the Leasing Act of	
21. Where Federal oil and gas permits and leases are held directly under sections 13 and 14 or 17 of the Leasing Act, they are subject to the acreage limitations of section 27 and remain so in the hands of a purchaser from the original holder.....	372		

Oil and Gas Lands—Act of February 25, 1920—Continued.

Section 13—Continued.

February 25, 1920 (41 Stat. 437), as amended, since such agreements create only a potential interest in any oil or gas which may be discovered, which interest may be divested if the agreement is canceled or forfeited prior to the discovery of oil or gas and the resulting issuance of a lease-----

371

27. One who elects to take an oil and gas permit is bound by such election, and rights under the mining laws which might otherwise be asserted must be deemed abandoned-----

166

28. Where an oil and gas prospecting permit was granted prior to the publication of an application for patent to the land under the Mineral Law, it is the duty of the patent applicant to contest the permit and not the duty of the permittee to adverse the patent application-----

166

Sections 14 and 17.

See also section 27.

29. Where Federal oil and gas permits and leases are held directly under sections 13 and 14 or 17 of the Leasing Act, they are subject to the acreage limitations of section 27 and remain so in the hands of a purchaser from the original holder-----

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30. The purchaser of interests in Government lands included within oil and gas leases held by others under sections 14 and 17 of the Leasing Act, will not automatically become entitled to the benefits of the fifth proviso of section 27 of the Leasing Act as amended by the act of March 4, 1931, which, under certain conditions, waives acreage limitations, but such purchaser must qualify as required by Circular No. 1252-----

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31. Where Federal oil and gas permits and leases are held directly under sections 13 and 14 or 17 of the Leasing Act, they are subject to the acreage limitations of section 27 and remain so in the hands of a purchaser from the original holder-----

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Section 18.

See also section 27.

32. The class of persons entitled to the benefit of the exemptions of section 27 of the Leasing Act

Oil and Gas Lands—Act of February 25, 1920—Continued.

Section 13—Continued.

is not limited to original claimants under section 18 of that act, but includes their assignees-----

371

Section 19.

See also section 27.

33. Where interests in oil and gas lands comprised within the public domain, whether operating agreements or actual permits and leases, were obtained originally under the so-called "relief sections" of the Leasing Act, and are sold, the purchaser acquires the interest purchased, unless it be an interest in a prospecting permit under section 19 of the Leasing Act, free from any charge under the acreage limitations of section 27, and this whether the holder of the interest conveyed was an original holder or an assignee---

371

Section 27.

34. Where interests in Government lands are in the form of agreements held by a corporation organized for the operation, drilling, or production of lands held by others under oil and gas *prospecting permits*, such interests pass, by a sale thereof, unincumbered by the acreage limitations of section 27 of the Leasing Act of February 25, 1920 (41 Stat. 437), as amended, since such agreements create only a potential interest in any oil or gas which may be discovered, which interest may be divested if the agreement is canceled or forfeited prior to the discovery of oil or gas and the resulting issuance of a lease-----

371

35. The purchaser of interests in Government lands included within oil and gas leases held by others under sections 14 and 17 of the Leasing Act, will not automatically become entitled to the benefits of the fifth proviso of section 27 of the Leasing Act as amended by the act of March 4, 1931, which, under certain conditions, waives acreage limitations, but such purchaser must qualify as required by Circular No. 1252-----

371

36. The class of persons entitled to the benefit of the exemptions of section 27 of the Leasing Act is not limited to original claimants under section 18 of that act, but includes their assignees-----

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Oil and Gas Lands—Act of February 25, 1920—Contd.

Section 27—Continued.

37. The ordinary purchaser of interests in oil and gas in Federal lands at a public auction ordered by a court is not, merely as such, entitled to that benefit of the exception in section 27 of the leasing act permitting ownership of such interests in excess of the acreage limitation to be held for a period limited to two years, but, instead, title must have come to him *volens volens* ----- 372

Rentals and Royalties.

38. Regulations of March 3, 1933, suspension of annual payments of rental under coal, oil, and/or gas leases (Circular No. 1294) ----- 181

39. Opinion of Secretary of the Interior, July 12, 1933, in Humble Oil and Refining Company ----- 247

40. Instructions of September 12, 1933, governing payment of rentals and royalties under oil and gas leases and permits (Order No. 678) ----- 288

Oil Shale Lands.

41. Executive order No. 5327 of April 15, 1930, under which certain oil-shale lands were temporarily withdrawn for the purpose of investigation, examination, and classification, constituted a withdrawal from every form of claim except for metalliferous minerals, and a permit to prospect lands within the withdrawn area for oil and gas was not allowable as long as the order remained unmodified or unrevoked by another Executive order or by act of Congress ----- 190

42. Failure to record a notice of desire to hold an oil shale placer mining claim in accordance with the provisions of the act of May 18, 1933 (48 Stat. 72), does not, *ipso facto*, work a forfeiture, but it is necessary, in order to terminate the claim, following failure to comply with the legal requirements, that there be on behalf of the United States at least some form of challenge of the valid existence of the claim ----- 244

O'Shaughnessy Dam.

See *Electric Power.*

Overruled and Modified Cases.

See *Table*, page xx.

Papago Lands.

See *Indians and Indian Lands*, 36-47.

Patent (Land).

See *Indians and Indian Lands; Wyandotte Scrip.*

1. Following an adjudication under section 4 of the act of March 3, 1807 (2 Stat. 440), duly approved by Congress, confirming a private land claim within the former Territory of Orleans (now State of Louisiana), and the land having been duly surveyed, patent from the United States may properly issue in the name of the claimant, his heirs, devisees, and assigns, the patent to contain appropriate recitals that it is issued solely as a muniment of the title which vested in the claimant.----- 434

2. Upon issuance of a land patent in the name of the original claimant, his heirs, devisees, and assigns, the Commissioner of the General Land Office may deliver such patent to persons who have made affidavit that they are the sole heirs of the original claimant and that no succession of the estate of the claimant has ever been made by them or their predecessors ----- 435

3. Where an act of Congress granting public lands provides for action by the Secretary of the Interior which is equivalent to the granting of a patent, such action by him ends the jurisdiction of his Department ----- 475

4. Suit for cancelation of a patent will not be advised by the Department of the Interior merely because the patent was issued inadvertently; but it must appear that some interest of the Federal Government or some person to whom it is under obligation has suffered by such inadvertent action ----- 475

5. It has not been authoritatively settled that a suit to cancel a list of lands certified to a State, if not brought within six years from the date of certification, or within six years from the date of discovery of fraud, would be barred by section 8 of the act of March 3, 1891 (26 Stat. 1099), but this statute has been referred to by the Supreme Court as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a cer-

Patent (Land)—Continued.

tain time, and it has been frequently held that certification of lists pursuant to similar grants is of the same effect as a patent...

Page 475

6. There is marked unanimity of opinion among authorities that to overcome the presumption that a patent to public land was issued upon sufficient evidence, clear, unequivocal, and convincing proof must be produced, and, in consideration of the mineral character of the land, not only must it satisfactorily appear that the land was known mineral land at the time the patentee's rights would have otherwise vested, but it must be more valuable for mineral than for agricultural or other purposes...

475

Patent Rights to Invention.

1. Officers and employees of the Federal Government, except those of the Patent Office, are not, by reason of such service or employment, precluded from exercise of the rights of an owner of a patent...

388

2. Subject to existing law, including manufacture and use by the United States free of charge, a patent-owning corporation, composed of Federal officers and employees, may enter into contractual relations with individuals or corporations as to the thing patented, including contracts for its manufacture and sale on a royalty basis...

388

Per Diem and Travel Expenses.

See *Appropriation*, 1, 2.

Petroleum Reserve.

See *Arkansas River Islands; Oil and Gas Lands, Etc.*, 15.

1. Where, following establishment by the President of a petroleum reserve embracing certain islands, and the consequent withdrawal of the land from disposition, legislation is passed providing for the disposition of the surface of lands in petroleum reserves, and other legislation is passed providing for the disposition of oil and gas deposits, no further bar remains to the disposal of such lands under the public-land laws, provided appropriate reservation is made of the oil and gas deposits...

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Pioneer Irrigation District, Idaho.

See *Irrigation District*, 2.

Pipe Lines.

See *Right-of-Way*, 4-7.

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Point Mackenzie Military Reservation.

1. Instructions of August 1, 1934, relative to restoration to entry of lands in Point Mackenzie Abandoned Military Reservation (Circular No. 1332).....

553

Policing.

See *Yosemite National Park*.

Possession Under Claim of Right.

See *Color of Title*, 1, 2.

Potash Lands.

1. A potash prospecting permit issued for a period of two years expires, in the absence of statutory provision for extension of time, at the close of the second anniversary of the date on which it was issued.....

142

Power Projects and Sites.

See *Electric Power*, 1-4; *Hetch Hetchy Power Site*.

Practice.

1. Rules of, cited and construed, (Table), page —.

2. Rules of Practice limiting the time in which appeals may be taken and motions for rehearing made are of the greatest practical importance, being necessary to put a period to vexatious litigation and to secure to the parties litigant the termination of their legal controversies, and, at least in cases *inter partes*, will be strictly enforced in the absence of valid excuse or of circumstances strongly calling for the exercise of the directory and supervisory power conferred upon the Department by law.....

144

3. Rule 76 of Practice prescribes that notice of appeal from the Commissioner's decision must be served on the adverse party and filed in the office of the register or in the General Land Office within 30 days from the date of service of notice of such decision.....

145

4. By the act of January 31, 1903 (32 Stat. 790), provision is made, by subpoena, to compel the attendance of persons desired as witnesses at hearings involving public-land matters; but apart from this, where a party to the

Practice—Continued.

proceedings is present at such a hearing, he cannot properly refuse to testify if called upon, since he is under the jurisdiction of the tribunal in charge thereof even though he may not have been subpoenaed under the provisions of said act of January 31, 1903, and therefore not liable to its penalty for refusal to appear and testify--

276

5. A defendant in a hearing before a local land office, after being called by the Government as a witness in its behalf and submitting some testimony, declined to further testify in that relation and left the witness stand. *Held*, that the testimony so given and the action in refusing to answer further questions and leaving the witness stand are properly a part of the record and therefore to be considered as evidence in the determination of the case, notwithstanding that the witness was not subpoenaed-----

276

6. In a case involving a contest of parties, or where adverse proceedings on the part of the Government are opposed by the entryman, and testimony has been adduced at a hearing called, it is not proper to remand the case for rehearing without first passing upon the defendant's testimony and refusal to answer questions--

276

7. The Secretary of the Interior, in the proper exercise of his supervisory authority, may vacate a decision of the General Land Office and direct a reconsideration of the case by said office, even though no appeal may have been taken from its decision therein-----

276

Private Land Claims.

1. Instructions of July 11, 1933, homestead applications for lands in patented private land claims (Circular No. 1305)-----

246

2. Following an adjudication under section 4 of the act of March 3, 1807 (2 Stat. 440), duly approved by Congress, confirming a private land claim within the former Territory of Orleans (now State of Louisiana), and the land having been duly surveyed, patent from the United States may properly issue in the name of the claimant, his heirs, devisees, and assigns, the patent to contain appropriate recitals that it is issued solely as a muniment of the title which vested in the claimant-----

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Private Land Claims—Contd.

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3. Upon issuance of a land patent in the name of the original claimant, his heirs, devisees, and assigns, the Commissioner of the General Land Office may deliver such patent to persons who have made affidavit that they are the sole heirs of the original claimant and that no succession of the estate of the claimant has ever been made by them or their predecessors-----

435

4. It is true in general that the General Land Office has authority to correct Government surveys after patent has been issued, and that courts do not have this right, but it is without authority to pass upon the validity and extent of a private land grant confirmed and surveyed under decree of the Court of Private Land Claims, or to determine the validity of the decree and survey, its jurisdiction, after approval of the survey, being limited to the ministerial duty of issuing patent, all other matters being solely within the jurisdiction of the courts-----

608

5. Congress, in the exercise of its authority over public lands, by the act of March 3, 1891, created the Court of Private Land Claims, and in sections 7 and 10 of the act empowered said court not only to determine the validity of titles but to determine that the surveys executed conformed to its decrees, errors made being subject to correction by appeal-----

608

6. The survey of a private land claim was approved in 1904, patent was issued in 1909, and objection was not made until 1933, although the alleged deficiencies in the area of the survey were apparent on the face of it from the day of its approval. *Held*, that consideration of the case could properly be denied upon the ground of laches-----

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Private Lands.

See *Soil Erosion Service*.

Proof.

See *Homestead*, 15, 16.

Prospecting Permit.

See *Oil and Gas Lands, Etc.*

Public Buildings.

1. The act of February 26, 1925 (43 Stat. 983), vested in the Office of Public Buildings and Public Parks of the National Capital

Public Buildings—Continued.

Page

broad powers of maintenance, care, custody, policing, upkeep and repair of public buildings in the national capital, but provided that nothing contained in the act "shall be held to modify existing law with respect to the assignment of space in the public buildings in the District of Columbia by the Public Buildings Commission", from which it is clear that when Congress centralized the administration and policing of many Government buildings in the Office of Public Buildings and Public Parks of the National Capital, it expressly negated any intention to disturb the complete control of the Public Buildings Commission over the allotment of space in all except certain designated public buildings in the District of Columbia, vested in the Commission by the act of March 1, 1919 (40 Stat. 1269)-----

322

2. Among the duties laid by Congress upon the Supervising Architect of the Treasury has been that of passing upon designs and estimates of projected public buildings, but that official has never had control of the allotment of space in the Federal buildings in the District of Columbia, and hence neither the newly created Procurement Division (to which the Office has been transferred), the Treasury Department, nor the Post Office Department, can have acquired any such power by transfer from the Supervising Architect.

322

3. The Office of National Parks, Buildings and Reservations succeeded to all powers and functions of the Public Buildings Commission by Executive Order No. 6166, promulgated June 10, 1933.-----

322

Public Land.

See *Right of Way*, 6; *Riparian Rights*, 1-4.

1. Land that has been cut off by avulsion from a tract of land owned by the United States abutting on a watercourse retains its status as public land, but one who has held and occupied it for many years under claim or color of title may acquire title thereto under the act of December 22, 1928, or under some other applicable public-land statute as against one attempting to enter it under the homestead law.-----

102

Public Works Administration.

Page

See *Five-Day Week*; *Mt. McKinley National Park*; *Soil Erosion Service*; *Sureties and Surety Bonds*.

1. The restrictions imposed by the special act of Congress of February 28, 1929 (45 Stat. 1406), authorizing the Secretary of the Interior to employ engineers and economists for consultation purposes on important reclamation work, apply only to employment authorized by that act, and do not bar the establishment of new or additional positions in the service and payment therefor from funds allotted from the Public Works fund.-----

411

2. The limitation on salary of the consulting engineer of the Indian Irrigation Service, provided by the act of February 28, 1929 (45 Stat. 1406), is without application to salaries paid from funds allotted for construction work by the Administrator of Public Works from funds made available under the terms of the National Industrial Recovery Act.-----

411

3. The employment of consulting engineers in the Indian Reclamation Service, where compensated from the Public Works fund of the National Industrial Recovery Administration, must be in conformity with the Executive order of November 18, 1933, or the Classification Act of 1923 as amended.-----

411

4. Nothing in the National Industrial Recovery Act or the regulations adopted to give it effect forbids payment by Government check for work performed with funds granted by the Federal Emergency Administration of Public Works; but where, owing to difficulties in the way of cashing checks, such method of payment would work a hardship, the purpose of the regulations would seem to require payment in cash.-----

328

Puerto Rico.

1. The Cattle Contagious Diseases Act of February 2, 1903, authorized the Secretary of Agriculture to take measures to have inspected cattle entering United States territory from foreign countries or from one State or Territory to another, and further provided that animals thus inspected might be transported into any State or Territory without further inspection under other authority.

Puerto Rico—Continued.

An act of the Legislature of Puerto Rico, approved April 23, 1931, provided that before bovine cattle should be permitted to enter the island they must be subjected to a tuberculin test. *Held*, That the act of the Puerto Rican Legislature is valid and enforceable only as to cattle which have not been certified and inspected under authority of the Secretary of Agriculture.

2. Section 9 of the Organic Act of Puerto Rico, in providing that "the statutory laws of the United States not locally inapplicable * * * shall have the same force and effect * * * as in the United States", reserves paramount power of legislation to Congress and limits the power of the Puerto Rican legislature to the enactment of legislation which does not conflict with acts of Congress and the Constitution of the United States, and from this it follows that where acts of Congress conflict with acts of the Territorial Legislature, the former must prevail.

Quinault Indian Reservation.

See *Indians and Indian lands*, 6-8.

Railroad Lands.

See *Right of Way*, 8-10.

Raker Act.

See *National Parks, Buildings and Reservations*, 23.

Reclamation.

See *Government Contracts; Homestead*, 19; *Indian Irrigation Projects; Irrigation District*, 1, 2.

Generally.

1. In the construction of public works, a contract by the Government for an entire structure is valid, even though funds are not at the time available for its completion, if in the contract it is provided that in the event the necessary allotment or appropriation of funds for completion of the structure should not be made, the Government is to be released from all liability due to such failure of allotment or appropriation.

2. The moratorium act of April 1, 1932, which afforded temporary relief to water users on irrigation projects constructed and operated

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Reclamation—Continued.

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Generally—Continued.

under the Reclamation law, being a relief act, should be liberally construed, and when so construed, sections 1 and 2 thereof, which are descriptive of the two large bodies of water users, namely, organizations and individuals, include the nonconsenters on the Garland Division of the Shoshone project, Wyoming, and on other projects.

13

Construction Charges.

3. The common object of the acts of April 1, 1932, and March 27, 1934, being the relief of settlers on reclamation projects by extending the period of payment of construction charges, such legislation should receive a liberal construction and the two acts be considered *in pari materia*.

550

4. Although the act of April 1, 1932, for the relief of water users on irrigation projects of the Reclamation Service by extending the period of payment of construction charges, provides for the deferment of "regular construction charges", and a charge already deferred is not a regular construction charge, it does not of necessity follow that the deferred charges cannot be further deferred under the later act of March 27, 1934, enacted to extend the operation of the earlier act. Such a further extension comes reasonably within the scope of the language, "all similar charges coming due for the year 1934" contained in the later act.

551

Indian-Owned Lands.

See *Indian Irrigation Projects*.

Interest.

5. Interest accruing upon deferred charges under the moratorium act of April 1, 1932, is neither a construction charge under section 3, nor an operation and maintenance charge under section 6 of the extension act of August 13, 1914, and is not, therefore, subject to the delinquency penalty imposed by subsection H of section 4 of the act of December 5, 1924.

86

Operation and Maintenance Charges.

6. The Federal statutes relative to the payment of debts and demands due the United States do not require the acceptance of money only in the settlement of

Reclamation—Continued.

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Operation and Maintenance Charges—Continued.	
such debts and demands, and accordingly the proper administrative official representing the United States may, where it would be to the interest of the United States, accept a "call" warrant for indebtedness of an irrigation district under its contract with the United States Reclamation Service for operation and maintenance of storage works, such warrant to be held by the United States until paid -----	264
Reclamation Fund.	
7. Opinion of the Solicitor, May 31, 1933, on advances to Reclamation fund by the Reconstruction Finance Corporation-----	216
Reconstruction Finance Corporation.	
1. Opinion of Solicitor of May 31, 1933, on advances to Reclamation Fund-----	216
Regulations.	
<i>Tables, see pages xxix, xxxi, and xxxii.</i>	
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See <i>Practice</i> , 6, 7.	
Reindeer.	
1. Where a native of Alaska dies leaving a mixed estate of restricted and unrestricted property, the Secretary of the Interior can deal only with the former class, while the jurisdiction over the latter class devolves upon the local court-----	15
2. Congress has conferred upon the Secretary of the Interior the authority to make regulations and to impose restrictions with respect to reindeer owned by the United States in the Territory of Alaska that have been or may be transferred to the natives and to act in behalf of the natives in such connection, and enforcement thereof may be had in a proper case by suit to recover the animals illegally transferred, or the value thereof-----	15
3. The fact that a reindeer organization in the Territory of Alaska has issued shares of stock to individuals for reindeer turned over to it by them does not deprive the Government of its control over any restricted reindeer where the transfer had not been approved by a proper administrative officer-----	15

Reindeer—Continued.

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4. There is no provision of law whereby any Federal agency has been constituted general guardian for the natives of Alaska so as to place their private property under governmental control, and consequently where the property of a native of that Territory consists of reindeer owned by him in his own right, altogether free from restriction, the Government has no authority to take part in the administration of his estate-----	15
5. The provisions of the act of June 25, 1910, as amended, for determining Indian heirs and for the administration of the restricted property of deceased Indians, are applicable to the natives of Alaska, and where the estate of a deceased native of that Territory consists of reindeer which were restricted from sale, the Secretary of the Interior is empowered to administer the estate, and he may, if he sees fit, remove the restrictions and dispose of the reindeer and pay the money over to the heirs, but an employee of the Reindeer Service has no such authority-----	15
Relinquishment.	
See <i>Contest</i> , 1.	
1. Relinquishment of a homestead entry as to part of a forty-acre legal subdivision, on the ground that it is mineral in character, will not be accepted unless the mineral character of the tract sought to be relinquished is shown to have been established in accordance with the requirements of the General Mining Regulations-----	228
See <i>Oil and Gas Lands, Etc.</i> , 38, 40.	
Restoration of Lands.	
See <i>Indians and Indian Lands</i> , 23½.	
Retirement Act.	
See <i>Civil Service Retirement</i> .	
Revised Statutes Cited and Construed.	
See <i>Table</i> , page xl.	
Right of Way.	
Generally.	
1. Regulations of August 19, 1933, <i>in re</i> tracings and duplicates showing public highway rights-of-way. (Circular No. 1310)-----	270

Right of Way—Continued.

Generally—Continued.

2. In the absence of specific legislation, no authority of law exists to grant a permit to occupy and use Government land for purposes which, in their nature, involve a permanent right or estate----- 155

3. The administrative authority vested in the Secretary of the Interior by the act of July 3, 1930 (46 Stat. 855), must be exercised within the limits prescribed by that act, and does not include authority to grant rights-of-way, by permit or otherwise, over Government land within the Colonial National Monument, Virginia----- 155

Pipe Line.

4. Under section 32 of the act of February 25, 1920, the Secretary of the Interior is authorized to do any and all things necessary to carry out and accomplish the purposes of the act. *Held*, a stipulation which requires that an applicant for a pipe-line right-of-way across public lands shall agree to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches, without discrimination as between Government lands and lands of others, and in such ratable proportions as may be satisfactory to the Secretary of the Interior, is within the purview of this statute. 465

5. The authority granted the Secretary of the Interior by section 28 of the act of February 25, 1920, to promulgate regulations to govern the use of rights-of-way through public lands for pipe-line purposes includes regulation of the pipe lines, the right-of-way being granted for "pipe-line purposes", and the only use of the right-of-way contemplated by the statute being use for a pipe line----- 465

6. The inclusion in the act of February 25, 1920, of the express condition that the pipe lines provided for must be operated as common carriers does not exclude, by implication, other control over the pipe lines, but was intended merely to direct the exercise of the discretion of the Secretary of the Interior on one particular feature, leaving him freedom of discretion over the other elements of regulation as to the use of the pipe line----- 465

Right of Way—Continued.

Pipe Line—Continued.

7. A requirement that an applicant for a right-of-way for an oil or gas pipe line shall, as a condition precedent to the granting thereof, enter into a stipulation expressly consenting and agreeing to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches without discrimination as between Government lands and lands of others, and in such ratable proportions as may be satisfactory to the Secretary of the Interior, does not transcend the scope of section 28 of the act of February 25, 1920 (41 Stat. 437, 448), governing applications of this character----- 465

Railroads.

8. Where the grant of a right-of-way to a railroad company across Indian lands creates a possibility of reversion in the Indians, and the Indian title is later extinguished in favor of the United States by treaty, the right of reversion passes to the United States and inures to its benefit... 393

9. A grant by the United States purporting to convey a quarter section of public land over which a railroad right-of-way had previously been granted under the act of February 18, 1888 (25 Stat. 35), carries with it, in the absence of further exception or reservation, the entire interest left in the United States, so that an application by the railroad company's successor for a lease, under the act of May 21, 1930 (46 Stat. 373), of the oil and gas deposits under the railroad right-of-way, may not be granted----- 393

10. Upon a grant by the United States of a right-of-way for railroad purposes over public lands, the company's interest is "neither a mere easement nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted"----- 392

Reservoir.

11. Instructions of January 4, 1933, concerning reservoir rights-of-way under act of March 3, 1891 (Circular No. 1291)----- 141

Riparian Rights.

See *Arkansas River Islands*, 1, 2.

1. Land that has been cut off by avulsion from a tract of land owned by the United States abutting on a watercourse retains its status as public land, but one who has held and occupied it for many years under claim or color of title may acquire title thereto under the act of December 22, 1928, or under some other applicable public-land statute as against one attempting to enter it under the homestead law.....

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102

2. Public land reserved by the United States, until disposed of by it, and in the absence of express legislation by Congress, is governed by the common law with respect to riparian rights and the effect of erosion and submergence, and not by the law of the State (*Widdecombe v. Rosemiller*, 118 Fed. 295).....

455

3. Where surveyed public lands of the United States bordering upon a navigable stream, and to which the United States has not parted with title, are eroded in their entirety by the action of the stream, and later restored by accretion, title to the lands so restored is in the United States, and not in the owners of the remote nonriparian lands, which lands for a time were the shore lands.....

455

4. Following Federal survey, certain undisposed of subdivisions of United States public lands in Nebraska bordering upon the Missouri River were washed away by that river, either as the result of erosion or avulsion, and later restored, augmented by other land, the result of accretion. *Held*, that title to the surveyed lands so restored or uncovered and to the lands added thereto by accretion is in the United States and not in the owners of the back lands which were for a time the shore lands.....

455

Rules and Regulations.

See *Regulations; Secretary of the Interior*, 2.

1. Rules and regulations whose sole statutory basis is section 1201 of title 413 of the United States Code have been given judicial sanction by the Supreme Court.....

353

2. Specific legislative authorization for regulation by the Secretary of the Interior of grazing

Rules and Regulations—Con.

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upon public lands withdrawn for a Federal grazing district is not necessary, his designation in the Executive order being sufficient. Such designation is consonant with the Secretary's general jurisdiction over the public lands of the United States; and by virtue of this general authority he may prescribe such rules and regulations as are necessary to effectuate the purposes for which the withdrawal and reservation are made.....

353

Rules of Practice.

See *Practice*.

St. Elizabeths Hospital.

1. There is no provision of law permitting the admission to St. Elizabeths Hospital of an insane alien in the charge of the United States Immigration Service pending deportation.....

267

2. The feasibility of admission of an insane alien to St. Elizabeths Hospital by his transfer from the Immigration Service to the Public Health Service and by that service to St. Elizabeths Hospital is one for determination by the services involved.....

267

Salary.

See *National Parks, Buildings and Reservations*, 2, 5, 6; also, generally, *Wages and Hours of Labor*.

455

Sale of Lands.

1. Regulations of September 22, 1932, governing sale of lands under section 17, act of February 25, 1920.....

140

Sand and Gravel.

See *Highways, Federal Aid*, 1; *Mining Claims*, 37, 38.

San Diego, City of.

See *Boulder Dam and Project*.

San Juan, McKinley, and Valencia Counties, N. Mex.

1. Instructions for exchange of lands, act of March 3, 1921 (Circular No. 1284).....

21

San Francisco, County and City.

See *Electric Power*, 1.

Santa Teresa Land Company.

See *Private Land Claims*, 4-6.

School Lands.

1. Where a State did not acquiesce in an erroneous decision of the Land Department resulting in the cancellation of a school-land selection, but, on the contrary, gave and continued to give notice to the world, by its actions, of its continued claim to the land, laches may not be imputed, even though a long period of time has elapsed following the erroneous cancellation of the selection and though there has been tardiness in seeking correction of the erroneous decision-----

112

Indemnity.

2. Where a State, possessed of the right, files an indemnity school-land selection for public land subject thereto, and performs all things needful to perfect the selection, its right may not be defeated by a subsequent withdrawal of the lands from entry, and a homestead entry of lands included within such withdrawal will not prevail against the State or a qualified grantee of the State----

112

3. The title a State has in an indemnity school-land selection is equitable only, the legal title being in the United States, from which it follows that, until legal title passes from the United States, inquiry as to all equitable rights is within the cognizance of the Land Department, which is clothed with jurisdiction to determine whether the land should be listed to the State or not; accordingly, the judgment of the Department, even though erroneous, is voidable only, and not void, and is therefore entitled to respect until set aside by direct attack in some manner recognized by law-----

112

4. The action of a State in granting an oil and gas lease of lands embraced within an uncompleted school indemnity selection list is tantamount to an oil and gas classification, within the meaning of the act of July 17, 1914 (38 Stat. 509), when the prospective oil and gas value is confirmed by the Geological Survey, or from other sources-----

175

5. School land indemnity may be allowed for loss based upon the fractional condition of a township even though the township is only partly surveyed, where such loss is shown by a protraction survey of the unsurveyed portion em-

School Lands—Continued.

Indemnity—Continued.

braced within a reservation added to the portion actually surveyed..

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Secretary of the Interior.

See, generally, *Administrative Jurisdiction*; *Alaska Natives*, 4; *Boulder Dam and Project*, 2, 5; *Homestead (Federal Subsistence)*, 35; *Indians and Indian Lands*, 3, 9, 11, 13, 17, 21, 31, 33, 34, 48-51; *National Parks, Buildings and Reservations*, 1, 7, 23; *Oil and Gas Lands, Etc.*, 2; *Public Works Administration*, 1; *Reindeer*, 1, 2; *Right-of-Way*, 3, 5; *Rules and Regulations*, 2; *Yellowstone Park*, 1.

1. Where a native of Alaska dies leaving a mixed estate of restricted and unrestricted property, the Secretary of the Interior can deal only with the former class, while the jurisdiction over the latter class devolves upon the local court-----

15

2. Congress has conferred upon the Secretary of the Interior the authority to make regulations and to impose restrictions with respect to reindeer owned by the United States in the Territory of Alaska that have been or may be transferred to the natives and to act in behalf of the natives in such connection, and enforcement thereof may be had in a proper case by suit to recover the animals illegally transferred, or the value thereof-----

15

3. Congress, in the act of August 1, 1914 (38 Stat. 582), having authorized and directed the Secretary of the Interior to act in determining the per acre charge for irrigation of lands within Indian reclamation projects, impliedly gave him authority to determine the estimated cost of the project and the total area that can be irrigated-----

195

4. The act of August 1, 1914 (38 Stat. 582), directing the Secretary of the Interior to apportion the cost of irrigation projects constructed for Indians in accordance with the benefits received by each individual Indian, requires him, in effect, to make an apportionment of the cost of such irrigation works upon a per acre basis based upon benefits received-----

195

5. In order to fix charges upon irrigated lands within Indian reclamation projects the Secretary of the Interior must determine the

Secretary of the Interior—Con. Page

estimated cost of the project and the total area that can be irrigated, which factors supply the basis for such charges.-----

195

6. It would be unusual to say that Congress intended, by the act of February 14, 1920 (41 Stat. 408) to declare as irrigable all land for which water for irrigation purposes can be delivered, and the Secretary of the Interior would not be justified in determining that land was irrigable if it was not arable and susceptible of economic cultivation with the use of irrigation water.-----

195

7. An act of Congress (Act February 27, 1925, 43 Stat. 1008) intended to permit greater latitude in the investment of the surplus funds of Osage Indians contained language which, if given literal application, would preclude the Secretary of the Interior from investing the funds of such Indians, if resident in Oklahoma, in bonds of the United States Government, and in other respects would work hardship to such Indians generally, whether resident in Oklahoma or not. *Held*, That the presence of this language in the statute should not preclude the Secretary from investing these funds in bonds of the United States Government, should he deem such action in the interest of the Indians.-----

260

8. The Secretary of the Interior, as such, is without authority to approve and make effective plans submitted by the Director of the Office of National Parks, Buildings, and Reservations, for changing the hours of labor from 30 to 40 per week, upon work in national parks, within the scope of the Federal Emergency Administration of Public Works, his authority in this connection being that conferred upon him as head of the Federal Emergency Administration of Public Works.-----

328

Supervisory Authority.

9. The Secretary of the Interior, in the proper exercise of his supervisory authority, may vacate a decision of the General Land Office and direct a reconsideration of the case by said office, even though no appeal may have been taken from its decision therein.-----

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Shoalwater Indian Reservation.

See *Indians and Indian Lands*, 6-8.

Shoshone Reclamation Project. Page

See *Reclamation*, 2.

Sodium and Sulphur.

1. Regulations of August 16, 1932, on sulphur production; act of April 17, 1926, as amended by act of July 16, 1932 (Circular No. 1287)-----

34

2. Regulations of June 13, 1933, agricultural entry of lands withdrawn, classified, or reported as valuable for sodium, and/or sulphur (Circular No. 1303)-----

227

Soil Erosion Service.

1. The Federal Soil Erosion Service, a national administrative agency created under authority of section 202, Article II, of the National Industrial Recovery Act (48 Stat. 195, 201), received an allotment of Public Works funds by resolution dated July 17, 1933, such resolution specifically authorizing soil erosion projects on privately owned lands, and this allotment was followed by another which did not specify whether it was to be used on private lands, but referred to the resolution of July 17, 1933, and designated the work to be done with the additional allotment as "certain additional projects." *Held*, That both allotments could be employed on erosion projects on privately owned lands-----

439

2. Services and supplies may be procured on behalf of an establishment of the United States Government without competitive bidding in instances where special skill and experience are more important than a low price and it is believed these cannot be assured by competitive bidding-----

408

3. The Soil Erosion Service of the United States has authority to enter into an agreement with a State administrative institution for the supplying of material needed in connection with the checking of soil erosion.-----

408

4. An agreement between the Soil Erosion Service of the United States and a State forest commission whereby, for a consideration, the latter is to produce and supply trees for the former, possesses the essential elements of a valid contract-----

408

5. Under the authority contained in section 202 of Article II of the National Industrial Recovery Act, to prepare a comprehen-

Soil Erosion Service—Contd.

sive program of public works which shall embrace "conservation and development of natural resources, including prevention of soil or coastal erosion, * * * and * * * flood control", the Federal Soil Erosion Service, an administrative agency duly created to effect the purposes of the act, is authorized to conduct projects for the prevention of soil erosion on private as well as public lands-----

439

6. The fact that benefits will ensue to private farms as the result of the prevention of soil erosion and other work of the Federal Soil Erosion Service affords no basis for confining its operation to public lands, for the evidence clearly indicates that Congress intended no such limitation-----

439

7. The work of the Federal Soil Erosion Service is in conformity with the practice of the Department of Agriculture since the time of that Department's establishment-----

439

8. Floods, pests, etc., have long been considered national problems, and Congress has frequently authorized work on private lands for their control. The inclusion of soil and coastal erosion prevention in the same paragraph—Sec. 202 (b)—with flood control work, indicates that Congress viewed soil erosion and floods as similar problems-----

439

9. From an early date the importance of maintaining a vegetative cover has been recognized as necessary to flood control. There can be no reasonable doubt that section 202 (b) authorizes measures necessary to maintain a vegetative cover on private lands for purposes of flood control-----

439

10. Section 202 (b) directs the Administrator to include in the program of public works projects for the "purification of waters." All the projects of the Soil Erosion Service on private lands, save a minor one, are located within the drainage basins of navigable rivers, and there can be no doubt that one of the major contributing causes of the pollution of our public streams is the depositing of erosional debris-----

440

11. The scheme of construction and financing of projects on private lands set forth in the cooperative agreements is authorized

Soil Erosion Service—Contd.

Page

by the National Industrial Recovery Act, section 203 (a), conferring authority upon the President * * * through the Administrator, * * * to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202-----

440

12. Cooperative agreement between landowners, etc., to hold harmless in case of damage to their land-----

542

Soldiers, Sailors, and Marines.

See *Homestead*, 17, 18.

Soldiers' Widows and Minor Children.

See *Homestead*, 25, 26.

Solicitor's Opinions.

See *Table*, page ix.

Spanish and Mexican Lands and Land Grants.

See *Indians and Indian Lands*, 36-47.

Special Agents, Department of the Interior.

1. Instructions of May 13, 1933, providing for appeals and motions for rehearing by special agents in charge (Circular No. 1299)-----

214

State Courts.

1. This Department has repeatedly decided that it is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts. *Silver Lake Power & Irrigation Company v. City of Los Angeles* (37 L. D. 152, 153) and cases there cited; and the remedy of the owner of such a water right lies in recourse thereto-----

144

State Laws.

See *Indians and Indian Lands*, 16, 27, 68; *Migratory Birds and Treaty*, 5.

1. The power to preserve fish and game within its borders is inherent in the sovereignty of a State (*citing Geer v. Connecticut*, 161 U. S. 519; *Ward v. Racehorse*, 163 U. S. 504, 507)-----

418

2. The power of each State to regulate fishing in its rivers includes authority to restrict the devices and types of tackle which fishermen generally employ-----

418

State Laws—Continued.

3. A regulation of fishing, imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intentment or operation a denial to a privileged Indian community of its right to fish, is not violative of a provision of a treaty with the Indians (see 12 Stat. 951; 45 Stat. 1158) under which they are guaranteed "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."-----

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418

4. A reasonable construction of a provision of a treaty with Indians guaranteeing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory", does not include authority to construct what is known as a willow weir or willow dam in the channel of the Columbia River, for the purpose of holding the salmon run, and in disregard of the State laws and regulations.-----

419

5. A Yakima Indian is not exempt from the general laws of the State of Oregon requiring a license in order to sell fish caught in the Columbia River and to pay a poundage tax on such sales, when sold at any place within the jurisdiction of the State.-----

419

6. It is doubtful whether State cession laws should be construed as applying to acquisitions in the name of a corporation, as a cession of jurisdiction, being an abrogation of sovereign authority by the State, must be construed strictly, and construction of such a statute which employs inference or presumption to defeat the jurisdiction of the State should be avoided unless very cogent reasons for such a construction appear.-----

500

7. Delaware may tax Federal Subsistence Homesteads Corporation for the privilege of existence as a Delaware corporation, but no other franchise, license, occupation, income, or excise tax may be imposed by Delaware or any other State, nor may the right of the corporation to enter into any State and conduct its operations there be qualified or restricted.---

499

8. The interest of a purchaser of land from the United States becomes taxable by the State

State Laws—Continued.

Page

when the purchaser acquires "equitable title" to the land, but for purposes of State taxation a purchaser from the United States does not acquire "equitable title" until he has done all things necessary, under any controlling statute or under his purchase contract, to entitle him to a deed or patent.---

499

9. In analogy to the exemption of private corporations engaged in interstate commerce from the operation of State statutes requiring that foreign corporations register and qualify to do business, a similar exemption is warranted on behalf of a corporate instrumentality of the United States having as its sole business the execution of an enactment of Congress.-----

499

10. Equities are not established against the United States by expenditures on lands in ignorance of the prior certification and approval of selection thereof by the State, the fact of such certification and approval being duly noted upon the local land office records.---

475

State Selection.

See, also, *School Lands*.

1. Where cancellation of a State selection was the result of an erroneous decision of the Land Department, and the State did not acquiesce in such decision, but, on the contrary, took action which, in effect, gave notice to the world that it claimed title to the land, such notice was effective, even though the State has been somewhat tardy in seeking correction of the erroneous decision which resulted in cancellation of its selection.-----

113

2. Section 15 of the act of September 9, 1850, which act provided among other things for the establishment of a territorial government for New Mexico, did not contain a grant *in praesenti* of sections 16 and 36 in each township in that Territory, but merely a reservation of those sections in contemplation of a future grant by Congress.-----

8

3. It has not been authoritatively settled that a suit to cancel a list of lands certified to a State, if not brought within six years from the date of certification, or within six years from the date of discovery of fraud, would be barred by section 8 of the

State Selection—Continued.

act of March 3, 1891 (26 Stat. 1099), but this statute has been referred to by the Supreme Court as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a certain time, and it has been frequently held that certification of lists pursuant to similar grants is of the same effect as a patent-----

Page 475

Statutory Construction.

See, also, *Words and Phrases.*

1. If giving to the words of a statute their natural meaning "leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with the design and purpose, sacrificing if necessary the literal meaning in order that the purpose may not vary." *Ozawa v. United States* (260 U. S. 178, 194). See, also, *Holy Trinity Church v. United States* (143 U. S. 457)-----

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90

2. Where an act of Congress, couched in general terms, if given literal application, would do violence to an established, integrated system, the growth of many years, while a qualified application avoids this and yet meets the need apparently intended, it is to be presumed, on well-established principles of statutory construction, that a restricted sense was intended-----

90

3. The act of July 1, 1932 (47 Stat. 564), contained a proviso that "the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessment shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished." *Held*, that the surrounding circumstances afford clear warrant for the conclusion that Government *Indian* irrigation projects were meant, and not irrigation projects within the purview of the Reclamation Act-----

90

4. The principle is well established that laws are to be given a sensible construction, and that a literal application of a statute which would entail unjust and ab-

Statutory Construction—Contd. Page:

surd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative intent----- 260

5. Where language in a statute whose purpose is to liberalize a prior law concerning Indians, if followed literally, would have the contrary effect, and would in other respects be inimical to the best interests of said Indians, such language will not be given administrative effect, since this would be inconsistent with the intent of Congress----- 260

6. The moratorium act of April 1, 1932, which afforded temporary relief to water users on irrigation projects constructed and operated under the reclamation law, being a relief act, should be liberally construed, and when so construed, sections 1 and 2 thereof, which are descriptive of the two large bodies of water users, namely, organizations and individuals, include the nonconsenters on the Garland Division of the Shoshone project, Wyoming, and on other projects----- 13

7. The ordinary and reasonable interpretation of the act of July 1, 1898 (30 Stat. 570), makes it one relating to the admission of the public to park grounds, their conduct therein, and the extent of supervision over such grounds in that connection, and not to policing. It supplies no warrant for assessing fines against the members of the park police force for offenses against the regulations peculiar to them as members of that force----- 302

8. It is a well-established principle of law that, where a statute sets up a general scheme for the administration of a given field, subsequent and more particular statutes will not readily be construed to enact a departure from the general scheme. (*United States v. Barnes*, 222 U. S. 513; *Automatic Registering Machine Company v. Pima County*, 285 Pac. 1034)----- 325

9. A provision in the Home Owners' Loan Act of 1933 that "the Corporation * * * shall determine its necessary expenditures under this act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expendi-

Statutory Construction—Contd. Page

ture of public funds", does not relieve the Office of National Parks, Buildings, and Reservations of the obligation of allotting to the Corporation space in some building or buildings in the District of Columbia owned or leased by the United States----- 325

10. Upon a grant by the United States of a right-of-way for railroad purposes over public lands, the company's interest is "neither a mere easement nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted"----- 392

11. Where an act of Congress is open to two constructions, one of which raises a serious constitutional question, and the other of which avoids such question, the settled rule of statutory construction requires adoption of the latter construction----- 401

12. Where the language of a statute giving authority and direction to modify a contract does not purport to establish the *exclusive* means for effecting the end sought, another method of modification, provided by the contract itself, is not prohibited----- 401

13. Consideration of the background and legislative history of the act of March 4, 1933, and the language of the act itself, leads to the conclusion that the act should not be construed so as to require consent of the Indians involved to a modification of a contract which, by its own terms, may be modified without the Indians' consent----- 401

14. The act of March 4, 1933 (47 Stat. 1568), which merely authorizes and directs the Secretary of the Interior, with the consent of the Indians and the purchasers, to modify timber sale contracts, cannot properly be construed to modify, *by its own operation and without the consent of the purchaser*, a contract provision for price reduction----- 401

15. A paper and pulp company's contract with Indians to purchase timber from them contained a provision affording the company administrative recourse against economically unreasonable stumpage prices, by price reduction, which

Statutory Construction—Contd. Page

provision formed a substantial consideration for the company's contractual promises. *Quaere*: Whether a later statute if construed to deprive the company of such administrative recourse for a price reduction would not violate the "due process" clause of the fifth amendment to the Federal Constitution----- 401

16. A reasonable construction of a provision of a treaty with Indians guaranteeing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory", does not include authority to construct what is known as a willow weir or willow dam in the channel of the Columbia River, for the purpose of holding the salmon run, and in disregard of the State laws and regulations----- 419

17. An oil and gas lease made under authority of section 2 of the act of May 27, 1908 (35 Stat. 312), contained provisions that it should run for five years from date of approval, which was November 3, 1920, "and as much longer thereafter as oil or gas is found in paying quantities"; that the lessee should pay as royalty on each gas-producing well \$300 per annum in advance, to be calculated from the date of commencement of utilization; and that, if the gas well should prove unprofitable commercially, and the lessee desired to retain certain gas-producing privileges, he should pay a rental of \$100 per annum, in advance, calculated from the date of discovery of gas, on each gas-producing well. *Held*, That no gas well having produced commercially since the year 1926, the mere payment by the lessee of \$100 annually, under the clause of the lease which makes provision for retention of gas-producing privileges in an unprofitable well, would not operate to extend the lease beyond the fixed or primary period of five years, an extension of the lease requiring, as a prerequisite, production of oil or gas in paying quantities----- 422

18. Under the authority contained in section 202 of Article II of the National Industrial Recovery Act, to prepare a comprehensive program of public works which shall embrace "conservation and development of natural

Statutory Construction—Contd.

resources, including prevention of soil or coastal erosion, * * * and * * * flood control", the Federal Soil Erosion Service, an administrative agency duly created to effect the purposes of the act, is authorized to conduct projects for the prevention of soil erosion on private as well as public lands.

439

19. The authority granted the Secretary of the Interior by section 28 of the act of February 25, 1920, to promulgate regulations to govern the use of rights-of-way through public lands for pipe-line purposes includes regulation of the pipe lines, the right-of-way being granted for "pipe-line purposes", and the only use of the right-of-way contemplated by the statute being use for a pipe line.

465

20. In accordance with well established principles of statutory construction, the act of June 5, 1920, permitting donations in aid of national parks, and the act of March 5, 1917, forbidding Federal employees receiving other than Government salary for Federal services; should both be given operation, the two acts not being unavoidably incompatible, and repeal by implication not being favored in law.

497

21. Under section 9 of the act of June 25, 1929, it is provided: "That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the act of July 2, 1864, and the joint resolution of May 31, 1870, and other acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this act shall have been finally determined." *Held*, that in the light afforded by the legislative history of the Northern Pacific land grants, and in view of pending litigation in the courts, said section must be interpreted as requiring the Secretary of the Interior to withhold all patents for *new lands* otherwise issuable to the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, until the determination of the litigation authorized in the 1929 act.

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Statutory Construction—Contd.

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22. There is a clear distinction between administration of a Government building, meaning supervision and maintenance, and the allotment of space therein, and these functions have been given distinct treatment by Congress, as appears from the act of February 26, 1925 (43 Stat. 983), and by the courts (see *In re Lyman*, 55 Fed. 29)-----

322

Stock and Stock Ownership.

See *Homesteads*, subheading, "*Subsistence*."

Subpoena.

See *Practice*, 4.

Subsistence Homesteads.

See *Homesteads*, subheading, "*Subsistence*."

Sundays and Holidays.

See *Claim for Damage*, 7.

Supervising Architect, Treasury.

See *Public Buildings*, 2.

Sureties and Surety Bonds.

1. Regulations of February 25, 1933, amending existing regulations concerning individual surety bonds (Circular No. 1293)-----

174

2. Regulations of the Federal Emergency Administration of Public Works regarding sufficiency of guarantors and sureties, adopted to give effect to provisions of the Federal Emergency Relief Act, contained the declaration that "the bond * * * of two responsible individual sureties will be accepted as security for any bid or contract." *Held*, that by this declaration it is not intended to limit to two the number of individual sureties, but to require that their number shall not be less than two.

472

3. A stockholder of a corporation may, under the terms of Bulletin 51 of Federal Emergency Administration of Public Works, be accepted as surety on the bond of the corporation, provided he has sufficient property, exclusive of his holdings in the corporation, so that he can justify for double the amount of his stipulated liability on the bond of the corporation.

472

4. Paragraphs 64 and 65 of Bulletin 51 of Federal Emergency Ad-

Sureties and Surety Bonds—Con. Page

ministration of Public Works permit two or more individuals to execute a bond as security for the faithful performance of a contract between the United States and construction companies, and in such bond limit their liability; but each such individual must justify for double the amount of his stipulated liability----- 472

5. Paragraphs 64 and 65 of Bulletin No. 51 of Federal Emergency Administration of Public Works contain no inhibition against more than two surety companies signing the same performance bond, and, in doing so, each company executing the bond may lawfully limit its liability to a stated sum less than the full amount of the bond, the sole interest of the United States being to secure a good and sufficient bond for a definite total amount designated----- 472

6. Corporations holding stock of a corporation submitting the successful bid on a contract between the United States and a construction company will be acceptable as sureties if their assets, independently of the stock of the bidding corporation, are collectively in excess of double the amount of the stipulated liability----- 472

Survey.

1. It is true in general that the General Land Office has authority to correct Government surveys after patent has been issued, and that the courts do not have this right, but it is without authority to pass upon the validity and extent of a private land grant confirmed and surveyed under decree of the Court of Private Land Claims, or to determine the validity of the decree and survey, its jurisdiction, after approval of the survey, being limited to the ministerial duty of issuing patent, all other matters being solely within the jurisdiction of the courts----- 608

2. Congress, in the exercise of its authority over public lands, by the act of March 3, 1891, created the Court of Private Land Claims, and in sections 7 and 10 of the act empowered said court not only to determine the validity of titles but to determine that the surveys executed conformed to its decrees, errors made being subject to correction by appeal----- 608

Survey—Continued. Page

3. The survey of a private land claim was approved in 1904, patent was issued in 1909, and objection was not made until 1933, although the alleged deficiencies in the area of the survey were apparent on the face of it from the day of its approval. *Held*, that consideration of the case could properly be denied upon the ground of laches----- 608

4. School land indemnity may be allowed for loss based upon the fractional condition of a township even though the township is only partly surveyed, where such loss is shown by a protraction survey of the unsurveyed portion embraced within a reservation added to the portion actually surveyed... 159

Taxation of Federal Instrumentalities.

See *Homesteads*, subheading, "*Subsistence*."

Taylor Grazing Act.

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Text of act----- 531
Executive withdrawal order for classification----- 539

Testimony.

See *Practice*, 4-6.

Timber and Timber Sale.

See *Indians and Indian Lands*, 57-62; *Mining Claim*, 16; *Statutory Construction*, 15; *Timber Trespass*.

1. Regulations of August 15, 1932, free use of timber on vacant unreserved public lands in Arizona and other western States. (Circular No. 1285)----- 26
2. Timber on mineral lands, act of June 3, 1878----- 29
3. Timber on nonmineral lands, act of March 3, 1891----- 30
4. New Mexico and Arizona brought within scope of act of March 3, 1891----- 30
5. Sale and use of timber in Alaska----- 31
6. Permits to cut timber in Wyoming and remove same to Idaho----- 31
7. California, Oregon, and Washington brought within scope of act of March 3, 1891----- 31
8. Permits to cut timber, Wyoming and Montana----- 32

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9. Permits to cut timber in Idaho and remove same to Oregon-----	32
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11. Timber cutting permitted for manufacturing, etc., purposes by outside corporations-----	33
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Title, State and United States.	
See <i>Arkansas River Islands</i> , 1, 2; <i>District of Columbia</i> , 1, 2; <i>Homestead</i> , subtitle " <i>Subsistence</i> ."	
1. The circumstances that lands ceded by a State to the United States were ceded in contemplation of their devotion to a particular use, and for a considerable length of time were so devoted, do not warrant the inference that upon the termination of such particular use or the substitution of other uses, title to the land reverts to the State, the cession containing no such reservation-----	492
Transportation.	
See <i>Right of Way</i> .	
1. In the carriage of freight by use of railway lines, the provisions of section 3709 of the Revised Statutes of the United States, requiring advertisement for competi-tive bidding, have not been held applicable to purchases and other contracts made or entered into by Federal officials-----	489
2. The head of an Executive De-partment of the Federal Govern-ment is authorized to enter into a contract for transportation of Government freight over the lines of a common carrier at a rate lower than that in the schedule filed with the Interstate Commerce Commission-----	489
Treaties.	
See <i>Indians and Indian Lands</i> , 14, 15, 23, 27, 36-47.	

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Tribal Ownership.	
See <i>Indians and Indian Lands</i> , 23½, 40.	
Trusts and Trustees.	
See <i>Indians and Indian Lands</i> , 5, 9, 49.	
1. Under that provision of sec-tion 2 of the act of January 27, 1933 (47 Stat. 777), relating to Indians of the Five Civilized Tribes in Oklahoma, which de-clares that "no trust com-pany * * * shall be trustee in any trust created under the act which has * * * promised to pay to any person other than an officer or employee on the regu-lar pay roll thereof any * * * remuneration for any service or influence in * * * attempting to secure for it the trusteeship in any trust", a company is disquali-fied to act as trustee in cases where it has entered into contrac-tual relations with one not on its regular pay roll, such person to re-ceive a compensation for obtain-ing for the company the consents of said Indians to its trusteeship in the creation of trusts under said act-----	237
2. The criterion for determining whether a company has placed it-self within the class inhibited from acting as Indian trustee under the provisions of the act of January 27, 1933, is the circum-stance, whether or not the person dealing in its behalf with the In-dians in endeavoring to obtain consents to the creation of trusts was at the time of the transac-tions an officer or employee on the company's regular pay roll, the statute and regulations clearly ex-pressing an intention to limit promises of compensation to per-sons <i>already on the regular pay roll of the company for purposes other than the procurement of trusts under the act</i> , and prohibiting any and all sorts of promises of re-muneration so long as they are made to persons who are not al-ready officers or employees on the regular pay roll-----	237
3. <i>Held</i> , that a trust company permanently disqualifies itself from acting as trustee in Indian trusts under the provisions of the act of January 27, 1933, where,	

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after filing the certificate prescribed by paragraph 2 of the Department's regulations of June 2, 1933, "to the effect that it has not paid or promised to pay any person other than an officer or employee on its regular pay roll * * * any remuneration for any service or influence in * * * attempting to secure for it the trusteeship in that or in other trusts to which these regulations apply", it is established that said company had entered into contractual relations with one not at the time an officer, employee, or on the pay roll of the company, under the terms of which he was to engage in efforts to procure Indian trusteeships for the company under said act of January 27, 1933.-----

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United States, Reversion of Title to.

1. Where the grant of a right-of-way to a railroad company across Indian lands creates a possibility of reversion in the Indians, and the Indian title is later extinguished in favor of the United States by treaty, the right of reversion passes to the United States and inures to its benefit.-----

393

U. S. Code.

See sections of Cited and Construed, *Table*, page XL.

Utah Lands.

1. Instructions of April 26, 1933, lands in Utah added to Navajo Reservation.-----

205

Utility Company.

See *Electric Power*, 1, 2.

Waiver.

See *Oil and Gas Lands*, 3.

Wages and Hours of Labor.

1. The order of the Secretary of the Interior of August 23, 1933, requiring that all work performed with funds granted by the Federal Emergency Administration of Public Works shall be subject to the labor policies and wage requirements prescribed by said organization, embraces work performed in National Parks, whether under contract or by the Government's own forces.-----

327

2. By subsection (b) of section 3, Article II, Circular No. 1, it is provided that, if work is located

Wages and Hours of Labor—

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at points remote and inaccessible, 40 hours' work in one week shall be permitted after it is determined by the State Engineer (P. W. A.), prior to advertisement, that the work is remote and inaccessible; and this regulation vests authority in the State Engineer (P. W. A.) for determining whether 40 hours shall constitute a week's work on any designated project with authority lodged in the Federal Emergency Administration of Public Works to modify such regulation-----

327

3. To be legally effective, a change from or waiver of the statutory 30-hour work week prescribed by the National Industrial Recovery Act and the Federal Emergency Administration of Public Works, as applied to National Parks, must be authorized by officials of the latter organization or the State Engineer (P. W. A.), in such persons residing the duty of determining whether it is impracticable or infeasible to do the work required on the 30-hour week basis or to substitute therefor the 40-hour week authorized in Circular No. 1 and the rules and regulations approved August 9, 1933-----

328

4. The Secretary of the Interior, as such, is without authority to approve and make effective plans submitted by the Director of the Office of National Parks, Buildings, and Reservations, for changing the hours of labor from 30 to 40 per week, upon work in National Parks, within the scope of the Federal Emergency Administration of Public Works, his authority in this connection being that conferred upon him as head of the Federal Emergency Administration of Public Works.-----

328

5. Nothing in the National Industrial Recovery Act or the regulations adopted to give it effect forbids payment by Government check for work performed with funds granted by the Federal Emergency Administration of Public Works; but where, owing to difficulties in the way of cashing checks, such method of payment would work a hardship, the purpose of the regulations would seem to require payment in cash.-----

328

6. Congress having fixed the minimum hours of labor per day for employees in the Executive

Wages and Hours of Labor— Continued.

Departments in Washington at not less than seven hours per day, except employees whose compensation is determined by special wage-fixing authorities, and declared that service shall be required each day except Sundays and days declared public holidays, there is no authority of law for elimination of Saturday as a partial workday by adding to the other workdays the four hours of service required by the act of March 3, 1931.....

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Waste Matter, Shrinkage, Etc.

See Opinion of Secretary in Humble Oil and Refining Co. *et al.*.....

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Water Users, Irrigation Projects.

See *Indian Irrigation Projects*, 10-13; also, generally, *Reclamation*.

1. Where a water user or water users' association or irrigation district that has been granted deferments under the moratorium act of April 1, 1932, defaults in the payment of the annual interest when due, simple interest may thereafter be charged upon the sums of interest due annually upon the principal debt as long as they remain unpaid.....

86

2. The procedure for the collection of defaulted interest upon the principal debt and of simple interest which may accumulate upon the interest due from a water user, water users' association, or irrigation district, is to be governed by the terms of the contract or of the applicable Federal statute; but where neither the contract nor the statute is applicable because of the particular conditions, then the remedy is to be pursued in accordance with the law of the State in which the project is located.....

86

3. The moratorium act of April 1, 1932, which afforded temporary relief to water users on irrigation projects constructed and operated under the Reclamation law, being a relief act, should be liberally construed, and when so construed, sections 1 and 2 thereof, which are descriptive of the two large bodies of water users, namely, organizations and individuals, include the nonconsenters on the Garland Division of the Shoshone project, Wyoming, and on other projects.....

13

Wages and Hours of Labor— Continued.

4. The common object of the acts of April 1, 1932, and March 27, 1934, being the relief of settlers on Reclamation projects by extending the period of payment of construction charges, such legislation should receive a liberal construction and the two acts be considered *in pari materia*.....

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5. Although the act of April 1, 1932, for the relief of water users on irrigation projects of the Reclamation Service by extending the period of payment of construction charges, provides for the deferment of "regular construction charges", and a charge already deferred is not a regular construction charge, it does not of necessity follow that the deferred charges cannot be further deferred under the later act of March 27, 1934, enacted to extend the operation of the earlier act. Such a further extension comes reasonably within the scope of the language, "all similar charges coming due for the year 1934" contained in the later act.....

551

Waters and Water Rights.

See also, *Boulder Dam and Project*.

Generally.

1. This Department has repeatedly decided that it is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts. *Silver Lake Power & Irrigation Company v. City of Los Angeles* (37 L. D. 152, 153) and cases there cited; and the remedy of the owner of such a water right lies in recourse thereto.....

144

2. A withdrawal for a public water reserve (see Executive order of Apr. 17, 1926, and regulations thereunder, in 51 L. D. 457) does not contemplate the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use, and the owner of a right, obtained from the State to such water, acquires no color of title or exclusive possessory right to the subdivision upon which the water was appropriated and used, but, at most, merely an easement.....

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3. In Colorado seepage or waste waters which return to a stream

Waters and Water Rights— Page

Continued.

Generally—Continued.

become a part of the water supply of the stream and cannot be taken or diverted by a new claimant when such diversion or use would interfere with the right of use by prior appropriators downstream—

83

4. Lands abutting on a stream the entire flow of which is insufficient to supply the priorities for irrigation already established and which are not therefore susceptible to irrigation may be designated under the stock-raising homestead act, if otherwise of the character contemplated by the act—

83

5. Authority to contract to deliver water from a canal to be constructed of necessity carries with it authority to contract for a canal capacity sufficient to carry the water to be delivered in addition to any other water to be carried, if said canal is to carry other water—

414

6. The water rights acquired and safeguarded by section 2339, Revised Statutes, are distinct from any right in the land itself, and the existence of such rights is no bar to acquisition of the land under subsequent homestead entries or locations, but all patents granted or homesteads allowed are subject to any vested accrued rights that may have been acquired under or recognized by this section—

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Section 2339, Revised Statutes.

7. The water rights acquired and safeguarded by section 2339, Revised Statutes, are distinct from any right in the land itself, and the existence of such rights is no bar to acquisition of the land under subsequent homestead entries or locations, but all patents granted or homesteads allowed are subject to any vested accrued rights that may have been acquired under or recognized by this section—

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Wheeler-Howard Act.

See *Words and Phrases*, 9.

1. Instructions of September 19, 1934 (date of submission, Aug. 10, 1934), to govern restoration of lands formerly Indian to tribal ownership—

559

Wild Life Conservation.

See *Yellowstone Park*, 1-6.

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Wills.

See *Indians and Indian Lands*, 12, 13.

Wisconsin Lands Erroneously Meandered.

1. Regulations of December 8, 1932, regarding Wisconsin lands erroneously meandered. (Circular No. 994, reprint)-----

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Withdrawal.

See *Grazing and Grazing Lands*, 1-3; *Oil and Gas Lands, Etc.*, 41; *Taylor Grazing Act*, at p. 539.

1. Where a State, possessed of the right, files an indemnity school-land selection for public land subject thereto, and performs all things needful to perfect the selection, its right may not be defeated by a subsequent withdrawal of the lands from entry, and a homestead entry of lands included within such withdrawal will not prevail against the State or a qualified grantee of the State—

112

2. A withdrawal for a public water reserve (see Executive order of Apr. 17, 1926, and regulations thereunder, in 51 L. D. 457) does not contemplate the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use, and the owner of a right, obtained from the State to such water, acquires no color of title or exclusive possessory right to the subdivision upon which the water was appropriated and used, but, at most, merely an easement—

144

3. A withdrawal of public lands from disposal, made by the President under the authority of the act of June 25, 1910 (36 Stat. 847), continues in effect until revoked by the President or by act of Congress—

222

4. The Federal courts have repeatedly held that an appropriation of public lands for a public purpose by proper Executive withdrawal prevents their further use by private persons for any purpose which is in conflict with the purpose for which the withdrawal was made—

353

Witnesses.

See Practice, 4-6.

Words and Phrases.

1. "Actual permanent residence"-----	426
2. "Actual production"-----	247
3. "Actual residence", under the homestead laws, means physical occupation of the premises; it means precisely the same thing as actual inhabitancy for seven months each year, subject to proper credit for military service-----	426
4. "Charge and control"-----	302
5. As used in sections 13 and 14 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), the expressions "compact" and "reasonably compact" relate to squares, so that, to be "compact", the selection of primary lease acreage must be in the form of a square wherever possible, and where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square in dimensions would conform to the statutory requirement-----	338
6. Considering the circumstances that led to the enactment of section 23 of the General Leasing Act (see 41 Stat. 448) as disclosed in the proceedings before the Public Lands Committees of Congress, by the phrase in that section reading "dissolved in and soluble in water and accumulated by concentration" was meant natural evaporation residues dissolved in and accumulated by surface or ground-water drainage in the form of brines and later crystallized-----	183
7. The transactions provided for by the terms of the authority granted the Federal Subsistence Homesteads Corporation are <i>bona fide</i> loans, and any such loan as is proposed would be an "expenditure of appropriated funds"-----	390
8. The expressions "have actually resided" and "actual permanent residence", as used in sections 2291 and 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), contemplate the performance of actual residence as distinguished from constructive residence-----	426
9. In section 4 of the Wheeler-Howard Act, limiting the class of persons to whom may be devised restricted Indian lands, it is provided that "in all instances such lands or interests shall descend or	

Words and Phrases—Contd. Page

be devised * * * to any member of such tribe or of such corporation or any heirs of such member." Held, that the phrase, "heirs of such member", therein employed, should be construed to mean "heirs of the testator", such construction being reasonable, consistent with legal usage, and in harmony with the general plan and expressed intent of Congress-----	584
10. A mill site appurtenant to a lode is a "location" under the mining laws of the United States-----	251
11. "Oil produced"-----	247
12. "Other public purposes"-----	58
13. The term "producing oil or gas field", as used in section 13 of the Leasing Act, must be construed to include areas in which there has been production and which will continue to produce oil or gas, and the fact that there has been a cessation of production and abandonment of wells in a given field is not of itself sufficient to warrant a redefinition of the structure or the revocation of the classification of the field in the absence of a proper showing persuasive that the area does not in fact contain valuable deposits of oil or gas-----	192
14. "Production" (oil)-----	247
15. "Reasonably compact"-----	338
16. The term "sodium borate" in section 23 of the Leasing Act of February 25, 1920 (41 Stat. 437), related to the character of the deposit as found in the ground; therefore, the fact that the products produced from kernite, a sodium borate mineral, such as borax and boric acid, are chiefly valuable for their boron content, does not exclude kernite from the purview of the act-----	183
17. As to what tribes of Alaskan natives were included within the term, "uncivilized tribes", as employed in Article III of the treaty under which Alaska was ceded to the United States (15 Stat. 593), it was held, in <i>In re Minook</i> (2 Alaska Reports, 200, 221), that they "were those independent pagan tribes who acknowledged no allegiance to Russia, and lived the wild life of their savage ancestors"; and this includes those natives who, today, live under primitive conditions in regions remote and difficult of access, influenced by superstition, and following the crude customs	

Words and Phrases—Contd.

inherited from their ancestors. By the terms of the treaty of cession, these tribes were to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country"-----

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18. Persons whose use of public lands rests merely upon the sufferance of the United States do not come within the purview of the exception contained in an order of withdrawal that it shall be subject "to all *valid existing rights*", the sole "right" of those so using the lands being to graze stock thereon at the sufferance of the United States-----

353

19. If, before the irrigable area of a reclamation project is determined and construction charges fixed, experience in actual cultivation and irrigation of known areas demonstrates that a crop cannot be economically produced thereon, such areas should be eliminated in the final determination of irrigable area, even though land "*to which water for irrigation purposes can be delivered*"-----

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Wyandotte Scrip.

1. Under the stipulation in the supplemental agreement contained in Article 9 of the treaty of January 31, 1855, the rights of the parties named in the original agreement contained in the Wyandotte treaty of March 17, 1842, inure to and may be exercised by their heirs or legal representatives without restriction, and such heirs or legal representatives may exercise those rights by the making of scrip locations and receiving patents therefor in their own names-----

4

Yakima Indians.

See *Fish and Game*, 5.

Yellowstone National Park.

1. In the exercise of the authority vested in him by section 5 of the act of August 25, 1916, as amended by the act of June 2, 1920, the Secretary of the Interior has promulgated regulations declaring the Yellowstone National Park is "a sanctuary for wild life of every sort, and all hunting * * * of any wild bird or animal, except dangerous animals, when it is necessary to prevent

Yellowstone National Park—

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them from destroying human lives or inflicting personal injury, is prohibited within the limits of the park"-----

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2. Under the generally recognized doctrines of the law, the ownership of wild game, insofar as it is capable of ownership, is in the Government, for the use of the whole people; and private persons cannot acquire an exclusive property in wild game except by lawfully taking and reducing it to their possession-----

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3. The State of Montana has ceded and relinquished to the United States exclusive jurisdiction over and with respect to all lands within the State which were or might be embraced within the Yellowstone National Park (Laws of Montana, 1891, p. 262), reserving only a concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of the State. See *Yellowstone Transportation Co. v. County of Gallatin* (31 Fed. 2d, 644); petition for writ of certiorari denied (280 U. S. 555)-----

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4. By the terms of section 2 of the act of March 1, 1872, establishing the Yellowstone National Park, exclusive control thereof was vested in the Secretary of the Interior, and this embraced the power to make and publish regulations for the care and management of the park, including the conservation of wild life-----

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5. The Federal Government has authority to declare a perpetually closed season for the killing or taking away of game at any place within the limits of the Yellowstone National Park, including privately owned lands within newly added park areas-----

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6. The proprietor of privately owned lands has the exclusive right to kill and take game on his own premises and may forbid others from doing so; but his exercise of this right is subject to the power of the Government to regulate the time and manner thereof, and it may even forbid outright his killing or taking of game upon land owned by him. See 27 Corpus Juris, 943, and cases cited-----

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Yorktown, Virginia, Monument.

See *Colonial National Monument, etc.*

Yosemite National Park.

1. The basis and extent of the jurisdiction of the United States Government over privately owned lands within the Yosemite National Park are established by the act of October 1, 1890 (26 Stat. 651); act of February 7, 1905 (33 Stat. 702); act of June 2, 1920 (41 Stat. 731); California Laws of 1919, chapter 51-----

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2. The power of policing privately owned lands within the exterior boundaries of the Yosemite National Park is incident to the cession of exclusive jurisdiction

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over said lands made to the Federal Government by the State of California, no exception as to jurisdiction over privately owned lands being made in said cession.

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3. Under the act of June 2, 1920 (41 Stat. 731) and regulations issued pursuant thereto, there are provisions for proper control of unsanitary conditions, disorderly conduct, the carrying of firearms, keeping of domestic animals, etc., on privately owned land in Yosemite National Park-----

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