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IN CASES RELATING TO

THE PUBLIC LANDS

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

NORTHERN PACIFIC RY. CO.

Decided December 31, 1915.

SELECTIONS UNDER ACT OF MARCH 2, 1899.

To entitle the Northern Pacific Railway Company to make selection under the act of March 2, 1899 (30 Stat., 993), it must not only appear that the land is not of known mineral character at the date of the selection but it must have been returned as nonmineral at the date of actual government survey; and a return by the surveyor that "mining operations are now being carried on to a great extent; mineral indications are found in nearly all parts of the township," does not constitute a nonmineral return, and land so returned is not subject to selection under that act.

JONES, *First Assistant Secretary:*

The Northern Pacific Railway Company has appealed from the decision of the General Land Office, rendered January 12, 1914, holding for rejection its selection list, Coeur d'Alene 07892, for unsurveyed lands which were, when adjusted after later survey, the SW. ¼ NW. ¼, W. ½ SE. ¼, Sec. 4, lots 1, 5, 7 and 8, and SE. ¼ NE. ¼ and E ½ SE. ¼, Sec. 5, lots 1, 2, 3 and 8, and NE. ¼, and SE. ¼ SW. ¼, NE. ¼ SE. ¼, Sec. 6, NW. ¼ NE. ¼, Sec. 9, T. 50 N., R. 4 E., B. M.

This selection was made under the act of March 2, 1899 (30 Stat., 993), which authorized that company to relinquish to the United States its title to lands owned by it within the Mount Rainier National Park, and select in lieu thereof—

> An equal quantity of non-mineral public lands, so classified as nonmineral at the time of actual government survey.

The surveyor who surveyed the township here involved, in his returns, said that:

> Mining operations are now being carried on to a great extent. Mineral indications are found in nearly all parts of the township.

The decision appealed from is based on the ground that that return does not amount to such a classification of the land as is required by the statute to support the selection.

The act of 1899 confers upon this Department the power to pass title under it when, and only when, the land involved is both nonmineral in fact and also shown to be nonmineral by the surveyor's return.

"Two elements are separately enumerated [in the act]. The land selected must (1) not have been known to be mineral in fact at the date of selection, and (2) it must have been returned as nonmineral at the time of actual Government survey." State of Idaho *et al. v.* Northern Pacific Ry. Co. (37 L. D., 135, 139). "The lands authorized by Congress to be taken by the railway company . . . must not only (1) have been classified by the Government surveyor as nonmineral, but (2) must (also) be nonmineral in fact." Northern Pacific Ry. Co. *et al. v.* United States (176 Fed., 706). "In other words, the lands authorized by Congress to be taken by the railway company must not only (1) be in fact nonmineral but (2) must *also* have been so classified as such by the Government surveyor. Congress has thus established a rule of evidence by which the Department must be controlled," and it has no power to approve selections in cases where either of these requirements is lacking. Northern Pacific Ry. Co. (40 L. D., 64, 67).

In support of the appeal in this case it is urged that the return amounts to no return whatever as to the mineral character of the land and, that, therefore, it must be construed and accepted as a nonmineral return, and considered as sufficient to support the selection under the rule announced and followed by this Department in the cases of Bedal *v.* St. Paul, M. and M. Ry. Co. (29 L. D., 254); Davenport *v.* N. P. Ry. Co. (32 id., 28); St. Paul, M. and M. Ry. Co. (34 id., 211), and State of Idaho *v.* N. P. Ry Co. (37 id., 70 and 135).

In all of these cases except Davenport *v.* N. P. Ry. Co. there was an entire failure on the part of all the surveyors to even attempt, in any manner whatever, to actually return any of the lands in any of the townships there involved as being either mineral or nonmineral in character; and in Davenport *v.* N. P. Ry. Co. the surveyor specifically mentioned certain particular parts of the township there involved as containing mineral, but was silent as to other parts which included the selected lands involved in that case.

In those cases this Department held that the failure of the surveyors to make *any return whatever* as to the mineral or nonmineral character of the selected land was tantamount to a nonmineral return, and justified the presumption that the lands were nonmineral. This rule can not be applied in the present case, because here there was a return, and, while this return did not make specific reference to particular tracts, and is possibly equivocal and uncertain, it can not be said that it, either through omission, or by direct reference, classified the selected tracts as nonmineral.

It is contended on appeal that any return which does not *positively* classify the lands as being *actually mineral in character* must be accepted as a nonmineral classification under the act of 1899. This contention lacks support of even the most liberal construction which

can possibly be given the words of the act. The statute does not in words declare that a selection of the kind here involved must be rejected when, and only when, the lands are returned as mineral. It says that such selections can be approved when, and only when, the lands *are returned* as nonmineral. Under the most liberal construction all that can be possibly said is that this Department is authorized to approve such selections in cases and only in cases where it is apparent either from the surveyor's silence or from the language of his return that he *intended to return* the land as nonmineral. If he did not so intend there was no return, and there can be no selection, even if the lands be actually nonmineral.

This Department is, therefore, of opinion that under the return by the surveyor in this case it is neither justified in approving the selection nor even empowered to do so.

But aside from these considerations this Department ought not to approve this selection upon the record now before it, even if the surveyor's return standing alone permitted that action, because there is evidence of record in the General Land Office other than the surveyor's return, which tends to show that the lands in sections 5 and 9 are mineral.

All of the odd-numbered sections in said T. 50 N., R. 4 E., were, without protest from the company and with departmental approval, classified as mineral lands under the act of February 26, 1895 (28 Stat., 683), before the selection here involved was made, and the company itself declared them to be mineral in character when it, even before that classification, assigned them as mineral bases for the selection of other lands under the indemnity provisions of the original grant to the Northern Pacific Railroad Company.

While a classification under the act of 1895 might not of itself so overcome a surveyor's nonmineral return as to defeat a selection under the act of 1899, that fact is worthy of consideration if it is not controlling where, as here, the surveyor's return is at best equivocal. See State of Idaho *et al. v.* Northern Pacific Ry. Co. (37 L. D., 135, 139). Where there is doubt as to the meaning of the surveyor's return, the previous assertion by the company that the lands are mineral and their classification as such by the land department are probative facts upon the main issue.

The decision appealed from was correct and is affirmed, and the selection list is hereby rejected.

NORTHERN PACIFIC RY. CO.

Motion for rehearing of the Department's decision of December 31, 1915, 46 L. D., 1, denied by First Assistant Secretary Jones, February 16, 1916.

NORTHERN PACIFIC RY. CO.

Decided January 26, 1916.

SELECTIONS UNDER ACT OF MARCH 2, 1899.

Selections by the Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat., 993), are limited to "nonmineral lands so classified as nonmineral at the time of the actual government survey;" and where the surveyor reported that "there are many indications of the presence of mineral, gold, copper, and silver, though no veins have been located," the land, not being of the class named, is not subject to selection under that act, even though it be in fact nonmineral.

JONES, *First Assistant Secretary:*

I return herewith, unapproved, clear list No. 81, submitted with your [Commissioner of the General Land Office] letter of November 16, 1915, involving lands in T. 10 S., R. 4 E., Oregon, act of March 2, 1899 (30 Stat., 993), for the reason that, in my opinion, there is no authority for the approval of the selection. The statute in question limits the company to the selection of "nonmineral lands so classified as nonmineral at the time of the actual Government survey." This land was not classified as nonmineral at the time of Government survey, but, on the contrary, the surveyor reported that "there are many indications of the presence of mineral, gold, copper, and silver, though no veins have been located."

Under the law, therefore, the land was not subject to selection by the company, nor is this Department warranted in approving the list presented; for even if it be in fact nonmineral land, it is not land of the class and character subject to selection under the act of March 2, 1899, *supra.*

JAMES RANKINE.

Decided June 28, 1916.

FINAL PROOF—FEES AND COMMISSIONS—WITHDRAWAL.

No vested right is acquired by submission of final proof upon a homestead entry before a United States commissioner, and deposit of the requisite fees and commissions with him, prior to receipt thereof by the local officers.

PRACTICE—FEES AND COMMISSIONS—UNITED STATES COMMISSIONER.

A United States commissioner is without statutory authority to receive moneys on account of fees and commissions; and where these are deposited with him in connection with the making of final proof for transmission to the local officers he acts merely as agent for the entryman, who can not be held to have done all that the law requires to entitle him to patent and a vested right to the land until such fees and commissions have been paid to the local officers.

JONES, *First Assistant Secretary:*

This is an appeal by James Rankine from the decision of the Commissioner of the General Land Office, of October 12, 1915, requiring

him to apply for classification as nonmineral of the N. ½ SE. ¼ and N. ½ SW. ¼, Sec. 27, T. 46 N., R. 98 W., 6th P. M., Lander, Wyoming, embraced in his homestead entry 03140, and declaring that, in default, patent therefor, if issued, would contain a reservation to the United States of all petroleum or gas deposits contained in the land.

The entry was allowed April 20, 1908, and final proof was submitted thereon April 30, 1914, before a United States commissioner at Meeteetse, Wyoming. At the time of submitting proof the claimant also deposited with the official named an amount to cover the local land office fees and commissions. The final proof record was, by the United States commissioner, transmitted to the local office, together with the fees and commissions, where it was received May 9, 1914, on which date final certificate of entry was issued.

Subsequent to the submission of final proof but prior to the receipt of the final proof record, together with the money in payment of fees and commissions, at the local office, the land was, by Executive order of May 6, 1914, and pursuant to the provisions of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), included in petroleum reserve No. 32.

Upon considering the entry, the Commissioner, by decision of July 27, 1915, adhered to by decision of October 12, 1915, found the proof to be satisfactory, but held that—

> The land having been included in a petroleum reserve subsequent to entry, you are directed to advise the party in accordance with paragraph 10–b of Circular No. 393, of March 20, 1915, containing instructions, under the act of July 17, 1914 (38 Stat., 509), that patent, if issued, will contain a reservation of the petroleum and gas deposits to the United States in accordance with the said act of July 17, 1914, unless, within thirty days there is filed in your office an application for a classification of the land as nonmineral, together with a showing, preferably the sworn statement of experts or practical miners, of the facts upon which is founded the knowledge or belief that the land applied for is not valuable for petroleum or gas.

Appellant concedes that the final proof record and the fees and commissions may not have been actually received at the local office until after the date of the order of withdrawal; but challenges the correctness of the Commissioner's decision on the ground that by submitting satisfactory final proof on his entry six days before the date of the order, before an officer authorized to take it, and depositing with that officer, to be transmitted to the local office with the record, an amount sufficient to cover the land office fees and commissions, he had, himself, at the date of the order, fully complied with every requirement and condition of the homestead law to entitle him to a patent, and thus secured, at that time, a vested right to the land that could not be defeated or otherwise impaired by the order of withdrawal subsequently made. He cites Departmental circular of March 24, 1905 (33 L. D., 480), which requires final proof taken out-

side of the land office to be transmitted to the land office by the official taking it, and prohibits its transmission in any case by the claimant; and urges that if there was any delay in the receipt of the proof and accompanying fees and commissions at the local office, it was due to the tardiness of the official before whom the proof was executed, and not to any act or negligence on his own part.

In further support of this position, he cites the unreported decision of the Department of July 27, 1915, in the case of Edgar H. Fourt, assignee of Charles C. Garrett; Departmental regulations of March 20, 1915 (44 L. D., 32); and Departmental regulations of June 4, 1914 (43 L. D., 322).

It is sufficient answer to these contentions to say that, regardless of what may be the rule as to final proof taken outside a local office, the claimant himself is required to see that the final fees and commissions on his entry are paid at the local office. A United States commissioner, although authorized to take final proofs, has no authority under the statute to receive moneys on account of fees and commissions, even for transmission to the local office. In receiving such money, therefore, he acts merely as the agent of the entryman, and at the latter's risk. (Bledsoe *v.* Harris, 15 L. D., 64; W. J. Potts, 21 L. D., 88.)

The local officers report, and it is not denied, that at the date of the withdrawal order claimant had failed to make payment at the local office of the necessary fees and commissions on his entry. He had not, therefore, at that time, complied with all the essential requirements of the homestead law to entitle him to a patent; and, for that reason, had not then obtained a vested right to the land.

Appellant directs attention to the facts that the entry long antedated the order of withdrawal; that it was seasonably completed and perfected; and that the withdrawal act, in express terms, excepts from the force and effect of any withdrawal made thereunder, all lands which, on the date of the order, are embraced in any lawful homestead entry theretofore made, which is at that time being maintained and perfected pursuant to law, and with respect to which the entryman shall continue to comply with the law. He therefore urges that the land was wholly unaffected by the order; and, hence, that in any event, he is entitled to an unrestricted patent on his entry, unless the land shall be positively shown, as the result of a hearing, to have been known to be valuable for mineral at the date of final proof and payment. A sufficient answer to this contention is found in Departmental circular of March 20, 1915 (44 L. D., 32), wherein it is declared that a withdrawal will be deemed *prima facie* evidence of the character of the land covered thereby, for the purposes of the act of July 17, 1914 (38 Stat., 509), making provision for agricultural entry of lands withdrawn, or reported, as containing oil and

certain other minerals; and that where any nonmineral application to select, locate, enter or purchase has preceded the withdrawal, and is incomplete and unperfected at such date, the claimant, not then having secured a vested right in the land, must take patent with a reservation, or sustain the burden of showing at a hearing, if one be ordered, that the land is, in fact, nonmineral in character, and therefore not of the character intended to be included within the withdrawal.

No reason is seen, therefore, to disturb the Commissioner's decision. It is, accordingly, affirmed.

JAMES RANKINE.

Motion for rehearing of the Department's decision of June 28, 1916 (46 L. D., 4), denied by First Assistant Secretary Jones, July 22, 1916; prior decisions modified by First Assistant Secretary Vogelsang, on reconsideration, March 12, 1917. See 46 L. D., 46.

STATE OF MINNESOTA v. IMMIGRATION LAND CO.

Decided June 29, 1916.

RAILROAD LAND—RIGHT OF PURCHASE—ACT OF MARCH 3, 1887.

Land embraced within a railroad indemnity selection presented in accordance with Departmental regulations and accepted and recognized by the local officers was not "undisposed land of the United States" within the meaning of the act of August 3, 1892, and did not fall within the grant to the State of Minnesota made by that act; and upon subsequent cancellation of such indemnity selection the grant did not attach thereto, but the land became public domain subject to disposition under appropriate laws.

JONES, *First Assistant Secretary:*

The State of Minnesota has appealed from the decision of the Commissioner of the General Land Office, dated January 26, 1915, dismissing its protest against cash purchase, made February 10, 1910, by the Immigration Land Company, for lands aggregating 2368.95 acres, and described as follows (Crookston, Minnesota, 05008):

SUBDIVISIONS.	SEC.	T. N.	R. W.
W. ½ NE. ¼, N. ½ NW. ¼, SE. ¼ NW. ¼, SE. ¼ SW. ¼, W. ½ SE. ¼, SE. ¼ SE. ¼	21	143	36
Lots 1, 2, 3, E. ½ SW. ¼, SW. ¼ SE. ¼	23	143	36
N. ½ NW. ¼, SW. ¼ NW. ¼, E. ½ SE. ¼, SW. ¼ SE. ¼	25	143	36
SE. ¼ NE. ¼, NW. ¼, SW. ¼, N. ½ SE. ¼, SE. ¼ SE. ¼	27	143	36
W. ½ NE. ¼, N. ½ NW. ¼, SE. ¼ NW. ¼	29	143	36
Lots 1, 2, 3, NW. ¼ NE. ¼, S. ½ NE. ¼, E. ½ NW. ¼, E. ½ SW. ¼, NE. ¼ SE. ¼	31	143	36
Lot 1	33	143	36
N. ½ NE. ¼, N. ½ NW. ¼, SW. ¼ NW. ¼, NE. ¼ SW. ¼, NE. ¼ SE. ¼	35	143	36
Lots 1, 2, SE. ¼ NE. ¼	1	140	36

The protest was initiated March 5, 1912, and related to the following described lands, aggregating 1616.49 acres, situated within the limits of what is known as the Itasca State Park:

Subdivisions.	Sec.	T. N.	R. W.
N. ½ NW. ¼, SE. ¼ NW. ¼, W. ½ NE. ¼, W. ½ SE. ¼, SE. ¼ SE. ¼, SE. ¼ SW. ¼	21	143	36
Lots 1, 2, 3, E. ½ SW. ¼, SW. ¼ SE. ¼	23	143	36
N. ½ NW. ¼, SW. ¼ NW. ¼, SW. ¼ SE. ¼, E. ½ SE ¼	25	143	36
NW. ¼, SW. ¼, SE. ¼ SE. ¼, N. ½ SE. ¼, SE. ¼ NE. ¼	27	143	36
Lot 1	33	143	36
N. ½ NE. ¼, N. ½ NW. ¼, SW. ¼ NW. ¼, NE. ¼ SW. ¼, NE. ¼ SE. ¼	35	143	36

The lands in controversy are within the second indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, under the act of July 2, 1864 (13 Stat., 365), as amended by the joint resolution of May 31, 1870 (16 Stat., 378). They were selected by the Northern Pacific Railway Company per list No. 12, filed October 15, 1883, at Crookston, Minnesota. The bases given in support of the selection were lands claimed to have been excepted from the company's grant of July 2, 1864, by reason of the withdrawal subsisting at the date thereof on account of the grant to aid in the construction of the Lake Superior and Mississippi Railroad made by the act of May 5, 1864 (13 Stat., 64). They were conveyed by the Northern Pacific Railway Company, by warranty deed, dated January 14, 1891, to Frederick Weyerhaeuser *et al.*, whose title, by *mesne* conveyances, passed to the Immigration Land Company. The consideration paid to the Northern Pacific Railway Company appears to have been $1.50 per acre, it being asserted that there was also a further consideration paid for the white pine timber standing upon the lands, making the total consideration approximately $4.00 per acre.

The act of August 3, 1892 (27 Stat., 347), granted certain lands to the State of Minnesota for park purposes. April 19, 1893, the railway company filed its rearranged list No. 12, setting forth the selected land and the base land, tract for tract. The list was held for cancellation, as to the lands here involved, by the Commissioner of the General Land Office, March 20, 1907, upon the authority of the Northern Lumber Company *v.* O'Brien (204 U. S., 190), decided January 14, 1907. The application to purchase, being under section 5 of the act of March 3, 1887 (24 Stat., 556), was filed by the Immigration Land Company, February 9, 1907. The Commissioner's order of cancellation, however, was suspended by an order of the Secretary of the Interior, dated April 1, 1907, but became finally effective October 30, 1909.

The State of Minnesota claims under the act of August 3, 1892, *supra*, while the Immigration Land Company claims under section 5 of the act of March 3, 1887, *supra*.

The act of August 3, 1892, provides:

That all undisposed lands of the United States situated in the following subdivisions, according to the public surveys thereof, to wit: Section six of township one hundred and forty-two; sections six, seven, eighteen, nineteen, thirty, and thirty-one of township one hundred and forty-three, all in range thirty-five; sections one, two, three, and four of township one hundred and forty-two, and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five, and thirty-six, of township one hundred and forty-three, all in range thirty-six, situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public State park: *Provided*, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public State park; or if the State shall not pass a law or laws to protect the timber thereon.

SEC. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act.

Section 5 of the act of March 3, 1887, provides:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor. *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The State contends that the tracts were "undisposed land of the United States" at the date of its grant, and that the right of purchase accorded by section 5 of the act of March 3, 1887, is not such a "vested right" as is protected by section 2 of the act of August 3,

1892. The Immigration Land Company contends that the lands were not "undisposed land of the United States" at the date of the grant to the State, and that its right to purchase under section 5 of the act of March 3, 1887, was such a "vested right" as is within the purview of section 2 of the State's granting act, relying largely upon the cases of Andrew J. Billan (36 L. D., 334), and Clogston *v.* Palmer (32 L. D., 77).

The State insists that the original list filed by the railway company was not in conformity with the regulations of the Department, had no segregative effect, and, therefore, was in no sense a disposition of the land.

The original list No. 12 embraced a total area of 24,264.25 acres, in lieu of which lands as base were set forth to the extent of 24,263.49 acres. The selected land and the base therefor were not set forth tract by tract, but in bulk. The list bears the following certificate executed by the register:

UNITED STATES LAND OFFICE,
Crookston, Minn.,
Oct. 15th, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said Company, by Act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company, by Chas. B. Lamborn the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of Forty miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, State, or any other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the Act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices; and that the said Company have paid to the undersigned, the Receiver, the full sum of Three hundred and three and 30/100 Dollars, in full payment and discharge of said fees.

The rearranged list contains the following recital:

Whereas, the Northern Pacific Railroad Company has heretofore, to-wit, on the 15th day of October 1883, duly selected under the directions of the Secretary of the Interior, those certain tracts and parcels of land particularly set forth and described in Crookston List No. 12 filed in the United States District Land Office at Crookston, Minnesota, on the 15th day of October 1883, as indemnity for certain tracts and parcels of odd numbered sections of land within the place limits of the grant to said Railroad Company, which said tracts were reserved, sold, granted, or otherwise appropriated, or not free from pre-emption or other claims or rights, at the time the line of its road was definitely located,

in accordance with the provisions of the Act of Congress, approved July 2d, 1864; and of the Joint Resolution of Congress, approved May 31st, 1870; which lands so selected are on and within forty miles of the line of the said road so definitely located.

And, whereas, the Secretary of the Interior has since the filing of said above described list, further directed that said list shall be rearranged so it shall indicate the specific loss in lieu of which each specific selection has been made:

Now, Therefore, to comply with the further requirements of the Interior Department, but not waiving or abandoning any rights or claims heretofore acquired by virtue of its selections heretofore made under the directions of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Crookston List No. 12 and no other lands, and has herein set opposite each specific description of land so selected the description of the land lost from its grant in place, and in lieu of which such indemnity land is selected.

The regulations of November 7, 1879 (6 Copp's Land Owner, 141), concerning railroad selections, required the claimant to file a list of its selections, which list must be carefully examined by the register and receiver and its accuracy tested by the plats and records of their office. If found correct, they were required, upon payment of the requisite fee, to execute the form of certificate above set forth. The instructions to the registers and receivers further provided:

It is required that clear lists of approvals shall in every case be made out by you, or required of the selecting agents, after your examination of the tracts which you are prepared to certify, showing clearly and without erasure the description of the lands and the area of each tract; also the aggregate area, properly footed in the columns, and set forth in the certificate.

As to indemnity selections the instructions stated:

In the adjustment of all grants it consequently becomes necessary to know for what lands lost *in place* the indemnity selections are made, and with the view to the end you will require the companies to designate the specific tracts for which the lands selected are claimed.

The unpublished circular of May 28, 1883, apparently permitted a grantee railroad company to make indemnity selections without specifying any base therefor. This practice, however, was changed by the instructions to registers and receivers dated August 4, 1885 (4 L. D., 90), which provided:

Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiences for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections upon record until directed so to do.

Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

Indemnity withdrawals previously made for the benefit of certain railroad and wagon road companies having been revoked and the lands restored to settlement, the Department directed the following form of procedure by the circular of September 6, 1887 (6 L. D., 131):

As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient prima facie showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to this Office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in favor of the company, and no appeal be taken, the land will be certified to the Secretary of the Interior for approval for patent without requiring further action on the part of the company except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be canceled and the filing or entry allowed subject to compliance with law.

In the case of Northern Pacific Railroad Company *et al. v.* John O. Miller, decided July 1, 1890 (11 L. D., 1), the Department said, at page 2:

The loss to its grant in the manner prescribed of a tract or tracts of land corresponding to those which it claims as indemnity is, under the stated provisions of its grant, an essential to the right of the company to so select.

That such losses should first be shown to the satisfaction of the land department, is obvious, for otherwise the indemnity claimed therefor could not properly be selected under the "direction of the Secretary of the Interior" or in other words, in accordance with the act of 1864, *supra*.

In the same case upon review (11 L. D., 428), decided November 13, 1890, it was said, at page 429:

While, as between the government and the company, the practical effect would be the same, where indemnity was allowed in bulk for an equivalent quantity of land lost in place, as where indemnity was allowed tract for tract, yet the individual rights of the settler can only be ascertained and protected by the latter mode.

The ruling in the Miller case was the first specific requirement that the selected and base lands should be set forth tract for tract.

In Northern Pacific Railroad Company *v.* Wolfe (28 L. D., 298), it was held that an application to make entry of land embraced within a *prima facie* valid railroad indemnity selection was properly rejected, and that the applicant gained nothing by an appeal from such rejection. In Falje *v.* Moe (28 L. D., 371), it was held that an application to enter lands included within a pending railroad indemnity selection made in accordance with departmental rulings then in force conferred no rights upon the applicant under the circular of September 6, 1887, *supra*, where he did not attack the validity of such selection, and that no rights were gained by an appeal from a rejection of an application so presented.

From the above résumé of the Department's regulations and adjudications concerning railroad indemnity selections it can not be questioned that the original indemnity selection in this case was in conformity with the existing departmental regulations, and segregated the land. The circular of September 6, 1887, was enacted in view of the situation created by the practice of making unauthorized withdrawals of land within indemnity limits. It simply permitted an application to enter lands covered by a pending indemnity selection to be filed where accompanied by a challenge to the validity of the selection, the indemnity selection still offering a bar to all other forms of application.

A railroad indemnity selection, presented in accordance with departmental regulations and accepted and recognized by the local officers, segregates the land covered thereby, during its pendency, from other application or entry. (See Santa Fe Pacific Railroad Company, 33 L. D., 161; Holt *v.* Murphy, 207 U. S., 407; Weyerhaeuser *v.* Hoyt, 219 U. S., 380.) The tracts here involved, therefore, were not "undisposed land of the United States" within the meaning of the act of August 3, 1892, *supra*, and did not fall within the grant to the State of Minnesota made by that act. The fact that the selection was later canceled did not cause the grant to attach, but the land became public domain, subject to disposition under the proper law (Andrew J. Billan, *supra*).

This conclusion is also in harmony with the legislative history of H. R. 222, 52d Congress, which became the act of August 3, 1892. The House Committee on Public Lands reported (House Report 694, 52d Congress, 1st Session):

> The following are the facts upon which the committee bases its recommendation:
>
> (1) This park in question was authorized by an act of the legislature of the State of Minnesota, passed and approved A. D. 1891.
>
> (2) The general purpose of said act would seem to be to preserve as far as possible the forest area at the head waters of the Mississippi River from destruction and create a forest park.

(3) *The area authorized comprises about 20,000 acres; about 3,000 belonging to railroad companies, about 1,500 to the State; about 10,000 to private individuals, and about 4,000 belonging to the United States.*

The lands are situated around and embrace Lake Itasca and a number of small lakes and streams constituting the sources of the Mississippi River in the State of Minnesota. *The only land of any real value has already been taken by private individuals, and that remaining, the title of which is in the United States, is of very little value.*

The State has already acquired title to the lands owned by the railroads for a merely nominal sum and is rapidly acquiring the title to that owned by private individuals.

Your committee are of opinion that the purpose of the legislature of Minnesota was a laudable one and should be encouraged. We would therefore recommend that the bill pass.

The report clearly indicates that the purpose of the law was to grant to the State of Minnesota merely the 4,000 acres of unappropriated public lands, and to except from the grant lands already "taken" by private individuals or railroad companies.

The action of the Commissioner in dismissing the State's protest was correct, and the Immigration Land Company's purchase should be approved, in the absence of other objection.

The decision of the Commissioner is accordingly affirmed.

STATE OF MINNESOTA v. IMMIGRATION LAND CO.

Motion for rehearing of the Department's decision of June 29, 1916, 46 L. D., 7, denied by First Assistant Secretary Vogelsang, September 30, 1916.

FRIEDRICH v. DUCEPT.

Decided February 3, 1917.

TURTLE MOUNTAIN INDIANS—ALLOTMENT SELECTION—SEGREGATIVE EFFECT.

The filing of a Turtle Mountain Indian selection, accompanied by the required certificate of the Indian agent or Indian Office as to the qualifications of the applicant (see Department instructions of August 2, 1915, in 44 L. D., 229), segregates the land from other disposition.

CERTIFICATE OF INDIAN AGENT—PRESUMPTION WHEN NOT FOUND.

When the contrary is not shown, it will be assumed that there has been compliance with the requirement that the Indian agent or the Indian Office shall furnish a certificate that the Turtle Mountain applicant is entitled to allotment.

DEPARTMENT INSTRUCTIONS OF AUGUST 2, 1915.

Under Department instructions of August 2, 1915 (44 L. D., 229), like segregative effect is given to allotment selections on the public domain under the fourth section of the General Allotment act of February 8, 1887 (24 Stat., 388), as is given under the Turtle Mountain Indian Act of April 21, 1904 (32 Stat., 189, 194).

HOMESTEAD APPLICATION IN CONFLICT WITH INDIAN ALLOTMENT SELECTION—EFFECT OF CANCELLATION OF SELECTION.

A homestead application for land segregated by an Indian allotment selection, and rejected for that reason, has no further vitality, and a later determination that the Indian was not qualified to take the allotment will not rehabilitate the homestead application, although the land becomes again subject to entry.

VOGELSANG, *First Assistant Secretary:*

Minnie Friedrich appealed from Commissioner's decision of May 9, 1916, rejecting her homestead application for the NE. ¼, Sec. 28, T. 35 N., R. 56 E., M. M., Glasgow, Montana, because of conflict with Indian allotment selection made under the Turtle Mountain act of April 21, 1904 (33 Stat., 189, 194), in the name of William Francis Ducept.

February 25, 1910, Henry Ducept filed allotment application 08241 for his minor child, the said William Francis Ducept, which was suspended for nonmineral affidavit. Nothing further is shown upon the records of the local land office as to said application, and the same, with accompanying papers, appears to have been lost.

September 21, 1915, Minnie Friedrich filed homestead application for the land in question, which was suspended by the local land officers the day it was filed because of conflict with Indian allotment application 08241, and was rejected by said officers December 8, 1915. Appeal was taken by the homestead applicant to the General Land Office from this rejection December 8, 1915.

Nothing further appears to have been done in respect to the Indian allotment application until November 3, 1915, when, in response to inquiry of October 15, 1915, the General Land Office advised the local land officers that no such application had been received in that office. Upon request for instructions by such officers, the General Land Office required the filing of a certificate from the Turtle Mountain superintendent showing the qualifications of the minor child, William Francis Ducept, to take an allotment under the act of April 21, 1904, and nonmineral affidavit covering the NE. ¼ of Section 28, T. 35 N., R. 56 E., and a new allotment application on behalf of said child in lieu of the one lost. This requirement was fulfilled, and the superintendent's certificate and the nonmineral affidavit were both filed December 3, 1915. The certificate is dated December 1, 1915, and the affidavit August 3, 1910, showing as to the latter that some attempt must have been made to comply with the rule laid upon Henry Ducept as to the filing of such affidavit. The new allotment application in lieu of the original one that was lost was filed February 14, 1916, and was executed by Virginia Ducept as head of family on behalf of her minor child, William Francis Ducept.

May 3, 1916, the General Land Office (it appearing that said minor child was born in 1907) held the allotment application in his behalf for rejection, in view of Departmental decision of January 15, 1916, in the case of Voigt *v.* Bruce (44 L. D., 524), that a child born after October 8, 1904, the date the Turtle Mountain act of April 21, 1904, was ratified by the Indians, is not entitled to allotment thereunder on the public domain.

May 9, 1916, the General Land Office rendered decision on Minnie Friedrich's appeal, sustaining the action of the local officers in rejecting her homestead application for conflict with the Indian allotment selection. That office found that with the selection was filed the certificate of the Indian superintendent that the allottee was qualified to make an allotment on the public domain under the act of April 21, 1904; that under Departmental instructions of August 2, 1915 (44 L. D., 229), said selection segregated the land, and that said land was therefore not subject to entry at the time Minnie Friedrich filed her application. Her appeal from said decision of the General Land Office brings the case before the Department.

It must be assumed, the contrary not appearing, that the allotment application filed by Henry Ducept, February 25, 1910, for his minor child, William Francis Ducept, was accompanied by a certificate from the Indian agent that the said child was an Indian entitled to an allotment under the act of April 21, 1904, as it was the uniform practice to require such certificate with all Turtle Mountain applications. The only purpose of requiring a new application to be filed was to replace the one lost, which did not affect the segregative effect of the original application, as shown upon the records of the local land office. The filing of a Turtle Mountain selection, accompanied by the required certificate of the Indian agent or Indian Office as to the qualifications of the applicant, has always been regarded as segregating the land from other disposition. Departmental instructions of August 2, 1915 (44 L. D., 229), but make applicable the same principle to allotments on the public domain under the fourth section of the general allotment act of February 8, 1887. The fact that the Indian allotment application herein must be canceled under a changed construction of the Turtle Mountain act of April 21, 1904, by decision in the case of Voigt *v.* Bruce, can make no difference. Regardless of the fact that the Indian allotment application must now be canceled, such application or selection, being at the time complete, except as to a minor curable omission, under the rule in force at the time as well as since the Voigt *v.* Bruce decision, had the effect of segregating the land. That decision was rendered long after the filing of Minnie Friedrich's homestead application. Hence the action of the local land

officers and the General Land Office in rejecting said homestead application for conflict was proper and is hereby affirmed.

There would seem to be no reason why, upon the cancellation of the Indian allotment application and in the absence of adverse claim or other valid objection, Minnie Friedrich should not be permitted to file new homestead application for the land involved or refile her original application as of the date the Indian allotment application is canceled upon the records of the local office.

HENRY HILDRETH (On Rehearing).

Decided February 5, 1917.

WITHDRAWAL—PETROLEUM RESERVE—LANDS EXCEPTED.

Nonmineral lands embraced within a lawful desert-land entry duly maintained and subsequently included within the boundaries of a petroleum reserve are excepted from the operation of the withdrawal by the act of June 25, 1910 (36 Stat., 847).

PROOF AS TO CHARACTER OF LANDS—UNRESTRICTED PATENT.

Where there is no evidence or allegation that at the date of final proof and payment the land was mineral in character, and where there is nothing before the Department warranting further investigation as to the character of the land, unrestricted patent will issue notwithstanding the fact that the land is within the exterior limits of a withdrawal made after desert entry.

PRIOR DECISION VACATED.

Henry Hildreth, 45 L. D., 464, vacated.

VOGELSANG, *First Assistant Secretary:*

This is a motion for rehearing, by Henry Hildreth, in the matter of Departmental decision of August 31, 1916, sustaining the action of the Commissioner of the General Land Office, dated February 29, 1916, denying his application for classification as nonmineral the land embraced in his desert land entry 01995, for the NW. ¼, Sec. 18, T. 27 S., R. 23 E., M. D. M., Visalia land district, California.

The desert land entry in this case was made November 3, 1909. The lands were thereafter withdrawn, under the act of June 25, 1910 (36 Stat. 847), and by Executive order of September 14, 1911, were included in petroleum reserve No. 23. On May 6, 1913, Hildreth submitted final proof, which was accepted as showing sufficient compliance with the desert land law. On September 16, 1915, the entryman applied to have the lands classified as nonoil and nongas-bearing. This application was denied by the Commissioner, February 29, 1916, and the entryman was allowed to apply for a hearing, at which the burden of proof was to be placed upon him to show that the land is not oil and gas-bearing in character. Upon appeal this action was affirmed by the Department, August 31, 1916.

The entryman has now filed a motion for rehearing, with an application for the issuance of an unrestricted patent, in which reference is made to the case of Fritz Hilmer, involving Lander, Wyoming, homestead entry 0571, decided by the Department July 26, 1916, in which it was found that the land was not mineral in character and that the entryman was entitled to an unrestricted patent.

In his application for reclassification the entryman in this case alleged, in support of his contention that the land is nonmineral in character, that a well bored by the Union Oil Company four miles west of the land to a depth of 4,000 feet had been abandoned without finding oil; that a well 1½ miles north of the land was bored to the depth of 1,000 feet and that no mineral was discovered; that a well, bored in section 6 of the same township, to a depth of 1,800 feet, failed to disclose any valuable mineral; that other wells bored in sections 9 and 16 of said township had failed to develop mineral. There was also submitted with this application an affidavit of Paul M. Paine, an engineer in oil-mining operations, of wide experience, to the effect that wells drilled in the vicinity of the lands had been carefully watched by him and that such wells had not disclosed the presence of oil or gas, and that from surrounding developments he was satisfied that the land involved contains no oil, gas or other valuable minerals. This showing was referred to the Geological Survey, which reported to the Commissioner that the same was not sufficient to prove the nonoil character of the land.

On August 31, 1914, F. Oskar Martin, a mineral inspector of the General Land Office, submitted a report to the effect that the claimant had complied with the desert land law and that the land was nonmineral in character. This report was based upon what appears to have been a very careful field investigation and is predicated upon a detailed statement as to the geological conditions existing within the area. The report also contains the following statement:

> When the first oil development started in the Lost Hills District in the early part of 1911, I concluded after a field examination that petroleum might be found within an economic depth and beyond the then existing petroleum reserve, and I therefore recommended, on July 27, 1911, that additional lands to the southeast of the existing reserve be withdrawn. This recommendation was approved, but the U. S. Geological Survey enlarged and added more lands, among them this entry in question, to the reserve as recommended by me, and the so enlarged reserve was promulgated by Executive order of September 14, 1911.

This report was referred to the Director of the Geological Survey, who, on August 23, 1915, replied as follows:

> The information at hand, including that submitted by your office, has been considered but is not conclusive that the land which is included in an out-

standing petroleum withdrawal, is nonmineral in character. There is nothing in the Survey records to indicate that at date of entry the entryman should have known of the possible mineral character of the land, and at date of final proof the outstanding withdrawal seems to have constituted the only notice to the entryman of possible mineral character.

The lands here involved were withdrawn under act of June 25, 1910 (36 Stat. 847), which provides:

That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law.

The act of July 17, 1914 (38 Stat. 509), permits agricultural entry of lands withdrawn, classified, or reported as containing oil and certain other minerals, and provides:

That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character.

Paragraph 11 of the regulations under this act (44 L. D. 32) provides:

A withdrawal or classification will be deemed *prima facie* evidence of the character of the land covered thereby for the purposes of this act. Where any nonmineral application to select, locate, enter, or purchase has *preceded* the withdrawal or classification and is incomplete and unperfected at such date, the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land is in fact nonmineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal.

Therefore where land has been withdrawn or classified upon data indicating that it is mineral in character and the Government continues to assert that it does in fact contain valuable mineral deposits, an applicant who seeks to have such land declared to be nonmineral must sustain the burden of proof at a hearing had for the determination of that question. The case under consideration does not, however, occupy such a status. The entry was made long prior to the petroleum withdrawal. The act of June 25, 1910, *supra*, under which the withdrawal was made, expressly excepted from the operation of the withdrawal lands embraced in any lawful desert-land entry theretofore made, where entryman should continue to comply with the

law. It appears from the record that Hildreth did continue to comply with the law; that he has made the necessary expenditures, submitted proof thereof, reclaimed the area prescribed by the desert-land laws, and otherwise fully complied with those statutes. Therefore, the withdrawal has, under the express terms of the act, failed to attach to the land embraced in his said entry, if the lands be of the character subject to acquisition under the desert-land laws.

If prior to final proof and payment a discovery of valuable mineral had been made upon the land, entryman would, irrespective of the withdrawal, and of the act of June 25, 1910, *supra*, upon proof of the fact, have suffered the cancellation of his entry, unless he came within and accepted the remedial provisions of the act of July 17, 1914 (38 Stat., 509). Such is not the fact in this case. As hereinbefore related, not only is there no discovery or allegation of discovery of mineral upon this land, but the Geological Survey reports that at time of final proof there was no evidence of its mineral character, unless the mere withdrawal constituted notice of that fact. A special agent of the General Land Office reports that the land is nonmineral in character. Both of these reports were made subsequent to the withdrawal and the submission of final proof. The case therefore does not fall within the rule and practice governing the discovery of mineral upon lands prior to final proof, nor is it analogous to entries made upon withdrawn lands. It is an entry upon nonmineral lands and excepted from the withdrawal by the express terms of the said act of June 25, 1910. Therefore, in view of the foregoing, and basing the decision wholly upon the facts and circumstances of this case, it is held that the entryman is entitled to an unrestricted patent for the land entered.

The motion for rehearing is granted, prior Departmental decision vacated, and the case returned to the General Land Office for appropriate action.

J. B. NICHOLS AND CY SMITH (On Rehearing)

Decided February 6, 1917.

MINING LOCATIONS IN NATIONAL FORESTS—JURISDICTION OF LAND DEPARTMENT.

The land department has full authority to inquire into and determine the validity of mining locations in National Forests, notwithstanding the locators have not applied for patent.

DECISION REAFFIRMED.

Rule announced in case of H. H. Yard *et al.*, 38 L. D., 59, reaffirmed.

VOGELSANG, *First Assistant Secretary:*

The Solicitor for the Department of Agriculture timely served and filed a motion for rehearing in this case, involving the Meadow Nos.

1 and 2 placer mining claims, covering 320 acres within the Wallowa National Forest in Townships 5 and 6 S., R. 43 E., W. M., La Grande land district, Oregon.

In unreported Departmental decision of October 24, 1913 [*Ex parte* J. B. Nichols and Cy Smith], it was held, that, as between the Government and the claimants, the courts and not the land department had exclusive jurisdiction to inquire into and determine the validity of a mere mining location. The decision in the case of H. H. Yard (38 L. D., 59), and all others of like import were expressly overruled. The Government proceeding herein was ordered dismissed.

Because of the gravity of the matter and the pendency in the Federal courts of certain cases touching the jurisdictional question, it has not been deemed advisable heretofore to act upon the pending motion. The Department of Agriculture has lately pointed out that in two cases the Federal courts have declined to interfere with proceedings pending before the land department affecting mining locations, and has urged that public interest would seem to require that action be taken. The suggestion made is persuasive.

The Department has had its attention sharply directed to the importance of the question presented. It has again reviewed the fundamental basis for support of its jurisdiction. By specific statutory provisions contained in Sections 441, 453 and 2478, Revised Statutes, the Secretary of the Interior and the Commissioner of the General Land Office are vested with power and authority to execute and enforce all of the public land laws, including those relating to mines. When the administration of the national forests was transferred to the Department of Agriculture by the act of February 1, 1905 (33 Stat., 628), Congress provided that the Secretary of that Department should execute or cause to be executed all laws affecting the public lands within the national forests, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." This was an explicit Congressional announcement that all those laws covering prospecting, locating and appropriating areas within the forests should continue to be executed as theretofore by the Interior Department.

In the case of Low *et al. v.* Katalla Company (40 L. D., 534), where the question was presented as to whether an issue as to the character of land was for the courts in Alaska or for the land department to determine, it was held (Syllabus):

The jurisdiction of the land department in all matters involving the disposition of the public domain is plenary and exclusive except where specific legislation has made the adjudication of local tribunals auxiliary to the proceedings before the land department connected with the acquisition of title.

This principle with respect to Alaska has been sustained by the courts in the cases of Nelson *v.* Brownell (193 Fed., 641) and Lassley *v.* Brownell (199 Fed., 772).

The United States Supreme Court has on numerous occasions commented upon the peculiar functions of the land department. The following excerpts from its opinions are apposite:

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere. [United States *v.* Schurz, 102 U. S., 378, 395.]

The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. [United States *v.* Beebe, 127 U. S., 338, 342.]

There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The statute of 1897 does not in terms refer any question that might arise under it to that department, but the subject matter of that act relates to the relinquishment of land in the various forest reservations to the United States, and to the selection of lands, in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of the laws regarding its public lands. Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject. Catholic Bishop *v.* Gibbons, 158 U. S. 155, 166, 167. There is no such law. [Cosmos Co. *v.* Gray Eagle Co., 190 U. S. 301, 308.]

As is said in Knight *v.* United States Land Association, 142 U. S. 161:

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial func-

tions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. [Riverside Oil Co. *v.* Hitchcock, 190 U. S. 316, 324.]

But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on. [Brown *v.* Hitchcock, 173 U. S. 473, 478.]

In Knight *v.* United States Land Association, 142 U. S. 161, the supervisory power of the Secretary of the Interior over all matters relating to the sale and disposition of the public lands, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress or under treaty stipulations, respecting the public domain, was fully considered, and numerous authorities cited. It was declared by Mr. Justice Lamar, speaking for the court, that the Secretary was clothed with plenary authority as the supervising agent of the government to do justice to all claimants, and to preserve the rights of the people of the United States, and that he could exercise such supervision by direct orders or by review on appeal, and, in the absence of statutory direction, prescribe the mode in which it could be exercised by such rules and regulations as he might adopt. [McDaid *v.* Oklahoma, *ex rel.* Smith, 150 U. S. 209, 215.]

It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. [Burfenning *v.* Chicago, St. Paul &c. R'y, 163 U. S. 321, 323.]

The above authorities, while announcing the general jurisdiction of the land department, do not go to the precise question of its authority over a mere mining location. This point is referred to in the case of Clipper Mining Company *v.* Ely Mining and Land Co., 194 U. S., 220. That case involved an adverse suit by prior placer claimants, whose application for patent had been rejected, against junior lode applicants, and the court, in the course of its opinion, used the following language, pages 223–234:

> Undoubtedly, when the Department rejected the application for a patent, it could have gone further and set aside the placer location and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.
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> * * *
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> The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against

the placer location and set it aside and in that event all rights resting upon such location will fall with it.

The case of Cameron *v.* Weedin *et al.*, 226 Fed., 44, was one in which a bill for injunction to restrain the local officers from proceeding against certain mining claims was filed by Cameron. District Judge Sawtelle, in his opinion, rendered September 4, 1915, makes the following statements:

The first question, therefore, to be considered, is whether this court has jurisdiction of the cause. It seems to me that this question must be answered in the negative. In the recent case of Plested v. Abbey, 228 U. S. 42, 33 Sup. Ct. 503, 57 L. Ed. 724, which was a suit against the register and receiver of the local land office of the United States at Pueblo, Colo., and in which plaintiffs sought injunctive relief against said land officers, restraining them from carrying out the orders of the Secretary of the Interior and the Commissioner of the General Land Office, as in the case at bar, it was strenuously insisted that the register and receiver were acting beyond and contrary to the law, and that, being outside of the pale of the law, they were not entitled to its protection, even though the rule exists that they should not be interfered with by the courts when exercising their official functions within the law. In that case the Circuit Court entered a decree sustaining a demurrer to the bill and dismissing the cause for want of jurisdiction.

The court then proceeds to quote from the decision of the Circuit Court and the opinion of the United States Supreme Court in the case cited, and continues:

It is claimed by plaintiff that the case just quoted involved the right under the laws of the United States to purchase coal lands belonging to the United States, and that therefore the decision in that case should not be followed in cases where rights are initiated and possession held under and by virtue of the laws of the United States relating to the location and possession of unpatented mining claims. I am of opinion that no such distinction can fairly be drawn, and that the principle announced in that case is equally controlling in cases arising under the mining laws. The language of the court is clear and positive, and is in terms which admit of no exceptions or qualifications, and it would seem a waste of time and labor to review or collate the decisions in which the questions here involved have been discussed, especially in view of the fact that they have been so carefully selected by the Chief Justice and are to be found in the opinion of the Supreme Court in the Plested Case, supra.

Counsel for plaintiff have called my attention to the case of Ex parte Nichols and Smith, recently decided by the Assistant Secretary of the Interior, now pending on rehearing. In that case the previous decision in the Yard Case, 38 Land Dec. Dept. Int. 59, was overruled, and it was there held that the Land Department was without jurisdiction in inquiries of the character now under consideration by the local officers, and that the courts have the exclusive jurisdiction to determine the right of possession to an unpatented mining claim. Entertaining, as I do, the opinion that this court has no jurisdiction to award the relief prayed, I deem it unnecessary in this opinion to enter into a discussion of that case, or to express any opinion with reference thereto. . . .

The motion to dismiss is hereby sustained, and the clerk is directed to enter a decree denying plaintiff's application for a temporary injunction, and dismissing the bill for want of jurisdiction.

In the recent case of Lane *v.* Cameron, decided by the Court of Appeals of the District of Columbia on November 14, 1916 (44 Wash. Law Rep., 743), this question of jurisdiction was the main issue presented. The court's opinion in that case concludes as follows:

It is apparent, therefore, that unless the Land Department of the Government, to which and to which alone has been entrusted the authority and duty of representing and protecting the public interests in these matters, is authorized to inquire into the good faith of these claims, the public interest may suffer. The jurisdiction of the Department to make such an inquiry should this appellee ask for a patent, is not denied. The question of jurisdiction, therefore, is dependent upon his will. If he conceives it to be to his interest to obtain a patent, jurisdiction will be conferred upon the Department to determine the character of the land embraced within these entries; but, if he elects not to apply for a patent, the Department, even if convinced that the character of the land is nonmineral, must permit him to occupy it to the exclusion of the public. This is a startling contention to press in a court of equity, and its fallacy is clearly apparent when we come to consider that the administration of the public land system was entrusted exclusively to the Land Department, that the public interest might be protected at all times.

But, says the appellee, it is open to the Land Department to institute a court proceeding to have determined his rights. The Department very naturally answers this contention by pointing out that under such a proceeding the court would be without jurisdiction to pass upon the fundamental question involved, namely, that of the character of the land. That question, as we have seen, has been held for the exclusive determination of the Department, and should the Department institute a court proceeding without first having determined it, there would be nothing upon which to pass a judgment. We are clearly of opinion that this contention of appellee is unsound.

Hardin *v.* Jordan, 140 U. S. 371, and Noble *v.* Union River Logging Co., 147 U. S. 165, are not in conflict with our conclusion that the Department has jurisdiction to inquire into the character of the land here involved, for in those cases there had been final action by the Department, and, hence, attempts to resume a jurisdiction wholly lost were abortive. In the present case, the legal title to the land embraced within these entries still is in the United States, and the question as to the character of that land still is undetermined. This, therefore, is an attempt not to prevent the Department from resuming a lost jurisdiction, but from exercising an existing jurisdiction and performing a statutory duty.

This attempt of appellee to interfere with the Department in the performance of its duty as the guardian of the public interest, must fail. If the character of this land really is mineral and the locations regular, such undoubtedly will be the finding of the Department, and appellee will be injured in no way. If, on the other hand, the character of this land is nonmineral and these locations irregular, these facts should be determined and appropriate action taken by the Department to restore the land to the public domain. The province of courts is to uphold, rather than stay, the hands of officials who, in good faith, are seeking to perform duties imposed by law.

It follows that the decree must be reversed, with costs, and the cause remanded with directions to dismiss the bill.

In passing it may be stated that at least three years prior to the rendition of the decision in the Yard case, *supra*, this Department, in

a letter addressed to the Department of Agriculture, expressed its opinion upon this matter as follows:

> There would seem to be no good reason, however, why the character of lands in forest reserves, located and claimed under the mining laws, may not be determined by the land department in the absence of entry or application for mineral patent, where such determination appeared to be necessary to the due and proper administration by your department of the laws providing for the protection and maintenance of such reserves. The land department unquestionably has jurisdiction over any and all lands embraced within such locations for the purpose of determining whether they are of the character subject to occupation and purchase under the mining laws. [38 L. D., 62.]

In line with the view so expressed, the regulations of May 3, 1907 (35 L. D., 547), circulars of June 26, 1907 (35 L. D., 632), and June 23, 1908 (36 L. D., 535), and the instructions of May 15, 1907 (35 L. D., 565), were drafted.

So far as this matter of jurisdiction is concerned the status of a settlement claim on unsurveyed land is quite analogous to that of a mining location. In the case of Susan A. Leonard (40 L. D., 429) it was held (Syllabus):

> The land department has full authority and jurisdiction, either on its own motion or at the instance of others, to inquire into the *bona fides* of a claimed settlement upon public land, notwithstanding the land is yet unsurveyed and no entry based upon such settlement claim has been allowed.

So far as the Department is now advised, this holding has never been questioned by the courts or overruled in later decisions. It is the doctrine which now obtains. No substantial grounds are perceived for attempting any distinction between a settler's possessory right on unsurveyed land and a mining claimant's location rights, with respect to the jurisdiction of the land department.

In the decision under review the statement is made that one of the fundamental tests of jurisdiction is the power of the tribunal to enforce its judgment, a lack of such power negativing the possession of jurisdiction in the premises. An essentially similar contention was made before the Supreme Court in the case of South Dakota *v.* North Carolina, 192 U. S., 286. The court there said:

> But we are confronted with the contention that there is no power in this court to enforce such a judgment and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. . . .
>
> Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.
>
> There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was

settled by Christian *v.* Atlantic & North Carolina Railroad Company, 133 U. S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises.

The difficulties there suggested did not prevent the court from entering its decree in that case for a money recovery, and in the case of Virginia *v.* West Virginia, 238 U. S., 202, a like decree was entered. In the latter case a petition for execution was filed and denied (241 U. S., 531) without prejudice to a renewal of the same, in order to give opportunity for the legislature of West Virginia to meet and provide for the payment of the judgment.

It can with propriety be said that a proper test of jurisdiction is the power of the tribunal to render a judgment efficient according to the nature of the proceeding. In cases like this the outstanding issues of fact are as to discovery and the character of the land. No one contends that where patent is sought the land department has not exclusive jurisdiction to determine these issues. Its determination so made is conclusive in the absence of fraud. It is the duly authorized tribunal, organized and equipped to that end. After notice and opportunity for full hearing, it determines the status of lands and of claims asserted thereto. It allows or disallows claims, rejects applications, and cancels entries pursuant to its findings. By it the rights of claimants are adjudicated. In no case does it undertake to put any claimant in possession of an awarded tract. Neither does it attempt to dispossess any occupant under a rejected claim. So here, any judgment to be rendered will be efficient and appropriate to the end sought. The question of discovery will be investigated and determined and the legal standing of the claim thereupon adjudged. From the findings so made certain legal consequences will naturally flow.

Upon a careful review of this question, and after mature consideration, the Department is convinced that under the law and authorities it possesses jurisdiction and authority over the subject matter of the present case. The doctrine enunciated in the Yard case, *supra*, is correct. The practice obtaining prior to the rendition of the decision on appeal herein will be reestablished and hereafter followed.

With respect to the issues involved in the case at bar it is found that the charges preferred against the two locations were as follows:

1. That there had been no discoveries of mineral upon the lands embraced in said claims, or either of them;

2. That said lands are not held in good faith for mining purposes, but for the purpose of speculation and the rental of lands to parties for grazing purposes.

Claimants filed answer denying the truth of the charges and asked for a hearing, which, after due notice, was had. Upon the evidence

adduced the local officers were of the opinion that the showing made in support of the claims did not meet the requirements of the statute, citing Castle *v.* Womble (19 L. D., 455). They held that the first charge had been fully established and recommended "the cancellation of these claims." Upon appeal, the Commissioner affirmed the findings and conclusions of the local officers, sustained the Government's protest, and held the two claims to be null and void. The record has been examined. The Department finds that there has been no discovery of any valuable mineral deposit within either of the two locations. The placer claims are, therefore, without legal basis. The Meadow No. 1 and the Meadow No. 2 placer locations are accordingly adjudged to be a nullity, and the lands covered thereby will be administered as a part of the public domain subject to the reservation for a national forest.

The Department decision herein of October 24, 1913, is recalled and vacated. The motion for rehearing is granted.

BALENTE LUNA.

Decided February 10, 1917.

ENLARGED HOMESTEAD—ADDITIONAL ENTRY—PART ONLY OF ORIGINAL HOMESTEAD RETAINED.

It is not essential to allowance of an additional entry under the Enlarged Homestead act of February 19, 1909, as amended by the act of March 3, 1915, that the applicant shall have retained in its entirety his original homestead.

VOGELSANG, *First Assistant Secretary:*

December 2, 1915, Balente Luna filed homestead application under the enlarged homestead act of February 19, 1909 (35 Stat., 639), for the NW. ¼, Sec. 11, T. 6 N., R. 24 E., N. M. M., as additional to his original entry for the NE. ¼ of said section, on which final proof was submitted and which was patented August 7, 1911.

Section 3 of the said act of February 19, 1909, was amended by the act of March 3, 1915 (38 Stat., 956), to read as follows:

That any person who has made, or who shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: *Provided*, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this Act, as provided by section one thereof.

By decision of June 20, 1916, the Commissioner of the General Land Office rejected the application for additional entry for the assigned reason that the applicant stated in his application for additional entry that he had sold the S. ½ NE. ¼ of said Sec. 11, the tract embraced in his original entry, but that he still owned and

occupied the N. ½ NE. ¼ of said section. This action was based upon the language used in the said act of March 3, 1915, providing the condition that the entryman "still owns and occupies the land" in the original entry. The view expressed by the Commissioner was that inasmuch as the applicant does not own all of the land embraced in the original entry he is not qualified to make additional entry under the act of March 3, 1915. The applicant has appealed from the action of the Commissioner.

The act under consideration is in its nature remedial. It was designed to benefit entrymen who had submitted final proof upon their original entries, made under the old law, for an area less in extent than permitted by the enlarged act, but of the same character of lands enterable under the enlarged act. The main object of the law was to afford opportunity to entrymen of inferior lands to enlarge their holdings by entering and cultivating lands of like character. An important condition prescribed was that the applicant should still own and occupy the land embraced in the original entry. But this provision should be given a liberal and reasonable construction to effect the purpose of the law, rather than a technical interpretation, so as to destroy its remedial intent.

The portion of the original entry which the applicant in this case owns and occupies is contiguous to the land applied for as an additional entry. Therefore, the claim thus composed will be available for use for agricultural purposes as a compact body. It is not believed that the allowance of this entry will contravene the terms of the act, and certainly the purposes of the law will be thereby subserved.

In the absence of other sufficient objection, the entry will be allowed. Accordingly, the decision appealed from is reversed.

W. E. MOSES (On Rehearing).

Decided February 13, 1917.

SIOUX HALF-BREED SCRIP—RELOCATION OF EXCESS.

Where an application for the location of Sioux Half-Breed scrip recited that such scrip was located on the land described "in satisfaction of the attached certificate or scrip," and the patent issued recited that the certificate was surrendered "in full satisfaction" for the land described, the locator has waived his right, if any existed, to any excess representing the difference in quantity between the land received and that called for by the scrip.

SAME.

Neither the law nor the practice of the Department authorizes the relocation of Sioux half-breed scrip to the extent of the excess of land represented by such scrip over that received under a location thereof.

VOGELSANG, *First Assistant Secretary:*

This is a motion for rehearing, filed by W. E. Moses, attorney in fact, in the above entitled case, involving a number of applications

for certified copies of Sioux Half-Breed certificates, with request for indorsement thereon showing former locations, as evidence of a right to make further locations of the excess.

By Department decision of January 3, 1917, the decision of the Commissioner of the General Land Office, dated September 28, 1915, denying the applications, was affirmed.

Request is made for opportunity to submit oral argument in support of the motion, but the case is sufficiently stated in the written brief, and the Department has given the matter mature consideration. It does not appear that oral argument could throw additional light upon the question at issue. Therefore, the request is denied.

These alleged rights consist in most cases of very small areas resulting from former locations on tracts of slightly less acreage than the piece of scrip or certificate surrendered. There are twelve such certificates involved in the applications.

The act of July 17, 1854 (10 Stat., 304), authorized issuance of certificates or scrip to the half-breeds or mixed bloods of the Sioux Indians according to the area each would be entitled to take if the lands of their reservation had been equally divided among them. All of their interest in the lands of the reservation was to be relinquished in exchange for the scrip. The pieces of scrip, or certificates, issued under the act, were in denominations of 40, 80 and 160 acres.

The instructions for the location of the scrip did not state whether the surrender of a piece of such scrip in exchange for a subdivision or subdivisions of land of less area than the area of the scrip surrendered, would fully exhaust the scrip so as to prevent subsequent use of the excess portion. See instructions in 1 Lester, 627; 1 Copp's L. L., 721 and 723; 2 Copp's L. L., 1355, edition of 1882.

No decision or regulation of the Department authorizing the relocation of such excess has been cited and after considerable research none has been found. Reference has been made to decision in the case of Frederick W. McReynolds (31 L. D., 259), wherein it was held that the location of Valentine scrip on an area less than the scrip certificate did not effect a waiver of the excess. The case of Harvey Spaulding and Sons (35 L. D., 483), was also cited, wherein a similar ruling was made as to Surveyor-General scrip. Likewise attention was called to a decision by the Commissioner of the General Land Office, dated May 21, 1914, allowing the use of the excess portion of a piece of Wyandotte scrip.

It is contended that the principle applied in said decisions applies with equal force to Sioux Half-Breed scrip, and that the logical conclusion to be drawn therefrom requires allowance of the use of the excess in the cases under consideration. But the denial of the use of similar excess in the case of forest lieu selections (29 L. D., 578), argues forcibly the other way.

Whatever may be said of the two Department decisions above cited with reference to other classes of claims, it has not been found that the said rulings have been extended to Sioux Half-Breed scrip in any Department decision or regulation, and the Department is not disposed at this time to so extend them. They do not afford clear authority for the claim here contended for, and even if they point that way the applicants do not appear to have been damnified thereby. Such rights are made nonassignable by law, and no interest therein may be granted, by power of attorney or otherwise.

The applications for the former locations recited that the scrip was located on the land described "in satisfaction of the attached certificate or scrip." The patents issued thereon recited that the certificate described was surrendered "in full satisfaction" for the land described. These cases were, therefore, considered as fully adjudicated and closed for nearly half a century. No reason is seen for reopening them.

The motion is accordingly denied.

VICTORIA M. LISY.

Decided February 15, 1917.

APPLICATION FOR WITHDRAWN LANDS—RESTORATION PENDING APPEAL.

Where public lands withdrawn from entry or other disposition are applied for under the terms of any public-land act, the application will be rejected, unless it comes within the terms of Circular 324 of the General Land Office (43 L. D., 254).

VOGELSANG, *First Assistant Secretary:*

Victoria M. Lisy has appealed from the decision of the Commissioner of the General Land Office of May 23, 1916, denying her application, filed March 29, 1915, to amend her homestead entry, made December 2, 1913, for the W. ½, Sec. 1, T. 22 N., R. 10 W., 6th P. M., Broken Bow, Nebraska, land district, to include the E. ½ of said section.

At the time the application to amend was filed the E. ½ of said section was set aside as an administrative site for the Hyannis ranger station, and from the Commissioner's first rejection of the application, October 23, 1915, Lisy appealed to the Department. While the case was pending here on appeal the land was, by Executive order of December 1, 1915, restored to homestead entry only, in advance of settlement or other form of disposition, from February 2, 1916, to February 29, 1916. The Department, January 18, 1916, remanded the case to the General Land Office for appropriate action, in view of the restoration of the land, and on the following day Charles Brezina filed application to make homestead entry therefor.

The Brezina application was properly filed under Department circular of May 22, 1914 (43 L. D., 254), which permits applications to be filed within the period of 20 days prior to the date of the restoration of land to entry. The effect of remanding the Lisy application to the General Land Office was to revoke the rejection thereof and permit the allowance of same at the proper time in the absence of an adverse claim. It became immaterial, therefore, that the application was actually filed at a time when the same could not have been allowed. On the date of the Department's decision remanding the application there was no adverse claim, and had immediate action been taken by the Commissioner, in accordance with said decision, the application would have been treated as properly filed and allowable at the time the land was restored to entry. The failure to take immediate action, however, does not affect the status of the application, and the same is not defeated by the adverse claim of Brezina, which was initiated subsequent to the Department's decision. In this view of the matter, the applications must be regarded as having been simultaneously filed, and will be disposed of in accordance with the circular above mentioned. The case is remanded accordingly.

It has been the practice of the Department, where applications are pending on appeal from the action of the Commissioner of the General Land Office in rejecting the same because the land applied for had been withdrawn, to remand said applications for allowance, in the absence of an adverse claim, where the land is restored pending such appeal. This practice will no longer be followed, and hereafter all such applications, except those which may be received under the circular of May 22, 1914, *supra*, will be rejected.

SOLDIERS' ADDITIONAL RIGHTS UNDER SECTIONS 2306 AND 2307, REVISED STATUTES.

INSTRUCTIONS.

[Circular No. 528.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 16, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Under date of February 15, 1917, the Secretary of the Interior made the following administrative ruling:

Sections 2306 and 2307, Revised Statutes, provide as follows:

"SEC. 2306. Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered,

under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

"SEC. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title."

The soldier's additional right thus created inures, first of all, to the soldier, to be exercised by him personally by entry of additional land, or, on authority deduced from Webster *v.* Luther (163 U. S., 331), which involved the exercise of the additional right by a soldier's widow, based on *her own original entry*, by sale and assignment to another, whereby in that manner he acquires the personal benefit intended by Congress.

Section 2307 provides for the devolution of this right if not exercised by the soldier in his lifetime. It is a distinct grant of the right or a similar right, first, to the widow under certain conditions, then to the minor children, acting through a guardian duly appointed and accredited at the Department of the Interior. The grant may be properly described as a grant of power, the exercise of which is essential to the creation of a tangible property right. Congress has expressly designated the parties who may exercise that power. The grant contains no words of inheritance, and the terms of the sections imply that the ordinary law of descent and distribution is inapplicable. Like the grant of a right of a pension to a soldier or to his widow, or to his minor children under sixteen, the privilege is personal and is not descendible.

The Land Department has not, since the decision in Webster *v.* Luther, given a construction to the law that confines the benefit of these sections to the parties expressly enumerated. It has assumed that upon the failure of all of the beneficiaries to appropriate the right, the right passed by descent to others. It has held that where the widow and the minor orphan children failed to avail themselves of the right left unexercised by the soldier, the right reverted to the latter's estate and became an asset thereof. More lately it has held that this is not so; that the right passes by devolution to the minor children and stops there, becoming an asset of their estate, subject to administration and to sale by an administrator. Soldiers' additional rights have been sold by administrators expressly appointed for that purpose, and at the instance of parties whose business it is to speculate in the rights. This has happened even where the soldier, or the minor child, left no heirs, the theory of the application for administration being that the State had an interest by escheat. Administrators have sold these rights to the party active in procuring administration for relatively trivial sums, no one but the assignee deriving any substantial benefit.

The department is convinced that it was never in the mind of Congress that these rights should pass beyond the limits indicated in the sections. Out of gratitude to the soldier, Congress desired to confer upon him personally a material benefit; or if he died before gaining that benefit, upon those *dependent upon him*—his widow or his *minor* orphan children; not upon his adult children, not upon collateral heirs, and certainly not, in the absence of any heir, upon some State or foreign Government.

Overruling then all decisions or expressions in decisions in so far as they may be in conflict herewith, the department construes the act to mean that the soldier's additional right may be used (1) by the soldier in his lifetime either directly by entering the land or indirectly, in his lifetime, by conveying his right to entry to an assignee; or (2), similarly, by the widow, while her status as widow of the soldier continued; or (3), similarly, in the absence of appropriation by the soldier or his widow, by the minor orphan children, during their minority, acting through their lawful guardian. If this right is not exercised in the manner indicated and within the term during which it was appropriable, the right lapses and ceases to exist. Unused, it never becomes an asset of the estate of the soldier, widow, or child.

Mindful, however, that, encouraged by a practice for some time not in harmony with this construction, many persons have in good faith and for a valuable consideration purchased such rights from administrators or heirs, so that some might advance the claim that the practice now to be determined has become as to innocent purchasers practically a rule of property on which they relied, the construction hereby placed upon sections 2306 and 2307 will not in operation be treated as retroactive—that is, where the right was actually sold and the transaction wholly completed and formally consummated by actual delivery of the written assignment prior to the date hereof.

The Commissioner of the General Land Office, and the officers who are under him, are instructed that no soldier's additional right assigned by the heirs generally or by the administrator of the estate of a deceased soldier or of his widow, or of his minor orphan children, or directly by such "minor children" after they shall have reached majority, thus assigned after the date hereof, will be recognized as the valid basis of entry of public land.

CLAY TALLMAN, *Commissioner.*

STATE OF WYOMING (On Rehearing).

Decided February 17, 1917.

STATE LANDS—SCHOOL INDEMNITY SELECTION—APPROVAL.

Until approval by the Secretary of the Interior, no equitable title or vested right accrues under an indemnity school land selection, nothwithstanding performance of all that the law and regulations require of the selector; and the Secretary is without authority to approve a selection of mineral land.

WITHDRAWAL AND RESERVATION OF PUBLIC LANDS UNDER ACT OF JUNE 25, 1910—LANDS EXCEPTED—SCHOOL INDEMNITY SELECTION.

Certain forms of disposition and certain classes of pending claims are specifically excepted from the force and effect of any withdrawal under the act of June 25, 1910 (36 Stat., 847), but a school land indemnity selection is not so excepted.

WYOMING STATE LANDS—MINERAL LANDS NOT SUBJECT TO GRANT OR SELECTION.

Mineral lands do not pass to the State of Wyoming under its school grant, either by virtue of the act of July 10, 1899 (26 Stat., 222, 224) or the act of February 28, 1891 (26 Stat., 796).

LANDS IN SCHOOL INDEMNITY SELECTION—MINERAL DISCOVERY—EFFECT UPON STATE SELECTION.

A discovery of a valuable mineral deposit subsequent to the tender of an indemnity school land selection but prior to approval thereof by the Secretary of the Interior defeats the selection.

COURT DECISIONS CITED AND CONTRASTED.

The case of Cosmos Exploration Company *v.* Gray Eagle Oil Company (190 U. S., 301) was not overruled or modified by the decision in the case of Daniels *v.* Wagner (237 U. S., 547).

VOGELSANG, *First Assistant Secretary:*

The State of Wyoming has filed a motion for rehearing in this case, in which the Department, by its decision of October 25, 1916, affirmed the action of the Commissioner of the General Land Office, holding the State's indemnity school land selection list No. 80, serial No. 05521, for cancellation as to the N. ½ SE. ¼, Sec. 19, T. 46 N., R. 98 W., 6th P. M., Lander, Wyoming, land district.

April 4, 1912, the State filed its application to select said lands with other tracts not here involved. The tract above described was included in Petroleum Reserve No. 32, by Executive order of May 6, 1914, pursuant to the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497). In connection with the pending motion counsel have conceded the present oil character of the land. They say:

> That it is fully understood that since the selection of this land, oil has been discovered, and in paying quantities upon this land, by the lessees of the State, who are in possession of the land.

The State has declined to apply for or accept a restricted patent reserving the oil and gas deposits, under the act of July 17, 1914 (38 Stat., 509). The provisions of that act are not here involved.

The State contends that upon the filing of a complete application to select, complying with the requirements of the law and Departmental regulations, it became possessed of a vested right and interest in the land and entitled to have its claim adjudicated as of the date of such filing. It is also urged that as approval and certification, when made, will relate back to the date of the filing of the application, conditions existing at that time are controlling, and if the land was then not known to be mineral in character the selection should be approved.

With counsel's contention the Department can not agree. Two insuperable barriers preclude approval of this selection. The first is the Executive order withdrawing the land. The second is the fact that the tract is mineral (oil) land. Either of these necessarily stays the hand of the Secretary of the Interior.

The act of June 25, 1910, *supra*, provides that the President may at any time, in his discretion, withdraw any of the public lands and reserve the same, and that such withdrawals and reservations shall remain in force until revoked by him or by an act of Congress. Certain forms of disposition and certain classes of pending claims are specifically excepted from the force and effect of any withdrawal

order so made. A school land indemnity selection presented by a State is not so excepted. The Executive withdrawal of May 6, 1914, attached to the land notwithstanding the State's pending application. In the case of State of California *et al.* (41 L. D., 592, 597), it was said:

> Moreover, since the President has, on account of their mineral character, withdrawn these lands from disposition, it is evident that the Secretary has no authority to approve the selections, and they must therefore be rejected.

The Administrative ruling of July 15, 1914 (43 L. D., 293), concluded as follows:

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

This ruling has been uniformly followed. See the cases of the State of California *et al.*, 44 L. D., 27, 118 and 127. In the face of the outstanding withdrawal this Department can not approve the selection.

Mineral lands do not in any event pass to the State. The act of July 10, 1890 (26 Stat., 222, 224), admitting Wyoming to the Union, provides in section 13:

> That all mineral lands shall be exempted from the grants made by this act.

For school sections in place, if found to be mineral, an equal quantity of other land is to be selected.

Section 14 prescribes:

> That all lands granted . . . as indemnity by this act shall be selected under the direction of the Secretary of the Interior.

The act of February 28, 1891 (26 Stat., 796), amending Sections 2275 and 2276, Revised Statutes, provides for indemnity selections in general and expressly prescribes that indemnity lands "shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State."

The land department is charged with the duty of determining the character of lands, and also it must determine the date subsequent to which the mineral question is foreclosed. The general rule is that when a public land claimant has done all that the law and authoritative regulations prescribe and has obtained an equitable title to and a vested interest in the land, any subsequent discovery or disclosure of mineral does not affect or impair his rights. Until approval by the Secretary of the Interior, no equitable title or vested right accrues under an indemnity school land selection.

In the case of Wisconsin Railroad Co. *v.* Price County (133 U. S., 496, 512–513), with respect to railroad indemnity, the court used the following language:

Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. . . .

The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

In the case of Sioux City &c. Railroad Co. *v.* Chicago, Milwaukee & St. Paul Railway Co. (117 U. S., 406, 408), it was said:

. . . no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior.

In Stalker *v.* Oregon Short Line Railroad Co. (225 U. S., 142, 149), it was said:

The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the lists of selections, the company does acquire a right to be preferred over such an intervenor.

This principle with respect to approval has been specifically applied to school indemnity by the Supreme Court of California in the case of Roberts *v.* Gebhart (104 Cal., 68; 37 Pac., 782), where it was said:

In the first place, the selection made by the state upon application of the plaintiff was not approved by the secretary of the interior, and therefore such attempted selection did not give to the state any legal or equitable right to the land therein described. In the case of Buhne *v.* Chism, 48 Cal. 471, this court, in passing upon the effect of such a selection, and the necessity for its approval by the secretary of the interior, said: "We think the approval of the secretary of the interior was essential to a valid selection and location by the state; and that it was incumbent on the plaintiff to show affirmatively that he had approved it. The act of March 3, 1853, provides in terms that the selection shall be subject to his approval, and we have no authority to dispense

with it. This condition was doubtless inserted for the reason that, in the opinion of the highest officer of the land department, the land might be required in the future for public uses; and it was intended that he should exercise his judgment in the premises before the selection should be valid."

. . . .

It is the consent of the United States, as manifested by the approval of the secretary of the interior, which gives legal efficacy to the application or selection made by the state; and without such approval neither the state nor its grantee is in a position to call in question any future disposition which the United States may make of the land embraced in the attempted selection.

See also Cape Mendocino Lighthouse Site, 14 Ops. Attys. Gen., 50, and Portage Land Grant, Ib. 645.

The decisions of the Department have been uniform to the effect that until approval a State has no vested right or interest as against the Government. In Tonner *v.* O'Neill (15 L. D., 559) it was held that no title was acquired by school indemnity selection until the same had been duly approved and certified, and that an attempted sale by the State prior to approval conveyed no right or title to the purchaser. In the case of the State of Washington (36 L. D., 371) it was decided that an approval of the selection was essential to the passing of the title and the acquisition by the selector of a vested right.

It is well settled in Departmental practice that the disclosure or discovery of mineral prior to approval defeats an indemnity selection. See the cases of Walker *v.* Southern Pacific Railroad Co. (24 L. D., 172); Swank *v.* State of California (27 L. D., 411); McQuiddy *v.* State of California (29 L. D., 181); Kinkade *v.* State of California (39 L. D., 491), and State of California (41 L. D., 592).

From the foregoing it follows that the State of Wyoming has obtained no equitable title or vested right in or to the lands sought. Being mineral lands they are interdicted and do not pass to the State under its grant.

The suggestion that conditions existing at the date of application are controlling is not new and possesses no merit. In the case of Swank *v.* California, *supra*, the following appears:

It is conceded by the defendants that the land is not subject to the State's selection if it was of known mineral character when the application of the State was filed, but it is contended that the subsequent discovery of mineral therein could not affect the right of the State. This contention is not sound. The law governing the right of the State to indemnity school land is in every essential respect similar to the law governing the right of a railroad company to select indemnity lands under its grant. In the case of Walker *v.* Southern Pacific Railroad Co. (24 L. D., 172), the Department held (syllabus):

"Prior to the approval of a railroad indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States."

With reference to the case of Cosmos Company *v.* Gray Eagle Company (190 U. S., 301), cited in the decision under review,

counsel state that they fail to find in that opinion any support for the decision on appeal herein. In the course of its opinion the Supreme Court, considering a forest lieu selection, said:

> The complete equitable title . . . can not exist until a favorable decision by that (land) department has been made regarding the sufficiency of complainant's proof of his right to the selected land. That question the department is competent and it is its duty to decide. It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the land was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of selection. But before any decision is made, how can there be an equitable title? . . . There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before a complete equitable title to the land can exist. The mere filing of papers can not create such title. The application must comply with and conform to the statute and the selector can not decide the question for himself.
>
> We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing . . . the selector has thereby acquired a complete equitable title to the selected lands. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement. . . . Until the various questions of law and fact have been determined by that department in favor of the complainant, it can not be said that it has a complete equitable title to the lands selected.

The foregoing emphasizes the principle that a selector gains no complete equitable title until favorable action or approval by the land department with respect to the selection. The case of Daniels *v.* Wagner (237 U. S., 547) is relied upon by the State. It was there held (Syllabus):

> One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, can not be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Offices.

The case is not in conflict with the principle announced in the Cosmos case. In the Daniels case no question of the mineral character of the land was presented. That controversy was between claimants asserting rights under the nonmineral land laws. Priorities were in question. This Department had disregarded the rights of the prior forest lieu applicant and had patented the lands to junior homestead and timber land claimants. This was done under the assumption that the officials of the land department possessed a broad discretionary power to so dispose of the land upon equitable considerations. The court decided that there was no basis for the assumption of such a discretionary power. The Cosmos Company *v.* Gray Eagle Company case was commented upon but was not overruled or modified. The court did not decide that the lieu selector, by compliance with all the essential requirements of the law and regulations, had obtained a vested equitable title to or a vested

interest in the land. It was decided that by the acts of the lieu selector he acquired priority and a right that was paramount to subsequent claims.

Counsel have requested that specific findings be made as to the sufficiency and due regularity of the State's application, as to the asserted fact that the land was not known to possess mineral value at the date of filing, and as to the good faith of the State and its ignorance of the oil deposits since developed, when it applied. Findings with respect to these matters are sought because it is believed that litigation will ensue and that such findings would be of avail on behalf of the State. The Department must decline to undertake an adjudication of the questions suggested. In connection with the present record, where no hearing has been had, matters of good faith and the known character of the land as of the date of filing can not with propriety be determined. An adjudication with respect to the questions suggested is not necessary for complete determination as to the validity of the State's application and a final disposition of this case before the Department. The Department is convinced that until a full equitable title arises the question of the mineral character of the land is open for determination. The land here involved having been withdrawn by the Executive and being mineral in character does not pass to the State under its application to select. The State's proffered school land indemnity selection as to the tract here involved will stand rejected.

The motion for rehearing is denied.

ELIZABETH McGLOTHERN.

Decided February 21, 1917.

DESERT LAND—INABILITY TO EFFECT RECLAMATION—RELIEF UNDER ACT OF MARCH 4, 1915.

A desert-land entryman's inability, for financial reasons, to obtain a water supply sufficient for the reclamation required by law, is not ground for relief under paragraph 3 or 4 of Section 5 of the act of March 4, 1915 (38 Stat., 1138, 1161).

VOGELSANG, *First Assistant Secretary:*

October 14, 1909, Elizabeth McGlothern made desert land entry 07000, at Waterville, Washington, for lots 4 and 5, Sec. 34, T. 30 N., R. 27 E., W. M., containing 83 acres. In her desert land declaration she stated that she expected to obtain her water supply from the Columbia River, which crosses the tract, and also that there was a small spring in the southwest corner of lot 5, sufficient for domestic use. She made three annual proofs, showing a total expenditure of

$411.25. May 23, 1913, she filed an application for extension of time within which to submit final proof, which was granted until October 14, 1915, by the Commissioner's order of February 27, 1914. October 13, 1915, she filed an application to perfect her entry, under paragraphs 3 and 4 of section 5 of the act of March 4, 1915 (38 Stat., 1138, 1161). Her application for relief under the act of March 4, 1915, was rejected by the Commissioner of the General Land Office, in a decision dated June 12, 1916, from which she has appealed to the Department.

The appellant sets forth that at the time of making entry she expected to secure the necessary water for irrigation from the Columbia River, by means of a pumping plant, which she was informed would cost about $400; she has now ascertained that such pumping plant would cost at least $1,000, which amount she has not been able to raise. She had expected to secure this sum from moneys which she contemplated would be awarded her from the estate of her deceased son, W. R. McGlothern, but this estate is still under probate, and it is extremely doubtful whether she will receive any funds from that source. The Commissioner, after reviewing the facts, which included a showing that she had laid 1200 feet of pipe to the small spring above mentioned, but failed to secure therefrom an adequate water supply, held:

> From the showing made it appears that Columbia River will afford ample water to irrigate the land, if a pumping outfit is provided. The relief sought can not be granted because of the applicant's financial inability to install a pumping plant. Such state of affairs, upon proper showing thereof, would be a ground for a further extension of time under the Act of April 30, 1912 (37 Stat., 105), or if the facts relied upon do not bring the case within the purview of this Act, then under paragraph 1 of the Act of March 4, 1915, supra.

The appellant contends that the act of March 4, 1915, *supra*, permits of the perfection of a desert land entry of the character embraced therein, either by compliance with the homestead law or by purchase, both in cases where the entryman is financially unable to build the necessary irrigation works or secure the necessary appliances, as well as where the failure of the water supply is due to physical reasons. It is clear that if this contention were adopted, it would result in adjudication of cases in accordance with each entryman's financial condition, and would permit of no uniform rule concerning the cases in which relief may be given.

The act of March 4, 1915, first authorizes an extension of time for the making of final proof, where there is a reasonable prospect that the entryman will be able to do the necessary work of reclamation, irrigation and cultivation. The next two paragraphs of the act permit of the perfection of the entry, either by compliance with the

homestead law, or by purchase, together with certain improvements, where—

> . . . there is no reasonable prospect that, if the extension allowed by this act or any existing law were granted, he would be able to secure water sufficient to effect reclamation of the irrigable land in his entry, or any legal subdivision thereof.

The act of March 4, 1915, was introduced by way of amendment in the Senate to the act making appropriation to supply deficiencies.

Prior to that time a bill (H. R. 19097, 63d Congress) had been introduced which proposed to grant a further extension of time within which to make final proof upon desert land entries, limited to 9 years in the aggregate. The Department, in reporting upon this bill, February 24, 1916, stated that its provisions would not afford relief to certain classes of desert land entries theretofore made. In this report, the Department said:

> In the administration of the desert land law and of the several statutes above named providing for extension of time within which to submit final proof, the Department has found that the difficulties and hardships confronting entrymen are often due to other causes than delay in the construction or operation of irrigation works. In a very large proportion of desert land entries, the claimant is confronted by the fact, after having expended large sums upon the land, that a supply of water adequate to the irrigation of the land can not be obtained. Sometimes this is due to prior appropriation of the water; in other cases it is shown that the tract was never irrigable from any known source of water supply. In the class of cases last mentioned, entries were of course improvidently allowed under showings deemed acceptable under the regulations then in force. It is obvious that it was never the purpose of the desert land law to permit the making of entries for lands incapable of reclamation. . . .
>
> Sections 2 and 3 of the bill herewith submitted propose to allow desert land entrymen, in cases where water sufficient for the reclamation of the irrigable land in the entry or any legal subdivision thereof can not be obtained, to perfect the entry in the manner required of a homestead entryman. . . .
>
> One who has in good faith gone upon a tract in the mistaken belief that it was subject to entry and capable of reclamation under the desert land law, and has expended time and money in a fruitless effort, has, in my judgment, an equitable claim to the consideration of the Government and should be permitted, if he desires to do so, to acquire title by compliance with the homestead law; or if this be impracticable, by developing the land for agricultural use and paying the price usually exacted of those who avail themselves of the commutation provisions of the homestead law.

The form of bill transmitted by the Department with that report later became the act of March 4, 1915, *supra*, and from the expressions of the Department there made, it is apparent that the kind of entries in contemplation were those for which there never had been a feasible source of water supply, or for which the contemplated source of water supply had failed. In the present case the source of water supply remains. The only difficulty is that the claimant has been unable to purchase or construct the necessary appliances, due to her

alleged financial condition. The showing made, therefore, does not bring the case within the act of March 4, 1915, as to the perfection of the entry by means of compliance with the homestead law, or purchase.

The decision of the Commissioner is correct, and is hereby affirmed.

ELIZABETH McGLOTHERN.

Motion for rehearing of the Department's decision of February 21, 1917, denied by First Assistant Secretary Vogelsang, May 29, 1917.

APPLICATIONS FOR REDUCTION OF AREA OF CULTIVATION ON HOMESTEADS IN NATIONAL FORESTS.

INSTRUCTIONS.

[Circular No. 530.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 21, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

You are directed to forward to the proper Forest officer all applications hereafter filed for reduction of the area required to be cultivated on homesteads under the Act of June 6, 1912, *where the lands involved are embraced in a National Forest.* The investigation of all such applications will in the future be made by the Forest Service.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

LANDS ELIMINATED FROM NATIONAL FORESTS—JURISDICTION—ENTRIES—DESIGNATION UNDER ENLARGED HOMESTEAD ACTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 7, 1917.

THE DIRECTOR OF THE GEOLOGICAL SURVEY:

Referring to your letter of February 26, 1917, you are advised as follows:

If land embraced in an entry under section 1 of the act of June 11, 1906 (34 Stat., 233), is eliminated from the forest, the limitations

of said act automatically terminate, as does the jurisdiction of the Secretary of Agriculture, and the entry is thereafter treated as though made under Section 2289, Revised Statutes.

The ruling of the Department in the case of Burtis F. Oatman (39 L. D., 604) was based on the limitations of the act of June 11, 1906, *supra*, allowing entries of not to exceed 160 acres within a national forest. Upon elimination of the land from the forest, the reason for the rule no longer exists, and petitions for the designation of the land under the enlarged homestead acts may be filed and considered.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

INDIAN OCCUPANTS OF RAILROAD LANDS—ACTS MARCH 4, 1913, AND APRIL 11, 1916.

INSTRUCTIONS.

[Circular No. 533.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 12, 1917.

REGISTERS AND RECEIVERS,
U. S. LAND OFFICES IN ARIZONA, CALIFORNIA AND NEW MEXICO:

Indian occupants of railroad lands who are entitled to the benefits of the act of March 4, 1913 (37 Stat., 1007), as extended by the act of April 11, 1916 (39 Stat., 48), should file in the proper local land offices their applications for allotment in the usual manner. Each application must be accompanied by a showing to the effect that the Indian claiming the benefits of the act has occupied the land involved for the required period of five years or more. Said showing may consist of the affidavit of the applicant, setting forth when the occupancy began, how long it continued, just what it consisted of, and such other pertinent facts as will enable the Department to determine the nature and extent of the alleged occupancy. This affidavit must be corroborated by at least two witnesses familiar with the facts. When such applications and showings are filed in the proper local offices, the registers and receivers will transmit them to this office, observing the instructions contained in Circular No. 403 of April 24, 1915 [44 L. D., 86].

2. When an application and the accompanying showing reach this office they will be examined, and if on their face they show that the Indian is qualified to make an allotment under existing law and has

occupied the land applied for in accordance with the requirements of the said act, the railroad company will be called upon for a statement as to whether it owns the land, and if so, whether it would be willing to reconvey it under said act in case it be found that the Indian's occupancy is sufficient and he would be otherwise qualified to take an allotment of the land. If the company or its assigns decline to entertain the suggestion of reconveyance then the Indian's application will be rejected; but if a reply is made in the affirmative, field examination will be directed not only with reference to the Indian's qualifications and his occupancy of the land, but also as to the value of the land. Should the field examination show that the Indian has not occupied the land as required by the statute or that he would otherwise be disqualified to take an allotment of it, charges will be lodged against his claim and the matter will proceed to a final determination under the usual procedure. Should decision be favorable to the Indian's claim upon the report of the field examiner or upon the hearing, as the case may be, the railroad company will then be requested to convey the land to the United States by proper deed or relinquishment with evidence of title and the non-alienation and non-encumbrance of such title. The instrument of conveyance should not be recorded until it has been accepted by the Department. Should the deed or relinquishment be accepted, it will be returned to the company to be properly recorded on the records of the county in which the land involved is situated, after which it will be retransmitted for the files of this office. When the deed or relinquishment has been properly recorded and returned to this office suitable notations of the conveyance will be made upon the records of this and the local office, after which appropriate action will be taken on the Indian's application for allotment with a view of its allowance.

After a deed or relinquishment has been accepted, recorded, and returned to this office, the railroad company may make selection of other vacant non-mineral, non-timbered, surveyed public lands of equal area and value situated in the same State, in accordance with the provisions of the statute, provided it is made within the time fixed thereby. Said lieu selection will be filed in the proper local office, where it will receive appropriate action by the register and receiver in the same manner as indemnity or other kinds of railroad lieu selection. If it be found upon examination when it reaches this office that the company's lieu selection is regular on its face, the field service will be directed to make an examination in the field with reference to the character of the land selected by the company and also as to whether it and the land relinquished by the company are of equal value. When the report of the field examination has been received by this office, further appropriate action will be taken on the selection.

These instructions will supersede those contained in Circular No. 510 of October 11, 1916 [45 L. D., 322], said Circular No. 510 being hereby revoked and recalled.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

JAMES RANKINE (On Reconsideration).

Decided March 12, 1917.

WITHDRAWAL—CHARACTER OF LAND AS OIL OR NONOIL—COURSES OPEN TO AGRICULTURAL ENTRYMEN.

Where, after agricultural entry and prior to final proof, the land involved is included within the outboundaries of a petroleum reserve, the entryman may (1) apply for restricted patent, or (2) apply for a classification of the land as nonmineral, or (3) apply for a hearing at which the issue shall be the known oil or nonoil character of the land at date of perfection of final proof.

PATENT, RESTRICTED OR UNRESTRICTED—HEARING—BURDEN OF PROOF—DETERMINATIVE DATE.

Upon a hearing to determine whether an agricultural entryman should receive restricted or unrestricted patent to land included within the outboundaries of a petroleum withdrawal between the dates of entry and final proof, the withdrawal being *prima facie* evidence the land is oil in character, the burden is on the agricultural claimant to establish that the land was not known to be such at the date of perfection of final proof.

VOGELSANG, *First Assistant Secretary:*

Counsel for James Rankine has informally requested the Department to reconsider its prior decisions of June 28, 1916, and July 22, 1916, requiring Rankine to take the limited patent provided for in the act of July 17, 1914 (38 Stat. 509), upon his homestead entry (No. 03140), made April 20, 1908, at Lander, Wyoming, for the N. ½ SE. ¼ and N. ½ SW. ¼, Sec. 27, T. 46 N., R. 98 W., 6th P. M. Final proof was submitted before a United States commissioner at Meeteetse, Wyoming, April 30, 1914, but the final proof together with the fees and commissions was not received in the local land office until May 9, 1914, on which date final certificate was issued. The land was withdrawn by Executive order of May 6, 1914 and included in petroleum reserve No. 32.

The Commissioner of the General Land Office, upon July 27, 1915, made the following ruling:

> The land having been included in a petroleum reserve subsequent to entry, you are directed to advise the party in accordance with paragraph 10-b of Circular No. 393 of March 20, 1915, containing instructions under the Act of July 17, 1914 (38 Stat., 509), that patent, if issued, will contain a reservation

of the petroleum and gas deposits to the United States in accordance with the said Act of July 17, 1914, unless, within thirty days, there is filed in your office an application for the classification of the land as nonmineral, together with a showing, preferably the sworn statements of experts or practical miners, of the facts upon which is founded the knowledge or belief that the land applied for is not valuable for petroleum or gas.

If application for classification is filed and same is denied, a hearing will be allowed, if desired, at which the burden of proof will be upon the claimant to show that the land *is* not valuable for petroleum or gas.

Rankine declined to apply for the classification, and the Commissioner, upon October 12, 1915, held that in the absence of an application for classification, patent would issue with the reservation of the oil and gas deposits to the United States. The Commissioner's action was affirmed, upon appeal, June 28, 1916, a motion for rehearing being denied July 22, 1916. Counsel then informally called the attention of the Department to the unreported decisions of July 26, 1916, in the cases of Fritz Hilmer, Lander 0571 (D–33026), and Charles Q. James, Visalia 02406 (D–32798). In both of those cases entry preceded an oil land withdrawal, which withdrawal, however, antedated final proof. In both of them, the Department ordered that unrestricted patent issue upon reports from the Field Service of the General Land Office and the Director of the Geological Survey that the land was as a present fact nonoil in character and was not known to be oil at the time of final proof.

Upon August 10, 1916, the Department called for a report as to the entry here under consideration from the Director of the Geological Survey. The Director, upon October 13, 1916, made the following report:

The land is located in the Grass Creek oil field. The Grass Creek anticline on which the field is developed has a general northwest-southeast trend and is asymmetrical in character, dips ranging from 24° to 58° having been observed on the southwest flank, while on the northeast flank they are less steep. Although the uplift was dominantly one of folding, yet toward the east and southeast beyond the tract listed folding gave way to faulting along the extension of the anticlinal axis. Beds from the Cody shale (Upper Cretaceous) through the Fort Union (Tertiary) are involved in the uplift, but it is only below the older beds along the inner portion of the anticline that oil may be expected to be found at economic depths or in commercial quantities. The highest part of the anticline in which the Cody shale is exposed has been eroded to form Grass Creek Basin, which is encircled by bluffs of the Mesaverde (Upper Cretaceous) formation. The land listed is underlain by the Cody shale and is located on the anticlinal axis toward the southeast end of the basin.

While the Grass Creek field had not been proved oil bearing before the withdrawal of May 6, 1914, it was nevertheless a matter of common belief in the region at the time of the Survey's examination in the summer of 1913 that oil was present in commercial quantities, a belief amply justified by subsequent drilling. It is difficult to understand how one living on land favorably situated for the accumulation of oil and gas, as Rankine's land is, should not at this time have been advised of a matter of such vital importance to him.

Subsequent to May 6, 1914, development has progressed steadily in the Grass Creek field with the result that an excellent production has been brought in. It is true that for the most part wells have been drilled on the highest portion of the anticline about 2 miles northwest of Rankine's entry, but that the southeast portion of the basin is not barren is demonstrated by the productive oil well brought in on the S. ½ of SE. ¼, Sec. 27, less than one-fourth mile from the south line of Rankine's homestead. It is unofficially reported that at present 18 rigs are drilling in the field and that development is progressing rapidly southeast toward the land here involved. A Survey geologist is now in the field engaged in bringing up to date the information regarding the Grass Creek development, and it is not improbable that he will obtain data which may be of interest to you in the consideration of this case. Such information as is available when field work is completed in November will be furnished at your request.

From the foregoing statement it appears that the tract listed is situated on the edge of a developed oil field in a position structurally favorable for the accumulation of oil, and that it was a matter of common belief in the region for at least 9 months prior to May 6, 1914, that the Grass Creek Basin contained valuable deposits of petroleum. The withdrawal of May 6, 1914, which is itself prima facie evidence of the oil character of the land, was recommended only after detailed field examination in the summer of 1913, and after mature consideration by the Survey during the winter of 1913–1914 of the facts collected in the field, and is therefore indicative that prior to May 6, 1914, the Survey was convinced that this land was valuable for deposits of petroleum. In view of these facts the development to date in the Grass Creek field, Rankine's land must be considered oil in character until actual drilling on the tract itself proves it barren.

In his supplemental report of January 16, 1917, the Director further stated:

Such little additional information, relating to the oil character of this land as was collected by the Survey in its examination last autumn, tends to strengthen the conclusions reached in my report of October 13, 1916, that the lands are mineral lands valuable for their deposits of petroleum. It was ascertained during this examination that two wells, in addition to the one mentioned in Survey letter of October 13, 1916, have been drilled in the SE. ¼, Sec. 27, and that all three wells yielded oil, on pumping, for a period of several months. During the time of field examination one of these wells was being cleaned out preparatory to being put on the pump again. It was also learned that at the north end of the field a well drilled through the Frontier sandstones, from which the production to date has come, encountered gas in the underlying Greybull sandstone. This sandstone, as well as those of the Frontier, underlies the land here involved.

In view of the facts that the lands were withdrawn prior to the submission of final proof, that the oil character of the lands may reasonably be considered to have been known for some months before (see my letter of October 13, 1916, in this case), and that the claimant has submitted no evidence indicating that the land is or at date of issue of final certificate was, nonmineral, it appears that limited patent should be issued * * *.

From the report of the Director of the Geological Survey and the fact that the entryman has declined to apply for a classification of the land as nonmineral, it may be assumed for the purpose of this case that the land is as a present fact known to be oil in character.

The regulations of March 20, 1915 (44 L. D. 32), provide in paragraph 10 (b) for an application for a classification of land as nonmineral. Should the application for classification be denied, the claimant is allowed 30 days to apply for a hearing "to establish the nonmineral character of the land." Paragraph 11 of the regulations provides:

A withdrawal or classification will be deemed *prima facie* evidence of the character of the land covered thereby for the purposes of this act. Where any nonmineral application to select, locate, enter, or purchase has *preceded* the withdrawal or classification and is incomplete and unperfected at such date, the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land *is in fact* nonmineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal.

In the case of Henry Hildreth, Visalia 01995, decided February 5, 1917 (46 L. D., 17), the Department held (Syllabus):

Nonmineral lands embraced within a lawful desert-land entry duly maintained and subsequently included within the boundaries of a petroleum reserve are excepted from the operation of the withdrawal by the act of June 25, 1910 (36 Stat., 847).

Where there is no evidence or allegation that at the date of final proof and payment the land was mineral in character, and where there is nothing before the Department warranting further investigation as to the character of the land, unrestricted patent will issue notwithstanding the fact that the land is within the exterior limits of a withdrawal made after desert entry.

In the course of the decision, it was stated:

Therefore where land has been withdrawn or classified upon data indicating that it is mineral in character and the Government continues to assert that it does in fact contain valuable mineral deposits, an applicant who seeks to have such land declared to be nonmineral must sustain the burden of proof at a hearing had for the determination of that question. The case under consideration does not, however, occupy such a status. The entry was made long prior to the petroleum withdrawal. The act of June 25, 1910, *supra*, under which the withdrawal was made, expressly excepted from the operation of the withdrawal lands embraced in any lawful desert-land entry theretofore made, where entryman should continue to comply with the law. It appears from the record that Hildreth did continue to comply with the law; that he has made the necessary expenditures, submitted proof thereof, reclaimed the area prescribed by the desert-land laws, and otherwise fully complied with those statutes. Therefore, the withdrawal has, under the express terms of the act, failed to attach to the land embraced in his said entry, if the lands be of the character subject to acquisition under the desert-land laws.

If prior to final proof and payment a discovery of valuable mineral had been made upon the land, entryman would, irrespective of the withdrawal, and of the act of June 25, 1910, *supra*, upon proof of the fact, have suffered the cancellation of his entry, unless he came within and accepted the remedial provisions of the act of July 17, 1914 (38 Stat., 509). Such is not the fact in this case. As hereinbefore related, not only is there no discovery or allegation

of discovery of mineral upon this land, but the Geological Survey reports that at time of final proof there was no evidence of its mineral character, unless the mere withdrawal constituted notice of that fact. A special agent of the General Land Office reports that the land is nonmineral in character. Both of these reports were made subsequent to the withdrawal and the submission of final proof. The case therefore does not fall within the rule and practice governing the discovery of mineral upon lands prior to final proof, nor is it analogous to entries made upon withdrawn lands. It is an entry upon nonmineral lands and excepted from the withdrawal by the express terms of the said act of June 25, 1910. Therefore, in view of the foregoing, and basing the decision wholly upon the facts and circumstances of this case, it is held that the entryman is entitled to an unrestricted patent for the land entered.

Under the facts of the entry here under consideration and in view of the regulations of March 20, 1915, as interpreted by the decision in the case of Henry Hildreth, *supra*, it would appear that three courses of action are open to Rankine.

1. He may apply for a restricted patent, or in the event of the failure to take any action, suffer cancellation of his entry (see George Ozbun, 45 L. D. 77).

2. He may apply for a classification of the land as nonmineral.

3. He may apply for a hearing.

Rankine has declined to apply for a classification of the land. Such a classification would involve the determination of the present character of the land. Should he apply for a hearing the question at issue would be as to its known oil or nonoil character at the date of the submission of final proof, which in this case has been taken as of May 9, 1914. Under paragraph 11 of the regulations of March 20, 1915, the withdrawal is deemed to be *prima facie* evidence of the character of the land. It is therefore *prima facie* evidence that the land was known to be oil in character at the time of final proof. Should the entryman herein apply for a hearing, the burden of proof will be upon him to establish that the land was not known to be oil in character at the time of final proof.

The entryman will accordingly be allowed the privilege of either applying for a restricted patent or for a hearing under the terms as above set forth. The prior decisions of the Department are modified to the above extent and the matter remanded for further proceedings in harmony herewith.

RALPH J. SHIRK.

Decided March 13, 1917.

ENLARGED HOMESTEAD ENTRY—ADDITIONAL—ACT OF JULY 3, 1916—LAND NONCONTIGUOUS.

An additional homestead entry of noncontiguous land is not permitted by the act of July 3, 1916 (39 Stat., 344), until final proof upon the original homestead entry has been submitted.

VOGELSANG, *First Assistant Secretary:*

Ralph J. Shirk appealed from decision of October 4, 1916, by the Commissioner of the General Land Office, holding for cancellation his homestead entry for the W. ½ SW. ¼, Sec. 15, T. 22 N., R. 21 E., N. M. P. M., Santa Fe, New Mexico, land district.

It appears that Shirk, on November 15, 1913, made homestead entry for the E. ½ E. ½ of Sec. 21 of said township, and on April 3, 1915, made additional entry, under the Enlarged Homestead act, for the W. ½ NE. ¼ of said section. On August 3, 1916, he made further additional entry for the W. ½ SW. ¼, Sec. 15, which latter entry the Commissioner held for cancellation for the reason that it is not contiguous to the lands embraced in the former entries and because he is not entitled to make entry for noncontiguous tracts, inasmuch as final proof has not been submitted upon the other entries.

In consideration of the appeal, the Department, under date of January 19, 1917, called upon the entryman to explain why he had not submitted proof and when he expected to do so. He has replied that he did not make settlement upon the land embraced in the first entry until May 1, 1914, and that he intended to make proof on May 1, 1917, or as near that date as possible.

The report of the local officers shows that on the same day that Shirk applied to make this additional entry, one Medina also filed application to enter said land, which application was rejected because of the prior entry of Shirk. They stated, however, that they had erroneously allowed the latter entry, and requested that it be canceled without delay in order that the application of Medina might be favorably acted upon.

Inasmuch as final proof had not been submitted by Shirk, he was not entitled, under the act of July 3, 1916 (39 Stat. 344), to enter the additional noncontiguous land.

The action of the Commissioner holding the entry for cancellation is correct, and said decision is accordingly affirmed.

Medina gained no rights by the filing of an application while the land was covered by an entry. Upon the cancellation of Shirk's entry, the land will be open to entry by the first qualified applicant.

DILLARD v. HURD.

Decided March 14, 1917.

HOMESTEAD ENTRY—CONTEST—DISABILITY CURED PRIOR TO CONTEST.

A contest brought upon the ground that the entryman is a minor and not the head of a family must fail where, prior to the filing of contest affidavit, the entryman attains his majority.

SAME—CONTEST—WHEN DEFAULT BEGINS TO RUN.

Where one under 21 years of age and not the head of a family is permitted to make a homestead entry, but attains his majority before the filing of a

contest affidavit charging failure to reside upon and cultivate the land as required by law, such contest must fail if six months had not elapsed since the entryman became 21 years of age.

VOGELSANG, *First Assistant Secretary:*

October 30, 1913, Claude B. Hurd filed application to make homestead entry, serial 029222, for the N. ½ NE. ¼, SE. ¼ NE. ¼, Sec. 10, and SW. ¼ NW. ¼, Sec. 11, T. 10 N., R. 12 E., B. H. M., Rapid City, South Dakota, land district, accompanied by corroborated affidavit stating:

That he is a minor nineteen years of age; that for the last two years he has been the head of the family; that he is the oldest boy at home; that his father is an invalid confined to the house at all times and to his bed a part of the time; that there are four children younger than himself and his father and mother to take care of; that he has provided the living for all of them and has done a man's work about the place the last two years, and that at this time he is so doing.

December 10, 1913, his application was allowed and entry made of record. October 6, 1915, Hubert Dillard filed application to contest said entry, charging that Hurd—

has abandoned said land and has not in good faith complied with the requirements of the homestead law; that said entry was illegally made in that the claimant at the date of entry was not the head of a family and that the claimant was not the sole support of his parents at that time, nor at any time since the date of his entry; that claimant is now only 20 years of age.

Notice of contest issued October 6, 1915, but service was not made upon the entryman until November 22, 1915, and proof of service thereof was filed on the same day. Answer was duly filed without objection to the service or proof thereof, and, upon further due proceedings therefor, testimony was taken before a designated officer in January, 1916, both parties appearing with counsel and witnesses.

April 15, 1916, the local officers joined in decision recommending dismissal of the contest, finding substantially in favor of the contestee upon the questions at issue.

December 2, 1916, the Commissioner of the General Land Office, considering the case upon the appeal of Dillard, affirmed the decision of the local officers, and from this decision contestant has appealed to the Department.

The record has been examined in the light of all briefs found on file in behalf of the respective parties, and it is found that the decision of the Commissioner sustaining the conclusion reached by the local officers that the contest should be dismissed is based upon holdings quite different from those made by the local officers.

The Commissioner finds that the statement of contestee that he was the head of a family, though made by him in good faith at the time he made his application, is not sustained by the evidence, but further finds that as he became 21 years of age on August 8, 1915,

and this contest was not filed until October 6, 1915, nor service thereof made on entryman until November 22, 1915, this defect is cured, as Hurd became a qualified entryman upon attaining his majority, prior to the inception of contest. This is clearly correct. See case of James F. Bright (6 L. D., 602), since many times cited by the Department, including 39 L. D., 418, 419.

This disposes of the charge that the entry was illegally made, as it clearly became effective from the date Hurd became a qualified entryman. Jones *v.* Burch (39 L. D., 418).

This leaves for consideration the charge that claimant "has abandoned said land and has not in good faith complied with the requirements of the homestead law."

If, as held by the Commissioner, the entry must date from the time Hurd became a qualified entryman (August 8, 1915), this contest must be dismissed as premature, having been brought within less than the six-months' period within which establishment of residence upon the land must be made. If, however, the entry should be held to date from the date it was allowed (December 10, 1913), the Department, after examination of the testimony, is of the opinion that the last above quoted charge made by the contestant is not supported by a preponderance of the evidence.

Upon full consideration of the entire case, however, the Department is satisfied that the decision of the Commissioner is sustained, by analogy of reasoning, by Departmental decision in the case of Jones *v.* Burch, *supra*. The conclusion, therefore, is, first, that the charge of minority must fail because Hurd became of age before the contest was filed, and, second, that the charge of abandonment and failure to comply with the law must fail because the entry must date from August 8, 1915, when the entryman attained his majority.

The decision appealed from is accordingly affirmed.

WICKHAM v. HEIR OF UBER.

Decided March 15, 1917.

CONTEST—SECOND—WHEN PERMITTED.

A second contest, by the same person, upon substantially the same charges as in the first, will not be permitted, even though the entryman was not served with notice of the first contest, unless satisfactory explanation is made why the first contest was not prosecuted.

VOGELSANG, *First Assistant Secretary:*

November 19, 1914, Frank A. Uber made in the Los Angeles land office what is now known as El Centro desert-land entry 02102, for the SE. ¼ SE. ¼, Sec. 1, T. 17 S., R. 12 E., S. B. M., El Centro, California, land district.

November 22, 1915, said entry was contested by one Bitler, alleging that the entryman died intestate, leaving as his only heir his father, A. B. Uber, and that neither the entryman nor his heir had ever done any work on the land, except clearing a part thereof of brush. Such further proceedings were had in said contest that said entry was canceled by the Commissioner's letter "H," of February 4, 1916, but such contest was later withdrawn, and, by the Commissioner's letter "H," of June 23, 1916, said entry was reinstated and left intact.

July 26, 1916, George R. Wickham, who had filed his soldiers' declaratory statement for the land during the period said entry was canceled of record, filed contest against said entry, alleging the death of entryman, leaving as his sole heir A. B. Uber, and that neither the entryman nor his heir since his death, during the first year or any time, had expended the sum of $1 per acre looking to reclamation, and that no money has been expended in the purchase of a water right. Notice issued on this contest July 26, 1916, but, no proof of service having been filed, such contest abated. September 5, 1916, Wickham filed another contest against said entry, making substantially the same charges but offering no explanation whatever, so far as appears by the record, as to his failure to prosecute the first contest. Notice issued on such second contest September 12, 1916, and service was made personally upon the father of the entryman and also upon the public administrator. October 20, 1916, the public administrator of Imperial County, California, filed answer, making allegations which need not be stated herein. October 28, 1916, the heir, by attorney, filed motion to dismiss the contest, upon the ground that the contestant had failed to prosecute his first contest, abated as aforesaid, in which the same charges were made, and had offered no explanation of his failure in that regard. Without taking any action on such motion the local officers issued and served notice of hearing returnable November 24, 1916, to which, in behalf of the heir, objections were filed insisting that he was entitled to action on his motion and that notice of hearing ought not to issue until such motion was disposed of. At the same time, however, for the protection of his client's interest, attorney for the heir filed answer denying the charges made by the contestant.

December 21, 1916, the Commissioner of the General Land Office, considering the case upon request of the local officers for instructions, disposed of it as follows:

> Until the claimant was served with notice there is in fact no contest, and such being the case, there is no good reason why the contestant should be deprived of the right to file a second contest, if he prefers to have the first abate, this office being principally interested in ascertaining the validity of the entry that may be contested.

The motion to dismiss having been made by the defendant as aforesaid he was entitled to action thereon before being forced to answer, but as he has already pleaded as hereinbefore indicated, your action overruling the demurrer is affirmed and you will now set a date for hearing and notify the parties thereof.

From this decision Alexander B. Uber, heir of Frank A. Uber, has appealed to the Department. Upon this appeal it is contended that the Commissioner's finding that "until the claimant was served with notice, there is in fact no contest, and such being the case there is no good reason why the contestant should be deprived of the right to file a second contest if he prefers to have the first abate," is erroneous, and "is contrary to precedent and the former practice of the Department." In support of this contention counsel for apellant cites decisions in the cases of Neiger *v.* Keyes, Los Angeles serials 010390 and 013799, and also refers to the case of Gauterau *v.* Chaney (26 L. D., 450).

The record has been examined in connection with the cases above referred to, and the Department does not concur in the holding of the Commissioner that a second contest may, as a matter of right, be prosecuted, if the entryman was not served with notice in the first contest. Contestant should have been required to explain his failure to proceed with his first contest, and second contest affidavit should not have been accepted, unless sufficient explanation was made. Such an explanation will be required before hearing.

The decision appealed from is accordingly modified, and the case is remanded to the General Land Office for further proceedings in accordance herewith.

WICKHAM v. HEIR OF UBER.

Motion for rehearing of the Department's decision of March 15, 1917, 46 L. D., 53, denied by First Assistant Secretary Vogelsang, April 9, 1917.

CALIFORNIA AND OREGON LAND CO. v. HULEN AND HUNNICUTT.

Decided March 17, 1917.

VACATION OF PATENT—NOTATION OF RESTORATION—WHEN LANDS SUBJECT TO APPROPRIATION.

Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

PRIOR DECISION OVERRULED IN PART.

So much of the decision in the case of Sarah V. White (40 L. D., 630), as holds that land restored to the public domain as the result of vacation of patent thereby becomes subject to settlement, if unappropriated, is overruled.

VOGELSANG, *First Assistant Secretary:*

The California and Oregon Land Company has appealed from the decision of the Commissioner of the General Land Office, dated May 12, 1916, rejecting its forest lieu selection under the act of June 4, 1897 (30 Stat., 36), for Lots 1, 2, 7, 8, 9, 10, 15 and 16 of Sec. 28, T. 21 S., R. 2 W., W. M., Roseburg, Oregon, land district.

The lands described were formerly embraced in two patented entries, which were canceled by decrees of court. The local officers were, by letter of December 9, 1915, advised by the Commissioner of the General Land Office that the decrees had been recorded, and they were directed to post in their office, and to give to the press as a matter of news, a notice to the effect that on a date thirty days hence they would note the restoration of the lands upon the records of their office, and that thereupon they would be subject to all forms of appropriation permitted by the public land laws appropriate thereto.

The local officers issued notice as directed, setting January 18, 1916, at 2 o'clock p. m., as the hour of opening said lands to entry.

Within twenty days prior to January 18, 1916, as provided in the regulations of May 22, 1914 (43 L. D., 254), William Hulen presented his application to make homestead entry for Lots 1, 2, 7, and 8 of said Sec. 28; Ulysses I. Hunnicutt presented a like application for Lots 9, 10, 15, and 16 of said section, and the California and Oregon Land Company, by Robert E. Smith, its attorney in fact, presented its forest lieu selection for all of the lands.

Hulen and Hunnicutt having alleged prior settlement, the local officers allowed their applications, and rejected the forest lieu selection for conflict therewith. The Commissioner held that, the local officers having followed the regulations of May 22, 1914, *supra*, the applications had been properly disposed of.

The Commissioner's decision is based on the assumption that the lands became subject to settlement when the prior patents were canceled by the court decrees. In this he erred. The correct rule is that when a decree canceling a land patent becomes finally effective, the patented lands are thereby restored to the public domain, but they are not thereby restored to appropriation until the local officers are instructed by the Commissioner that the lands are restored to entry and have in accordance with instructions made notation of restoration upon the records of the local office. See cases of Hiram M. Hamilton (38 L. D., 597) and Sarah V. White (40 L. D., 630). In the latter case it was held:

By a final decree of cancellation of patent, land once patented becomes part of the public domain, subject to settlement, . . . if unappropriated, but does not become subject to entry until opened to entry by the General Land Office.

The quoted holding was not necessary to the disposition of the case, and the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office. So much of the White decision as holds to the contrary is overruled.

It follows that, instead of recognizing any claim of prior settlement, a drawing should have been had, as directed by paragraph 4 of the regulations of May 22, 1914, *supra*. However, Hulen's entry was canceled on relinquishment filed October 17, 1916, and Hunnicutt's entry was likewise canceled on January 29, 1917. The selection of the California and Oregon Land Company will therefore be allowed, if no other objection exists.

The decision is reversed.

ADDITIONAL ENTRIES—ACT OF FEBRUARY 20, 1917.

INSTRUCTIONS.

[Circular No. 535.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 19, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

1. Your attention is directed to the act of Congress of February 20, 1917 (39 Stat., 925), which provides:

That any person otherwise qualified who has obtained title under the homestead laws to less than one quarter section of land may make entry and obtain title under the provisions of the act entitled "An act to provide for enlarged homesteads," approved February nineteenth, nineteen hundred and nine, and an act of June seventeenth, nineteen hundred and ten, entitled "An act to provide for an enlarged homestead," for such an area of public land as will, when one-half of such area is added to the area of the lands to which he has already obtained title, not exceed one quarter section: *Provided*, That this act shall not be construed to apply to soldiers' additional homestead entries made under section twenty-three hundred and six, United States Revised Statutes, or acts amendatory thereof or supplemental thereto.

2. This act permits an additional entry under the enlarged homestead act to be made for a tract designated as subject thereto,

although the land included in the applicant's perfected entry be not thus designated; it is immaterial whether he owns the original tract, and the additional tract may be contiguous thereto or at any distance therefrom.

3. The application must contain a description of all entries theretofore made by the applicant or such data as will serve to identify them.

4. Under section 6 of the act of March 2, 1889 (25 Stat., 854), a person who has partially exhausted his homestead right through a perfected entry is entitled to make an additional entry for so much land as will with the area of the completed entry make 160 acres. The present act supplements that legislation by providing that the additional land, if designated under the enlarged-homestead act, shall be estimated at only one-half its actual area in the calculation under the act of March 2, 1889. To illustrate: If the person has obtained title to 40 acres, he may make additional entry for not exceeding 240 acres of enlarged-homestead land, that is, twice 120; if he has had 80 acres, he may still take 160 acres of such land; if he has had 120 acres, he may now take an additional 80 acres.

5. In connection with an application pursuant to the provisions of this act, a petition for designation of the land sought may be filed as provided in other cases of applications under the enlarged-homestead act, and the proceedings with relation to the application and petition will be as in other cases.

6. Where an application is filed for additional entry under either section 3 or section 7 of the enlarged-homestead act, and the Secretary of the Interior refuses to designate thereunder the tract included in the original perfected entry, the application may be allowed for so much of the land sought as the claimant is entitled to enter under this act, provided said land be designated as subject to the enlarged-homestead act.

7. In proof on an entry allowed pursuant to the provisions of the present act there must be shown the existence of a dwelling house upon the land entered and the usual residence and cultivation. Residence must be for not less than three years, subject to the privilege of being absent five months in each year, in two periods if desired. There must be cultivation of not less than one-sixteenth of the land entered during the second year after the date of the entry and not less than one-eighth of its area during the third year and until submission of proof. However, credit for military service will be allowed as in other cases. Proof must be submitted within five years after the date of the entry.

8. The present act does not in anywise affect the right of additional entry under the stock-raising homestead act; under the pro-

visions of that law no additional entry can be made unless the land originally entered has been designated as subject thereto.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

UMATILLA INDIAN GRAZING LANDS—ACT OF FEBRUARY 17, 1917.

INSTRUCTIONS.

[Circular No. 536.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1917.

REGISTER AND RECEIVER,
UNITED STATES LAND OFFICE, LA GRANDE, OREGON:

Your attention is directed to the act of February 17, 1917 (39 Stat., 923), which reads as follows:

> That all persons who have heretofore purchased or may hereafter purchase any of the lands of the Umatilla Indian Reservation in the State of Oregon, and have made or shall make full and final payment therefor in conformity with the acts of Congress of March third, eighteen hundred and eighty-five, and of July first, nineteen hundred and two, and subsequent acts respecting the sale of said lands, shall be entitled to receive patents therefor upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence and are exclusively grazing lands, incapable of any profitable use other than for grazing purposes.
>
> SEC. 2. That where a party entitled to claim the benefits of this act dies before securing a patent therefor it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to make the necessary proofs and payments therefor to complete the same; and the patent in such cases shall be made in favor of the heirs of the deceased purchaser, and the title to said lands shall inure to such heirs as if their names had been especially mentioned.

1. This act is identical in its terms with that of February 11, 1913 (37 Stat., 665), except that its provisions are now extended to all entries heretofore or hereafter made. Proofs may be submitted only after publication and posting of notice, as in ordinary homestead cases. If the regularly introduced testimony shows that a tract is not susceptible of cultivation or residence and is exclusively grazing land, incapable of any profitable use other than for grazing purposes, the entryman is, by the act, relieved of the requirement of residence.

Moreover, such proof entitles him to issuance of final certificate, upon payment of the unpaid installments of the price, and it is not necessary to show that the land has been actually used for grazing purposes.

2. Section 2 of the act allows submission of proof by one of the heirs, or by the executor or administrator of the estate of the entryman, if he be dead. However, the certificate is to be issued in favor of the heirs. The executor or administrator, offering proof, must produce record evidence of his appointment and qualification as such.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

H. STELLA SAMUELSON.

Decided March 22, 1917.

REPAYMENT—ERRONEOUS ENTRY INCAPABLE OF AMENDMENT—ACT OF MARCH 26, 1908.

Where entry is made of land not intended to be taken, and amendment is rendered impossible because the land desired has been disposed of, the entryman, upon relinquishment, is entitled, under Section 2 of the act of March 26, 1908 (35 Stat., 48), to return of all moneys paid in connection with such entry.

VOGELSANG, *First Assistant Secretary:*

H. Stella Samuelson has appealed from the decision of August 16, 1916, denying repayment of moneys paid on her desert-land entry for the S. ½ SW. ¼, S. ½ SE. ¼, Sec. 20, N. ½ NE. ¼, SW. ¼ NE. ¼, SE. ¼ NW. ¼, Sec. 29, T. 6 N., R. 3 W., S. B. M., Los Angeles, California, land district, which was canceled on her relinquishment.

Mrs. Samuelson found she had entered land some distance from and entirely inferior to that which she had selected, and not susceptible of reclamation. She alleged that this was due to fraud practiced upon her. She was advised of her right to amend the description, but it was then found that the tract she had in fact selected was covered by another entry; nor was she able to locate any other practicable land. She then relinquished the entry as an essential incident to her application for repayment.

Since it appears that the land which she had originally intended to enter, and which she supposed she applied for, has been otherwise appropriated, it follows that she is entitled to relief under the provisions of the act of March 26, 1908 (35 Stat., 48). An error in the

original application, induced in the manner described, can not be determinative of rights under a remedial statute. See the case of John Ard (45 L. D., 323), in which it was determined by the Department that fees as well as purchase money and commissions were repayable under the provisions of said act, where the tract selected and intended to be entered was not subject to appropriation. In such cases the entire payment must be regarded as in excess of legal requirements, and thus within the terms of the second section of the act.

The decision is accordingly reversed.

HEIRS OF WILLIAM L. NAFTZGER.

Decided March 22, 1917.

RECLAMATION ENTRY—DEATH OF ENTRYMAN AFTER FINAL PROOF—DEVOLUTION OF ENTRYMAN'S INTEREST.

Upon the death of an entryman who has made satisfactory homestead final proof on a reclamation farm unit, the homestead becomes a part of his estate, and as such subject to distribution, and is not an unperfected entry subject to the provisions of Sec. 2291, Rev. Stat.

RECLAMATION ACT—REQUIREMENTS NOT CONDITIONAL OF HOMESTEAD LAW OR PROOF, BUT ADDITIONAL THERETO.

The conditions imposed by the Reclamation Act as to reclamation, payment of charges and filing of water-right application, are conditions not of homestead law or proof, but arising out of reclamation and imposed as a further requirement.

VOGELSANG, *First Assistant Secretary:*

Vinnie Pharris, Pearl Conley, and George Naftzger, as children and heirs at law of William L. Naftzger, deceased, have appealed from the decision of the Commissioner of the General Land Office, dated October 1, 1915, rejecting the final affidavit of reclamation submitted in connection with decedent's homestead entry for the E. ½ NE. ¼ (farm unit A), Sec. 13, T. 4 N., R. 5 W., B. M., Boise reclamation project, Idaho.

William L. Naftzger made the original homestead entry August 21, 1905, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), the land being within a reclamation withdrawal, second form. April 5, 1912, Mr. Naftzger submitted final homestead proof, alleging that he had established residence upon the land in December, 1905, resided thereupon to date of final proof, having placed improvements to the value of $1,500 upon the land, and cleared and cultivated the entire 80 acres.

The final proof was received and forwarded to the General Land Office for consideration, and on July 16, 1912, the Commissioner advised entryman, through the register and receiver, that his—

> five-year proof . . . has been examined in this office and found to be sufficient as to residence, cultivation, and improvements required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one-half of the irrigable area in the entry, as finally adjusted, has been reclaimed, and that all the charges, fees, and commissions due on account thereof have been paid to the proper receiving officer of the Government.

Entryman died November 28, 1914, leaving surviving a widow and three adult children by a former wife, from whom he was divorced or separated some time during the year 1907. June 2, 1915, one of the children, Vinnie Pharris, filed a water-right application and a final affidavit showing reclamation of the land under the provisions of paragraphs 55 and 56 of circular of September 6, 1913 (42 L. D., 349), as amended by Departmental order of June 4, 1914. The final affidavit was approved by the reclamation project manager on June 1, 1915, but rejected by the Commissioner of the General Land Office, on the ground that the widow is the statutory successor of entryman and the proper person to submit proof of reclamation.

Appellants contend that patent should issue to the heirs. Both the widow and heirs, through their attorneys, have been heard orally, and have filed written briefs and arguments.

According to the records of the Department, preliminary farm unit plats, including the tract in question, were furnished to the Boise land office in 1909, and thereafter water for irrigation was furnished on a rental basis. The irrigable area of the units was not determined until January 26, 1917, when the plat was approved by the Department.

Section 2291, Revised Statutes, in force at the time of making the homestead entry, and under which proof of residence, cultivation, and improvement was submitted, is as follows:

> No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The act of June 17, 1902, *supra*, provides, in section 3, that lands believed to be susceptible of reclamation from contemplated irrigation works shall be withdrawn from entry "except under the homestead laws," and that lands which are to be irrigated "shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided." Section 4 authorizes the Secretary of the Interior to limit the area per entry to such acreage as, in his opinion, may be reasonably required for the support of a family. Section 5 provides:

> That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract as provided in section four. . . .

The latter provision was modified by the act of August 9, 1912 (37 Stat., 265), so—

> that any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, . . . may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation submit proof of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent. . . .

This was subject to the condition expressed in the act that every patent issued should reserve to the United States a prior lien for the payment of all sums due or to become due the United States.

June 23, 1910 (36 Stat., 592), Congress provided:

> That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

Said law was reenacted and its operations extended by act of Congress approved May 8, 1916 (39 Stat., 65).

From the foregoing it will be perceived that the entryman, William L. Naftzger, prior to his decease had fully met the requirements of the general homestead law as to residence, improvement, and cultivation, and had submitted proof thereof, which proof was approved and accepted by the Commissioner of the General Land Office. The

proof as to reclamation of one-half the land and the application for a water right, required to be made by the reclamation laws, were not submitted until after his decease.

The question at issue in this case is, briefly, whether upon Naftzger's death the entry or the land covered thereby became a part of his estate subject to distribution under the laws of the State of Idaho, or whether it was an unperfected homestead entry which, under the provisions of section 2291, Revised Statutes, could be completed only by the surviving widow.

Section 2291, Revised Statutes, as in force at date of original entry, and under which, as stated, proof was submitted by Naftzger, deals only with residence, cultivation, and improvement, and not with reclamation of lands. The proofs which the widow, or, in case of her death, entryman's heirs or devisees, are authorized to submit, are that "he, she, or they have resided upon or cultivated the same for the period of five years immediately succeeding the time of filing the affidavit." The party making proof is also required by the statute to make affidavit that no part of the land has been alienated, and that he, she, or they will bear true allegiance to the United States. Has this section been amended or modified by the provisions of the Reclamation act of June 17, 1902, or acts amendatory thereof?

As already pointed out, the act provides that irrigable public lands under a reclamation project shall be subject to entry only under the provisions of the homestead laws, and section 5 requires entrymen, "in addition to compliance with the homestead laws," to reclaim one-half of the total irrigable area of the entry.

Under the reclamation laws, this Department has issued regulations prescribing the form and manner of this proof, requiring the execution and filing of a formal application for a water right, and prescribing the procedure to be followed.

The language of the statute cited indicates that it was not the purpose of Congress to amend the homestead laws in this respect, but to impose additional requirements with respect to reclamation. This view of the law is borne out by the fact that Congress, in the act of June 23, 1910, *supra*, provided that after entrymen under the homestead laws had submitted satisfactory proof of residence, improvement, and cultivation "for the five years required by law," they might assign their entries, in whole or in part, to other persons, the assignees, upon submitting proof of reclamation and upon payment of charges due, to receive a patent for the lands. The Department, considering said act, held, April 2, 1914 (43 L. D., 456, 457):

> It is evident from the language of the act that to become entitled to the right to assign such a homestead entry the original entryman must have fully complied with the requirements of the homestead law as to residence, and in practice such an entryman is not required to reside upon the land or in the

neighborhood after he has submitted satisfactory proof of such residence, improvement, and cultivation for the period required by the homestead laws. It seems to follow that no greater or additional obligations should be imposed upon the assignee than were imposed upon the original entryman, and that such assignee should not be required to repeat or duplicate, with respect to the lands secured by assignment, the conditions already satisfied by the original entryman. It has been contended that assignees under this act must possess all the qualifications of a homestead entryman, but this contention was disapproved by this Department, it being held that the law contains no warrant for imposing such a limitation.

The conditions which remain to be fulfilled by the assignee of a homestead entryman in such a case are the payment of charges specifically mentioned in the act of June 23, 1910, and such other conditions as may be imposed by the law, which may include the reclamation of one-half the irrigable area of the land, provided that this requirement has not been previously fulfilled by the original entryman. As intimated, the original entryman, if he retains the land entered, is not required to continue his residence upon the land or in the vicinity after submitting satisfactory proof of residence, and nothing in the law seems to impose the requirement of residence upon an assignee. His assignor has already fulfilled all the requirements of the law in this particular, and it remains for the assignee only to complete the unfulfilled conditions.

This holding implies that the requirements of the two laws are separate and distinct; that is, that the homestead law operates within the sphere therein described and defined, and that the conditions as to reclamation, payment of charges, and filing of water-right applications are conditions not of homestead law or proof, but arising out of reclamation and imposed as a further requirement upon the homestead entryman or his assignee. This view is further supported by the fact that section 2291, Revised Statutes, requires the filing of proof of nonalienation of the land as a prerequisite to the issuance of final certificate of patent to the entryman, his widow, or in case of her death, his heirs, or devisees, while the act of June 23, 1910, *supra*, permits the assignee of such an entryman, who has submitted his final homestead proof, to obtain patent without filing such evidence or without showing that he is a qualified homestead entryman.

The law cited and the rulings of this Department in connection with the Reclamation law, support the view that a homestead entryman who has proceeded in the manner and to the point to which Mr. Naftzger proceeded prior to his death has met the requirements of section 2291, Revised Statutes, and that whoever succeeds to his right, title, and interest in the land succeeds not under the devolution set out in the statute, but as an heir or devisee under the laws of the State. What remained to be done after his death could, with equal legality, be performed by an assignee, by an administrator, by an heir or devisee, the limitation of section 2291, Revised Statutes, being, as pointed out, confined to cases where the entryman died

prior to the submission of proof of residence, cultivation, and improvement. It is accordingly held that the water-right application may be filed, and the proof of reclamation and cultivation be submitted and the payment of reclamation charges made by or for those who are entitled to share in the distribution of decedent's estate under the laws of the State of Idaho.

The decision of the Commissioner is reversed.

CHEYENNE AND ARAPAHOE SCHOOL LANDS—EXTENSION OF PAYMENTS—ACT OF FEBRUARY 23, 1917 (39 STAT., 937).

INSTRUCTIONS.

[Circular No. 539.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 23, 1917.

REGISTER AND RECEIVER,
UNITED STATES LAND OFFICE, GUTHRIE, OKLAHOMA:

The act of Congress of June 17, 1910 (36 Stat., 533), opening to entry certain tracts of land of the ceded Cheyenne and Arapahoe Indian Reservation (theretofore reserved for agency and school purposes), stipulated that one-fifth of the price bid for each tract be paid at the time of sale, and that the balance of the purchase price be paid in six equal annual installments without interest. The sales were made November 15, 16, and 19, 1910.

The act of August 22, 1911 (37 Stat., 33), granted the purchasers an extension of one year for payment of each deferred installment of the price of the land, and provided that they must pay interest for that postponement at 5 per cent per annum.

A clause in the Indian Appropriation Act of August 24, 1912 (37 Stat., 518, 530), provided that the maturity of any installment of the purchase price of these lands might be extended for one year, on condition that the purchaser paid in advance interest for that year at 5 per cent per annum; also that further annual extensions might be obtained, but not to a date later than one year after the last installment would have been due under the act opening the lands to entry; that is, not later than November, 1917.

2. The act of February 23, 1917 (39 Stat., 937), provides:

That the Secretary of the Interior is hereby authorized and directed to grant to purchasers of land in the former Cheyenne and Arapahoe Indian Reservation, Oklahoma, sold in the year nineteen hundred and ten, under the act of Congress approved June seventeenth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and thirty-three), a further exten-

sion of time to make payment; the unpaid portion of the purchase price shall be divided into five equal portions, one portion to be due November fifteenth, nineteen hundred and eighteen, and one portion thereof November fifteenth of each of the four succeeding years, interest to be paid annually on each installment or portion at the rate of five per centum per annum; Provided, that interest due under existing law granting extensions of time must be paid up to November fifteenth, nineteen hundred and sixteen, within ninety days from the passage of this act; Provided further, that failure to pay any installment, as well as the interest thereon, as the same becomes due, as herein provided, will forfeit the entry and the same shall be cancelled, and any and all payments previously made shall be forfeited.

3. In order to obtain the benefits of this act, the holder of an entry must within ninety days after its passage, that is, by May 24, 1917, pay all interest due on the purchase price down to November 15, 1916, counting from the original maturity of each installment. To illustrate:

If on the first day a person bid for a tract the sum of $1,500, paying $300 at the time of purchase but not making any further payment, the interest to be now paid by him would be calculated in the following manner: The first deferred installment of $200 fell due November 15, 1911; he had five years' postponement thereof, prior to November 15, 1916, and the interest for said years amounted to 25 per cent, or $50; similarly he owes 20 per cent, or $40, on the second deferred installment; 15 per cent, or $30, on the third installment; 10 per cent, or $20, on the fourth installment; 5 per cent, or $10, on the fifth installment. Therefore, he must pay $150 in order to secure the benefits of the recent legislation.

4. Regardless of the question whether one or more of the deferred installments have been paid on an entry, if the interest is paid as above explained, such portion of the principal of the purchase price as may remain unpaid is to be divided into five parts, which will fall due on November 15, of the years 1918, 1919, 1920, 1921, and 1922, respectively. However, 5 per cent interest must be paid on the entire sum November 15, 1917, and on each of the other dates mentioned one year's interest must be paid on the entire sum then remaining unpaid, as well as on the installment falling due. In the above case taken as an illustration, the claimant would have to make the following payments:

	Principal.	Interest.	Total.
Nov. 15, 1917		$60.00	$60.00
Nov. 15, 1918	$240.00	60.00	300.00
Nov. 15, 1919	240.00	48.00	288.00
Nov. 15, 1920	240.00	36.00	276.00
Nov. 15, 1921	240.00	24.00	264.00
Nov. 15, 1922	240.00	12.00	252.00

5. The extreme limit of time granted for payment for these lands, aside from the present act, will expire November 15, 16, and 19, 1917. Unless full payment is then made, or the claimant entitles himself to the benefits of the present act, the entry will be subject to cancellation. Moreover, as provided by the act of February 23, 1917, the entry will be subject to cancellation, and all payments will be forfeited, if the holder of the claim fails to pay the extended installments and interest when due, as heretofore explained.

6. Homestead proof on these entries may be submitted at any time prior to November 15, 1922, provided compliance with the conditions of law as to payments be continued to the time of its submission. Such proof will be accepted by you if satisfactory, subject to the payment of the unpaid portions of the purchase price, but final certificate will not issue until full payment is made; and the proof will be accepted by this office on the same conditions, if found satisfactory. After acceptance of such proof, the claim is subject to transfer, and you will issue all notices in connection with the case to the transferee, provided notice of the transfer be duly filed in your office.

7. You will use every reasonable effort to promptly convey a copy hereof to the holders of pending entries for these lands; that is, the entrymen or their transferees.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SURVEY—OWENS LAKE, CALIFORNIA—OWNERSHIP OF LANDS UNCOVERED BY WATER'S RECESSION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 23, 1917.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

On March 10, 1917, you forwarded for Departmental consideration certain communications between your office and the United States Surveyor General for California, which raise a question as to whether certain lands uncovered by recession of the waters of Owens Lake, a navigable body of water in that State, 10 miles wide and 15 miles long, should be surveyed and disposed of as public lands belonging to the United States, or be treated as belonging to that State.

Under well-settled doctrine, universally recognized by both the Federal and State courts in this country, and by this Department,

all the lands then covered by the waters of this lake passed into the ownership and under the sovereignty and dominion of the State of California on September 9, 1850, the date on which that State was admitted into the Union; and they were no longer the property of or under the dominion and control of the United States after that date, except in so far as relates to their possible use for the purposes of interstate or foreign commerce, unless the Federal Government later acquired title thereto as the riparian owner of abutting lands, through accretions or reliction. Shively *v.* Bowlby (152 U. S., 1); United States *v.* Mission Rock Co. (189 U. S., 391); Harvey M. La Follette (26 L. D., 453).

The rule as to the extent of the rights of riparian owners is not uniform in all the States, and is controlled by the laws of each individual State. In some States it is held that the title of a riparian owner extends only to the lands owned by him above the line of ordinary high water; and in California it has been provided that the ownership of lands below that line is in the State.

While the laws of California accord the owners of lands abutting upon *navigable streams* the right to claim lands added by the accumulation of material or by the recession of the stream (section 1014, California Civil Code), no such provision has been made as to the owners of lands above the line of high water on *navigable lakes;* but, on the contrary, the State has asserted ownership of such lands adversely to riparian owners by expressly making provision for the sale of "the lands uncovered by the recession or drainage of the waters of inland lakes inuring to the State by virtue of her sovereignty" (Laws, 1893, p. 341).

It must be held, therefore, that the ownership of all lands covered by the waters of Owens Lake at the date of the admission of California into the Union was in the State of California, and that such of them as have been uncovered since that date are not in any sense public lands of the United States, and can neither be legally surveyed nor disposed of by the Federal Government, and that they did not, therefore, pass to the State under the swamp-land grant of September 28, 1850 (9 Stat., 519), and can not be patented to the State as such. Edwards *v.* Rolley (31 Pac. [Cal.], 267); Frank Burns (10 L. D., 365); G. W. Sabastian *et al.* (22 L. D., 710); Harvey M. LaFollette (26 L. D., 453); Palo Alto County (32 L. D., 545).

You will please furnish the surveyor-general with a copy of this communication, and request him to take action in conformity therewith, in all cases where applications are made for the survey of lands of the kind here considered.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SECOND HOMESTEAD ENTRIES—ACT OF FEBRUARY 20, 1917 (39 STAT., 926).

INSTRUCTIONS.

[Circular No. 540.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 24, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress approved February 20, 1917 (39 Stat., 926), which provides:

> That from and after the passage of this Act any person who has heretofore entered under the homestead laws, and paid a price equivalent to or greater than $4 per acre, lands embraced in a ceded Indian reservation, shall, upon proof of such fact, if otherwise qualified, be entitled to the benefits of the homestead law as though such former entry had not been made: *Provided*, That the provisions of this Act shall not apply to any person who has failed to pay the full price for his former entry, or whose former entry was canceled for fraud.

2. A person claiming the right of second homestead entry, pursuant to the provisions of this act, must furnish a description of the land included in his perfected entry or data from which it can be identified; and he must state that he paid $4 or more per acre for the tract; but it is not necessary that he name the precise price paid.

3. A second entry is not allowable unless the first entry was made prior to February 20, 1917, 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 either under the General Homestead law, under the Enlarged Homestead act, or under the Stock-raising Homestead act. Compliance with the law must be shown as though it were an original entry.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

NELLIE MALEY.

Decided April 2, 1917.

REPAYMENT—DESERT LAND ENTRY—IMPOSSIBILITY OF RECLAMATION.

The impossibility of effecting reclamation of the land embraced in a desert-land entry is not, of itself, ground for repayment.

VOGELSANG, *First Assistant Secretary:*

Nellie Maley has made application to the Commissioner of the General Land Office for return of the money paid by her in connection with desert-land entry Lemmon, 018911, made March 3, 1910, for the N. ½ NW. ¼, Sec. 29, T. 23 N., R. 1 E., B. H. M.

The record in this case shows that the entrywoman submitted first, second and third yearly proofs and map of plan of system of irrigation, but she was unable to make satisfactory final proof, and May 20, 1914, she petitioned for an extension of time within which to perfect her claim. By the Commissioner's letter "G," of June 5, 1914, she was granted until November 1, 1916, within which to submit final proof.

October 19, 1916, the entrywoman executed a relinquishment of all claim to the land and the entry was canceled thereon.

October 27, 1916, she filed her application for return of the purchase money paid on said entry.

January 17, 1917, the Assistant Commissioner of the General Land Office denied her application, and she has appealed from said decision.

Since said last mentioned date and on February 2, 1917, she has filed in the Department a letter signed by herself, which she designates an appeal, in which she says:

> However in the face of the fact that I had shown an honest effort in fencing the entire 80 acres and putting 20 acres under cultivation at an expense of $3.00 per acre—and then finding that my plan of irrigating owing to the limited area from which a sufficient amount of water could be gathered and retained to sufficiently irrigate—I became discouraged in making or incurring the additional expense when there appeared that my effort would not come up to the requirement and that I would eventually fail. I relinquished and asked for this little refund believing that I was asking very little compared to the hard effort I made in trying to acquire the said 80 acres under the Desert Claim Act.

It appears from the statement of applicant that the conditions surrounding her desert-land entry are such that there is no reasonable prospect that she would be able to secure water sufficient to effect reclamation. Her statement, if true, would have entitled her to relief under the provisions of the act of March 4, 1915 (38 Stat., 1161), by the terms of which she could have perfected her entry in the manner required of a homestead entryman. Said act contains a further provision that in the event of failure to perfect the entry as therein

provided, all moneys theretofore paid shall be forfeited and the entry canceled.

If applicant was unable to reclaim the land on account of financial embarrassment, there is no provision of the law authorizing repayment on this account.

The doctrine announced in the case of *Ex parte* Melvin Hay, decided by the Department November 5, 1915, is applicable in this case, wherein it is said:

> But even if he had put forth such efforts as to satisfactorily demonstrate the impossibility of effecting reclamation, this would not have furnished grounds for repayment. Inability upon the part of an entryman to comply with the requirements of law has never been regarded as ground for repayment under the existing repayment laws.

The decision appealed from is affirmed.

GEORGE W. LOTZ AND FRANK COLGAN.

Decided April 5, 1917.

FINAL PROOF—APPROPRIATE OFFICER—SEC. 2294, REV. STAT., AS AMENDED MARCH 11, 1902.

Sec. 2294, Rev. Stat., as amended March 11, 1902 (33 Stat., 59), does not permit the making of final proof outside the county in which the land lies, unless the officer before whom it is taken be the nearest or most accessible qualified officer within the land district.

VOGELSANG, *First Assistant Secretary:*

Frank Colgan has appealed from the decision of the Commissioner of the General Land Office, dated December 21, 1916, dismissing his protest against the acceptance of the final proof on George W. Lotz's homestead entry for SE. ¼ SW. ¼, Sec. 14, NE. ¼ NE. ¼, Sec. 22, N. ½ NW. ¼, SE. ¼ NW. ¼, NE. ¼ SW. ¼, SW. ¼ NE. ¼ and NW. ¼ SE. ¼, Sec. 23, T. 26 N., R. 51 E., M. M., Glasgow (Montana) land district.

Colgan is a United States commissioner, with an office at Arthur, Richland County—the same county in which the land lies. The proof was submitted before H. E. Rickard, a United States commissioner at Poplar, Sheridan County, and Colgan protested against its acceptance because not submitted before the officer nearest or most accessible from the land.

The Commissioner held that the question of whether the proof-taking officer is or is not the nearest or most accessible from the land is rendered immaterial by the provisions of Sec. 2294, Revised Statutes, inasmuch as the proof was taken in the city where the newspaper is published in which the final-proof notice was printed.

Said Section 2294 provides:

> That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land distict in which the lands are situated: Provided, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed.

It is correct to hold that if the proof is submitted before a qualified officer at his place of business in a town or city where the newspaper is published in which the final proof notice is printed the entryman is relieved of the necessity of making affidavit that the officer is the nearest or most accessible from the land, but the statute does not justify the register of the district land office in setting proofs before an officer outside the county in which the lands are located, when there are officers within the county who are qualified to take the proofs, unless it is a fact that the officers named are nearer or more accessible from the land. Even if a showing to that effect is made, it would not warrant the register in setting the proof outside the county where the land is located if he knows that the affidavit of entryman is false. In other words, the clause—

> But such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed—

found in Section 2294, Revised Statutes, does not in any way modify what precedes it, being based on the assumption that the register, presumably in possession of data on which to act, will not name an officer at the place where the paper is published if there be an eligible officer within the county who is nearer or more accessible from the land. It merely relieves entrymen from making a certain showing under certain conditions, and does not modify the conditions which must exist.

The Department is of opinion that Congress has explicitly directed that final proofs must be submitted within the county where the land is located, if there be qualified officers within the county, and that the exception to the rule is applicable only where it is a fact that an officer outside the county, but within the land district, is

nearer to or more accessible from the land. The mere making of an affidavit to that effect is not sufficient, where the register, who is presumed to be familiar with the usual traveled routes in his district, knows the contrary to be true.

However, while the Department holds that the protest of Colgan is well founded, it is not believed that the entryman should be required to readvertise and make new proof. The proof, being otherwise satisfactory, may be accepted, and after the issuance of final certificate be referred to the Board of Equitable Adjudication for confirmation.

The decision is modified accordingly.

MILITARY SERVICE—ACT OF JUNE 16, 1898—STOCK-RAISING HOMESTEADS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 6, 1917.

Mr. P. L. WASSON,
Miles City, Montana.

SIR: In response to your telegram of April 5, 1917, you are advised that one who has filed a valid application and petition for designation under the stock-raising act, pursuant to which entry is subsequently allowed after designation of the land, would be entitled to the benefits of the act of June 16, 1898 (30 Stat., 473), in the absence of other objection. If at the time such person would ordinarily be required to establish residence on the land he is serving in the U. S. Army, and the United States is engaged in war, his services would be equivalent to residence upon the land and his entry would not be subject to contest on the ground of abandonment. It would be necessary, however, for him to reside upon the land for at least one year before patent could issue.

The act of June 16, 1898, herein referred to, is printed in the enclosed circular No. 506.[1]

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

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[1] See 45 L. D., page 488; see also, Circular No. 564, *post.*

FORT PECK INDIAN LANDS—TIME FOR PAYMENT EXTENDED—ACT OF MARCH 2, 1917 (39 Stat., 994).

INSTRUCTIONS.

[Circular No. 544.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 13, 1917.

REGISTER AND RECEIVER,
U. S. LAND OFFICE, GLASGOW, MONTANA:

Your attention is directed to section 1 of the act of Congress of March 2, 1917 (39 Stat., 994), which provides: That any person who has made or shall make homestead entry under the Act approved May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-eight), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment," may obtain extensions of time within which to pay one-half of any installments of purchase money, which have become due and are unpaid or which will hereafter become due by paying to the register and receiver of the land office for the district in which the lands are situated interest in advance on the amounts due for the period of the desired extension at the rate of five per centum per annum, and any payment so extended may at its maturity be again extended in like manner: *Provided*, That payment of interest on installments now due must be made in order to secure the extension; interest payments must hereafter be made annually before the maturity of the payments to be extended, and no payment will be postponed for more than eight years from the date of entry nor will any extension be made for less than one year: *Provided further*, that if commutation proof is submitted all the unpaid payments must be made at that time.

2. The first entries for the lands, opened under the act of May 30, 1908, were made in May, 1914; under its provisions each homesteader was required to pay one-fifth of the appraised price of a tract at the time of filing application therefor, the balance being payable in five equal installments due respectively in one, two, three, four and five years after the date of the entry, without interest. Under the present act an extension may be secured as to one-half of each installment, on all entries heretofore made and which may hereafter be made.

3. The act provides that no extension shall be made for less than one year and clearly contemplates that interest and installment periods shall coincide. In order that all entrymen may have due notice

of this act, compliance with its provisions will not be insisted upon until November 1, 1917. On or before that date, any homesteader who is then in default in any installment payment or payments, must either pay the amounts due in full, without interest, under the provisions of the act of May 30, 1908 (35 Stat., 558), or he may pay interest at the rate of five per cent per annum on all moneys due prior to November 1, 1917, from date of maturity to the date when the next installment after November 1, 1917, is due on his entry. Should he fail to do one of these things on or before the date named, his entry will be canceled without further notice.

On or before the date when the next installment after November 1, 1917, falls due, at least one-half of the moneys past due and one-half of the installment then due must be paid, as well as five per cent interest on the half of any installment or installments for which extension of payment is desired, as advance interest on such deferred payments for one year.

4. As each succeeding installment falls due, the homesteader, instead of paying the amount in full, may pay one-half thereof and five per cent on the other half as interest for the next twelve months. Moreover, any half installment which has been extended may be extended for additional years by payment of five per cent thereon each year, as interest in advance.

5. No payment can be extended for a time longer than eight years from the date of the entry, and proof may be submitted within that period, provided the requirements of the law as to payments are complied with.

6. No special form of application for extension of time to make payment will be required; the payment of the required sums will be sufficient and the Receiver will note upon the receipts and on the abstracts of collections the nature and purpose of the payment.

7. If compliance with the provisions of the act of May 30, 1908, and of the present act as to payments be continued, three-year or five-year proof on an entry may be submitted without the necessity of paying for the land in full. Such proof will be accepted by you if satisfactory, subject to the payment of the unpaid portions of the purchase price, but final certificate will not issue until full payment is made; and the proof will be accepted by this office on the same conditions if found satisfactory. After acceptance of such proof, the claim is subject to transfer, and you will issue all notices in connection with the case not only to the entryman, but to the transferee, provided notice of the transfer be duly filed in your office, but when payment in full is made, final certificate will issue in the name of the entryman.

8. If commutation proof be submitted, payment of the price of the land in full must be made.

9. The act of March 2, 1917, makes no change in the requirements as to entries made under the provisions of the reclamation act, except as to the extension of the payments of the price of the land, hereinbefore discussed.

10. You will forward copies of these instructions to all homesteaders for these lands who are in arrears as to one or more installments, and to their transferees (if there be any), advising them that, in order to secure the benefits of the act, they must comply with its requirements as herein explained, by November 1, 1917.

C. M. BRUCE,
Acting Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

T. RANDOLPH ARNOLD.

Decided April 13, 1917.

APPLICATION—AMENDMENT.

Where clerical error in the description of the land desired is apparent upon the face of an application to enter public land, it should not be rejected, but suspended to afford opportunity for amendment.

DESERT-LAND APPLICATION.

A declaration and map are alike required by statute of an applicant to make desert-land entry.

AMENDMENT OF APPLICATION—SCOPE OF RULE.

The rule that an application properly rejected, or fatally defective when presented, should not be allowed, on supplemental showing in the nature of amendment, to the prejudice of an intervening application made in due form by a qualified applicant, does not apply to an application, filed by one qualified to make desert-land entry, to amend to a tract subject to such entry and correctly described in the map accompanying the declaration.

VOGELSANG, *First Assistant Secretary:*

August 3, 1915, T. Randolph Arnold filed desert land application for lots 2, 3, 4, and SW. ¼, E. ½ SE. ¼, Sec. 11, T. 33 N., R. 48 E., M. M. September 3, 1915, his application was rejected because the land applied for was noncontiguous. September 18, 1915, applicant filed a petition to amend his application so as to embrace the SE. ¼, and E. ½ SW. ¼, of said section, which he alleged was the land intended to be entered by him and that through a clerical error the application as filed described the land as the SW. ¼, and E. ½ SE. ¼, of said section.

August 6, 1915, Isadora Johnson filed application 035497, for lots 1, 2, 3, and SE. ¼, and E. ½ SW. ¼, Sec. 11, T. 33 N., R. 48 E.

Arnold appealed from the action of the local officers and has appealed from the decision of the Commissioner of the General Land

Office of October 3, 1916, requiring him to select one or the other contiguous tract embraced in his original application and rejecting his petition to amend, holding that Isadora Johnson's application takes precedence over Arnold's petition to amend as to the E. ½ SW. ¼ and SE. ¼ of said section.

Arnold contends on appeal that the clerical error in his original application was obvious and that his petition to amend should be allowed.

The record shows that with Arnold's application, and as a part thereof, he filed plat and map showing and describing the land desired, which substantiates his averment in his petition to amend that a clerical error was made in his application as to the land desired to be entered. These papers taken together constituted his application and were sufficient to put others on notice of the land he intended to enter.

Arnold's application was pending at the time Johnson's application was filed and taken in its entirety was sufficient to entitle him to have it accepted and suspended for the purpose of curing defects therein by amendment. In regard to his application the record shows:

> Suspended August 3, 1915, for record evidence of water for irrigation purposes. August 28, 1915, suspension mailed. September 3, 1915, rejected, noncontiguous. September 9, 1915, rejection mailed. September 18, 1915, claimant filed affidavit requesting correction in description of land, also additional showing as to water rights.

On August 26, 1915, Arnold filed a plat showing the plan of irrigation proposed and correctly describing the lands desired, which was prior to the order of the local officers of September 3, 1915, rejecting the application on account of the lands being noncontiguous.

It will be seen that he took timely steps to correct the clerical error made in his application and is not guilty of laches in this respect. He also filed an affidavit of one Hovind, an abstracter, who prepared his application, and who states that he did the typewriting thereof and that he erroneously and unintentionally described said land as lots 2, 3, and 4, and SE. ¼, and E. ½ SW. ¼, of Sec. 11, instead of lots 2, 3, 4, and SW. ¼, and E. ½ SE. ¼ of Sec. 11, and that he knows of his own knowledge and from Arnold's original plat that said desert land application was made to apply to the last mentioned land.

Arnold's application was made in good faith in the belief that he was getting the land described in his plat. He proceeded to, and did acquire, a water right sufficient to irrigate all the irrigable portion of the land desired.

The Commissioner has based his decision upon the uniform ruling of the Department that an application properly rejected or fatally

defective when presented should not be allowed, on supplemental showing in the nature of amendment, to the prejudice of an intervening application made in due form by a qualified applicant. But the rule that an application can not be amended in the face of an intervening claim applies, in cases of the character here considered, only where there is an attempt to amend to a tract entirely different from the one described in the application, and adverse claims have interposed as to the tract sought by amendment.

Under all the circumstances in this case, it is the opinion of the Department that Arnold's amendment should be allowed and his entry as amended should stand, and it is so ordered.

The decision appealed from is reversed and the case remanded for further action in accordance herewith.

DISPOSITION OF SURPLUS COAL LANDS RESTORED FROM INDIAN RESERVATIONS.

INSTRUCTIONS.

[Circular No. 547.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 16, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Attention is directed to the act of Congress approved February 27, 1917 (39 Stat., 944), entitled "An act to authorize agricultural entries on surplus coal lands in Indian Reservations," a copy of which is appended hereto.

With the exception of the lands of the Five Civilized Tribes, the act applies to all Indian reservations that have been or which may be hereafter restored where the surplus lands are or may be divided into mineral and nonmineral classes.

It recognizes that such surplus coal lands have two distinct values, coal and nonmineral or agricultural. It provides for the disposition of the two estates therein created, the coal deposits and the nonmineral, and directs that the proceeds derived from both be placed to the credit of the Indians in the manner provided for other surplus lands. But while the estates may be so separated, no sale of the coal deposits only may be made in advance of the disposition

of the nonmineral estate. The act does not extend the coal land laws to areas not otherwise subject thereto, except to permit of the purchase of the coal deposits where the lands have been disposed of under the act, with a reservation of such deposits, and then only where the coal land laws shall have been extended to such areas at the time of such coal purchase. It does not repeal or modify the coal land laws where otherwise applicable, nor prevent the acquisition of both estates thereunder, but in providing for the disposition of the two estates and in directing the payment to the Indians of the proceeds arising from each, it necessarily contemplates that if the coal land purchaser precedes the agricultural applicant and thus secures title to both estates, he must pay for each at the prices fixed for the respective estates.

Where the law providing for the separation of the lands into mineral and nonmineral classes placed a flat price on the nonmineral lands or authorized the disposal of such lands at a general price which has been so fixed, this act does not require a specific tract appraisal of the coal lands to be disposed of thereunder with a reservation of the coal deposits, and in all such cases the nonmineral or agricultural estate may be disposed of at the prices so fixed for the nonmineral lands. Where the law requires that the nonmineral lands shall be separated into further classes and appraised either by tracts or by such groups, no disposition of the coal lands in such reservation may be made either under this act or under the coal land laws until such surplus lands have been separated into classes and appraised as to their value exclusive of the coal deposits in the manner provided for nonmineral lands, and in such cases the act has the effect of withdrawing from entry under the coal land laws the coal lands in such reservations until such coal lands shall have been appraised without reference to the coal deposits, in the manner provided for the nonmineral lands.

If the nonmineral lands and the coal lands with the reservation of the coal deposits be withdrawn from other disposition for the purpose of sale, no entry under the coal land laws may be allowed therefor until such lands shall have been sold with the reservation of such deposits or restored. The coal deposits in lands sold or otherwise disposed of with a reservation of the coal, if otherwise subject to disposition, may be purchased under the coal land laws at prices fixed thereunder, and if any of the coal lands so withdrawn for sale shall be restored unsold, both estates may be purchased under the coal land laws upon the payment of the nonmineral and coal prices.

If, under the law authorizing the disposal of the nonmineral lands, a proclamation of the President or order of the Secretary is required before the restoration can take effect, the coal lands with the reser-

vation of the coal deposits will not become subject to disposal under the provisions of this act until so restored.

C. M. BRUCE,
Acting Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

An Act To authorize agricultural entries on surplus coal lands in Indian reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any Indian reservation heretofore or hereafter opened to settlement and entry pursuant to a classification of the surplus lands therein as mineral and nonmineral, such surplus lands not otherwise reserved or disposed of, which have been or may be withdrawn or classified as coal lands or are valuable for coal deposits, shall be subject to the same disposition as is or may be prescribed by law for the nonmineral lands in such reservation whenever proper application shall be made with a view of obtaining title to such lands, with a reservation to the United States of the coal deposits therein and of the right to prospect for, mine, and remove the same: *Provided,* That such surplus lands, prior to any disposition hereunder, shall be examined, separated into classes the same as are the nonmineral lands in such reservations, and appraised as to their value, exclusive of the coal deposits therein, under such rules and regulations as shall be prescribed by the Secretary of the Interior for that purpose.

SEC. 2. That any applicant for such lands shall state in his application that the same is made in accordance with and subject to the provisions and reservations of this Act, and upon submission of satisfactory proof of full compliance with the provisions of law under which application or entry is made and of this Act shall be entitled to a patent to the lands applied for and entered by him, which patent shall contain a reservation to the United States of all the coal deposits in the lands so patented, together with the right to prospect for, mine, and remove the same.

SEC. 3. That if the coal-land laws have been or shall be extended over lands applied for, entered, or patented hereunder the coal deposits therein shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right at all times to enter upon the lands applied for, entered, or patented under this Act for the purpose of prospecting for coal thereon, if such coal deposits are then subject to disposition, upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reasons of such prospecting. Any person who has acquired from the United States the coal deposits in any such lands, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided,* That the owner under such limited patent shall have the right to mine coal for personal use upon

the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications made under the applicable land laws of the United States for any such surplus lands which have been or may be classified as coal lands with a view of disproving such classification and securing a patent without reservation.

SEC. 4. That the net proceeds derived from the sale and entry of such surplus lands in conformity with the provisions of this Act shall be paid into the Treasury of the United States to the credit of the same fund under the same conditions and limitations as are or may be prescribed by law for the disposition of the proceeds arising from the disposal of other surplus lands in such Indian reservation: *Provided*, That the provisions of this Act shall not apply to the lands of the Five Civilized Tribes of Indians in Oklahoma.

Approved, February 27, 1917.

EVANS v. NEAL.

Decided April 21, 1917.

DESERT-LAND ENTRY—ASSIGNMENT IN BANKRUPTCY.

An unperfected desert-land entry is property which will pass to a trustee upon a voluntary assignment in bankruptcy.

VOGELSANG, *First Assistant Secretary:*

November 23, 1911, Herbert L. Evans made desert land entry 011795, for the S. ½ NW.¼, N. ½ SW. ¼, Sec. 55, T. 5 N., R. 3 E., B. M., 160 acres, Boise, Idaho, land district. Three annual proofs have been submitted on said entry.

November 23, 1915, he filed application for relief under the last two paragraphs of Section 5 of the act of March 4, 1915 (38 Stat., 1161), and October 16, 1916, said application for relief was rejected. June 19, 1916, Evans was adjudged a bankrupt in the United States district court for the southern district of Idaho, and one Rathbun was duly appointed and qualified as trustee in bankruptcy.

July 7, 1916, said trustee filed petition in said court praying, among other things, for an order authorizing the sale of all the right, title and interest of the bankrupt in certain real estate therein described, to wit, the land embraced in said entry 011795.

July 30, 1916, the court acting upon this petition, ordered that the trustee be authorized to sell at auction the portion of the bankrupt's estate specified in said petition, and pursuant to such authorization the sale was made to B. F. Neal, for a consideration of $225, and August 7, 1916, the court approved and confirmed the sale, directing the trustee to execute and deliver a proper deed to the purchaser.

August 8, 1916, in obedience to said order, the trustee duly executed a deed to said B. F. Neal conveying such property.

Later the bankrupt entryman petitioned for review of the proceedings, upon the contention that a desert land entry prior to final proof is not a part of an insolvent entryman's estate.

October 4, 1916, the court rendered a decision denying the petition and affirming its previous orders.

Later, Neal, assignee of the trustee in bankruptcy, and Evans, the entryman, filed petitions in the General Land Office, asking for recognition as owner thereof in further proceedings concerning said entry.

December 2, 1916, the Commissioner of the General Land Office, considering the case upon the opposing claims of the entryman Evans and assignee Neal, held that the interest of Evans in such desert entry had passed to Neal by deed of the trustee in bankruptcy, and from this decision Evans has appealed to the Department.

In support of his contention Neal has placed with the record certified copies of the proceedings in the United States district court, showing the regularity of such proceedings, and copies of all orders and decisions of the court made in the course of such proceedings, and affidavit establishing his qualifications to take the entry by assignment.

In behalf of Evans it is contended that he made the entry in good faith and complied with the law and regulations with reference thereto, but from ill health and financial difficulties was compelled to file the petition in bankruptcy, in which he did not mention his desert-land entry, believing it was not property that should pass by such assignment, and that the court proceedings and various orders made therein were without his knowledge; that the sale was made for less than actual value of his desert-land claim, and the orders of the court in said proceedings were improperly obtained.

The only question presented for decision by the Department is whether or not Evans' interest in the desert-land claim, as heretofore described, constituted property which passed or should pass to a trustee by voluntary assignment in bankruptcy.

It is noticed by the terms of the Bankruptcy act (See section 70a, subdivisions 1 and 5, Supplement to U. S. Revised Statutes, page 867) that by assignment in bankruptcy the trustee succeeds to all documents relating to his property and—

> property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

The right to transfer a desert land entry is too well settled for further discussion. Evans might have transferred his entry to anyone qualified to take it, and by his voluntary act such transfer has in due course of law been made to B. F. Neal, and his deed thereto

from the trustee in bankruptcy is just as effective and complete as if the transfer had been made directly by the entryman to him.

Nothing contrary thereto is found in the departmental decision in the case of Ellingson *v.* Aitken (30 L. D., 71), nor in the case of Young *v.* Trumble *et al.* (35 L. D., 515). If there were irregularities in the proceedings in the United States district court, correction thereof can be sought only in that court, and while the Department is not bound by the action of the court, it does not, as said by the Commissioner, follow—

> that the conclusions of the court may not be adopted by the land department if found not to be contrary to established precedents or out of harmony with conclusions reached as a result of independent reasoning.

In this case the views of the Department are in accord with the conclusion reached by the court.

The decision appealed from is affirmed.

ALBERT G. CARSON.

Decided April 24, 1917.

HOMESTEAD ENTRY—SECOND ADDITIONAL ENTRY—ACT OF JULY 3, 1916.

An unperfected entry under section 3 of the Enlarged Homestead act is no bar to an entry under section 7 of that act as amended July 3, 1916 (39 Stat., 344), where the total area covered by the entries does not exceed 320 acres.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Albert G. Carson from the decision of the Commissioner of the General Land Office, dated December 16, 1916, rejecting his application to make entry, under the act of July 3, 1916 (39 Stat., 344), for E. ½ NW. ¼ and NW. ¼ NE. ¼, Sec. 18, T. 28 N., R. 29 E., W. M., Waterville, Washington, land district (120 acres).

Carson's original entry, for SW. ¼ NW. ¼, W. ½ SW. ¼, Sec. 2, and SE. ¼ NE. ¼, Sec. 3, said township (160 acres), was made February 10, 1900, and was perfected by five-year proof, final certificate issuing March 27, 1906, followed by patent. On May 24, 1915, he made entry, under section 3 of the Enlarged Homestead act [35 Stat., 639] as amended by the act of March 3, 1915 (38 Stat., 956), for lot 4 of said Sec. 2 (42.37 acres).

It was because final proof had not been submitted on the additional entry that the application in question was rejected.

The act of July 3, 1916, *supra*, added a new section (7) to the Enlarged Homestead act, as follows:

> That any person who has made or shall make homestead entry of less than 320 acres of lands of the character herein described, and who shall have sub-

mitted final proof thereon, shall have the right to enter public lands subject to the provisions of this act, not contiguous to his first entry, which shall not with the original entry exceed 320 acres.

The purpose of the act was declared to be to grant relief to that class of entrymen, unable to enter such area of land contiguous to that already entered, as will make up, with the original entry, 320 acres.

Carson was able to secure but 42.37 acres contiguous to his original entry, which he still owns and on which he resides.

The additional entry for contiguous lands can be perfected without further residence on either the original entry or such additional, it being necessary only to cultivate a certain area thereof during the years prescribed by the so-called Three-Year Homestead law, while an additional entry for incontiguous land can be perfected without in any way interfering with compliance with the law under which the first additional entry was made.

After mature consideration, the Department is convinced that it was the intention of Congress, when it added section 7 to the Enlarged Homestead act, to provide that additional entries for incontiguous land should be allowed in all cases where it is possible for entryman to comply with the law as to such additional and also earn title to any prior unperfected additional under section 3 of the act as amended.

The Departmental decision herein of March 24, 1917, is accordingly recalled and vacated, and the decision appealed from is reversed.

GONZALES v. STEWART.

Decided April 24, 1917.

HOMESTEAD ENTRY—MINERAL PROTEST—BURDEN OF PROOF.

Where a homestead entry is allowed upon proper showing, including satisfactory evidence of the nonmineral character of the land, and protest is later made against such entry, alleging that the land is mineral in character, the burden of proof is upon the protestant.

MINERAL PROTEST—BURDEN OF PROOF—CASES DISTINGUISHED.

Upon the state of facts set forth in the preceding paragraph, the rule announced in Central Pacific Ry. Co. (43 L. D., 545), that the burden is upon the grantee under a grant in aid of the construction of a railroad, to show, by clear and convincing evidence, that the land involved is of a character subject to the grant, is not applicable. Cases of Sarah Frazier (41 L. D., 513) and Henry Hildreth (45 L. D., 464, and 46 L. D., 17) distinguished.

MINING LOCATIONS—CHANGE IN PRACTICE.

The rule of property adopted in Rough Rider and Other Lode Mining Claims (42 L. D., 584) does not apply to mining locations made after the decision of January 31, 1911, in Rough Rider and Other Lode Claims (41 L. D., 242).

MOTION FOR NEW TRIAL.

A motion for new trial upon the ground of newly discovered evidence must relate to the issues of the original contest.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Lew C. Gonzales from a decision of the Commissioner of the General Land Office, dated June 5, 1916, affirming the recommendation of the register and receiver and dismissing his protest against homestead entry 024063, made January 13, 1914, at Phoenix, Arizona, by Lloyd L. Stewart, for lots 1, 2, 3 and 4, S. ½ NW. ¼, Sec. 29, T. 23 S., R. 24 E., G. & S. R. M., containing 209.15 acres, under the provisions of the Enlarged Homestead laws.

The protest, filed February 4, 1915, alleged that the land embraced in the homestead entry is not agricultural but mineral in character; that the protestant with his co-owner claimed it under mining locations; that the homestead entry was not made in good faith, but for speculative purposes; that the homestead entryman had made an agreement to convey the land as soon as patent is obtained, and that the land is more valuable for mining than for agricultural purposes, practically all of the surface being covered by rock and being situate within a half mile of known and paying mines. A hearing was held, beginning June 1, 1916.

Sections 29, 30, 31 and 32, of the above township, were surveyed in the field November 29 and 30, 1910. In the field notes the surveyor returned the following general description:

> The land in this township 23 S., 24 E., is practically all mineral and of little value for agriculture and grazing even in that part classified as agricultural land. The whole township is dotted over with prospect shafts and even the land surveyed by me is claimed to be mineral, although I fail to see any signs of mineral other than the capping which appears to be the same as that covering the mineral belt, which, in itself, is a good indication that it is the same.

At the time of making homestead entry Stewart made the usual nonmineral affidavit, corroborated by two witnesses. Counsel for the appellant contends that the above return by the surveyor constitutes a mineral return and that under the Department's decision in Magruder *v.* Oregon and California R. R. Co. (28 L. D., 174), the burden of proof in this case is upon the homestead entryman to show that the land is nonmineral in character.

The surveyor in his return first speaks of the entire township, stating that it is practically all mineral. To the north of the land surveyed by him there are numerous mines, and no doubt a considerable area of the township has been or would be classified as mineral. As to the part surveyed by him, however, the surveyor, while stating that the land was claimed to be mineral, stated that he failed to see any signs other than the capping, which was a good indication of its mineral character. Assuming that this particular return may be accepted as a mineral return, the homestead entry in this case was regularly allowed upon the submission of such evidence of the character of the land as is required by the regulation. Further, the surveyor's

return here involved is evidently based, not upon actual discovery of mineral, but upon a geological theory indulged in by the surveyor.

Counsel makes a partial quotation of certain language contained in the case of Magruder *v.* Oregon and California R. R. Co., *supra* (28 L. D., at page 177), as follows, the part in italics being omitted by him:

> The return of the surveyor general, in connection with the survey of public land to the effect that the land is mineral or non-mineral, is sufficient evidence of its character to cast the burden of proving the contrary upon one who alleges that the land is of a different character; *but the opportunities and qualifications of surveyors for determining the mineral or non-mineral character of land are so uncertain that this presumption is only a slight one and may be readily overcome by evidence of a higher character.*

Counsel then asserts:

> Until final certificate or its equivalent, the burden is upon an applicant when compliance with the law or the character of the land is called into issue, . . .

citing Sarah Frazier (41 L. D., 513); Central Pacific Railway Company (43 L. D., 545); and Henry Hildreth (45 L. D., 464).

In the case of Sarah Frazier, *supra*, a charge of failure to comply with the provisions of the homestead law was made by an officer of the Government against an entry upon which final proof had been submitted but had been suspended for investigation. The Department there held, that as the entryman was endeavoring at that time to obtain title from the United States, it was the duty of the Government to see that the law had been complied with, and the fact of such compliance must be affirmatively established by the one claiming to be so entitled. In the present case the homestead entryman has not submitted final proof, the contest did not challenge his compliance with the law as to residence, and was filed before the entryman's compliance as to cultivation and improvement could be called in question.

The case of Central Pacific Railway Company, *supra*, involved the question of the character of land as mineral or nonmineral within the meaning of the excepting clause of the grant to the Central Pacific Railway Company. The Department held that the grantee, in order to establish its right to a patent, must, when the character of the lands is called into issue, furnish clear and convincing evidence that the lands are of the character subject to the grant. In the present case the homestead entry was regularly allowed upon proper evidence of its nonmineral character. This character is now being challenged by the mineral protestant. To require of all homestead entrymen, upon the challenge of a mineral protestant, to assume the burden of proof as to the character of land, would, in the opinion of the Department, place an unwarrantable burden upon them. To pursue the argument of counsel, it would follow that it is equally

incumbent upon the mineral claimant to show that the land claimed by him under the mining laws is in fact mineral in character. The entry having been regularly allowed, the ordinary rule that one who challenges its validity must sustain the burden of proof, applies.

In the case of Henry Hildreth, *supra*, a desert-land entry was involved which fell within the limits of a later oil land withdrawal. In its decision of August 31, 1916 (45 L. D., 464), the Department held that, under the regulations, such a withdrawal constituted *prima facie* evidence of the character of the land, and that the burden of proof was upon the desert-land entryman to disprove its *prima facie* oil character. The case has no application to the present matter, since this land is not embraced in any mineral withdrawal, in fact, was excluded from mineral land withdrawal No. 1, Arizona No. 1, made by the President September 23, 1912, covering some 9,700 acres in the Warren mining district, Bisbee, Arizona. Further, it may be pointed out that the decision of August 31, 1916, in the case of Henry Hildreth, was recalled, upon motion for rehearing, February 5, 1917, under the particular facts there applying. (46 L. D., 17.)

The mineral protestants asserted title to a group of mining claims designated as Bull Dog No. 1, Bull Dog No. 2, Bull Dog No. 4, located January 1, 1912, Bull Dog Nos. 5 and 6, located January 8, 1912, and North Star, located March 18, 1912. Counsel contends that these locations should be sustained as valid under the Department's decision of December 26, 1913, in Rough Rider and Other Lode Mining Claims (42 L. D., 584). The Department there held, in view of the prior practice in the Warren mining district to locate and patent mining claims without any actual discovery of a vein or lode, but upon land which was found to be mineral in character, the mineral entries there involved should not be canceled, such prior practice having become a rule of property. The particular entries there involved had been held for cancellation by the Department January 31, 1911 (41 L. D., 242), for lack of a discovery. The present locations, therefore, were made after the first decision in the Rough Rider cases, and the locators here can not invoke the rule of property which was applied in the Rough Rider case. Further, as hereinafter stated, there is no basis upon which to classify the land here involved as mineral.

It is conceded that no discovery of a vein or lode has been made upon the mining claims. It is contended, however, that under the geological evidence the land should nevertheless be held mineral in character and not subject to homestead entry. The evidence concerning this is comprehensively stated by the Commissioner and need not be repeated. The Department need only observe that this tract

is south of the geological area called the Copper Queen block, as designated in professional paper No. 21, by Prof. Ransome, of the United States Geological Survey, and south of the Escabrosa zone of faults and dikes. The Department, accordingly, concurs in the finding of the Commissioner that there is no satisfactory evidence of any mineral deposits underlying this tract.

No evidence to sustain the charge of speculative character or that the entryman had a contract to alienate his land was introduced. The evidence shows that the entryman established residence in July, 1914, and has since resided there. He has constructed a substantial house, has a small garden, fencing, his improvements being valued at something in excess of $1,200. While the land is rocky, it contains areas which may be cultivated, and the Department is unable to find that it may be excluded from homestead entry by reason of its alleged impossibility of cultivation.

After the register and receiver had rendered their decision recommending that the protest be dismissed, upon February 14, 1916, the mineral protestant filed with the Commissioner of the General Land Office a motion to reopen the case upon the ground of newly discovered evidence. This consists of affidavits to the effect that an examination of the land was made upon January 26, 1916, more than two years after the date of the homestead entry, and that the entryman had failed to cultivate one-sixteenth of the total area. The issue so sought to be introduced into the case is one not within the scope of the original protest and one which arose subsequent in time to the filing of such protest. In effect, it is an attempt to initiate a new contest proceeding. A motion for new trial upon the ground of newly discovered evidence should be based upon evidence relating to the issues as made in the original contest, and a new and distinct asserted ground of contest should not be made the subject of such a motion. The Commissioner's action in denying this motion was correct.

The action of the Commissioner holding that the protest of Gonzales should be dismissed is warranted by the record, and his decision is, accordingly, affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. YOSEMITE POWER COMPANY.

Decided April 27, 1917.

RIGHTS OF WAY—CONSTRUCTION OF STATUTES—RULE EJUSDEM GENERIS.

The act of December 19, 1913 (38 Stat., 242), granting to the city and county of San Francisco right of way over and through the Yosemite National Park, the Stanislaus National Forest and certain public lands,

for a water supply, hydroelectric power and other purposes, excepted from its force and effect, as to certain things, "lands upon which homestead, mining, or other existing valid claim or claims shall have been filed or made, and which now in law constitute prior rights to any claim of the grantee." *Held*, that the rule *ejusdem generis* applies, under which the class of claims excepted is limited to claims of the same general character as those specifically mentioned in the act, and that consequently a prior ungranted application for a license for a right of way over such lands does not come within the scope of the exception.

SAME—CONSTRUCTION OF STATUTES.

The intent of Congress, as expressed in the act of December 19, 1913, was to give to the city and county of San Francisco a preference right to the utilization of certain lands of the United States for purposes named; and by the terms of said act obligations are imposed upon the city and county inconsistent with a divided use of the lands.

SAME—UNAPPROVED APPLICATION—NO BAR TO GRANT SUBSEQUENTLY MADE.

An unapproved application, under the act of February 15, 1901 (31 Stat., 790), for a right of way over public lands for power purposes, is not a bar to a grant, subsequently made, of a conflicting right of way over such lands.

RIGHT OF WAY APPLICATIONS—APPROVAL BY SECRETARY OF THE INTERIOR.

There is nothing in the language of section 11 of the act of December 19, 1913, which even by inference repeals existing statutes requiring approval by the Secretary of the Interior of applications for rights of way as a prerequisite to the use of public lands for reservoirs and other means for power development, citing State of California *v.* Deseret Water, Oil and Irrigation Company (243 U. S., 415).

LANE, *Secretary:*

September 4, and December 16, 1908, the Tuolumne Power and Light Company filed in the district land office at Sacramento, California, maps and papers comprising an application, under the act of February 15, 1901 (31 Stat., 790), to use a right of way for flumes, tunnel, pipe line, tailrace, and building sites on lands in Ts. 1 S., Rs. 15, 16, 17, and 18 E., and T. 1 N., R. 16 E., M. D. M., California. With the application is a notice of the appropriation, dated June 22, 1907, of 30,000 inches of the water of the Tuolumne River. A portion of the right of way sought is within a national forest, and application therefor was filed with the District Forester.

July 21, 1909, the Tuolumne Company filed in the district land office at Sacramento an application under the act of February 15, 1901, *supra*, for permission to use the so-called Poopenaut reservoir, covering a distance of about 4 miles along the Tuolumne River, in Sec. 25, T. 1 N., R. 19 E., and Secs. 16, 17, 19, 20, and 30, T. 1 N., R. 20 E., M. D. M., California. The reservoir sought covers an area of 456.3 acres, with an alleged capacity of 43,800 acre-feet, and is situate within the limits of the Yosemite National Park, below the Hetch Hetchy valley.

The plan of the company, as stated in a certificate accompanying the record, was to utilize the reservoir for the storage of—

> the waters of the Tuolumne River in times of high water for the purpose of using the same in times of low water for the generation of electricity by means of several power plants to be constructed along said river, or either of the forks thereof, for the construction of which permits have been, or may hereafter be, applied for.

With the application was also filed notice of appropriation, wherein the company states that the purpose of this reservoir—

> is to store the flow of both flood and waste waters of the Tuolumne River by and after the construction of the restraining dam herein referred to,

and that the company claims 25,000 inches of the water flowing or to flow out of said reservoir from the waters artificially stored by means of the dam aforesaid. The latter notice was posted September 9, 1908, and recorded in the office of the county recorder September 15, 1908.

In 1911, the Yosemite Power Company filed with the Forest Service, Department of Agriculture, an application for a permit for a conduit leading from the proposed Poopenaut reservoir site through the Yosemite National Park and the Stanislaus National Forest to a proposed power-house site on the Tuolumne River.

September 10, 1914, the Yosemite Power Company, as successor in interest to the Tuolumne Company, filed in the district land office at Sacramento, under the provisions of the act of February 15, 1901, *supra*, an application for a preliminary permit for the so-called Ward's Ferry project. As depicted on the map, this project consists of a water conduit extending from a diversion dam in the Tuolumne River in Sec. 24, T. 1 S., R. 17 E., along the south bank of the river to a power-house site in Sec. 2, T. 1 S., R. 15 E., M. D. M., near Ward's Ferry. This proposed conduit traverses lands within Stanislaus National Forest, as well as unreserved public lands, and practically coincides, as far as public lands are concerned, with the conduit shown on the map previously filed by the Tuolumne Power Company. The showing of water right filed with the latter application is the same as that filed by the Tuolumne Company.

August 4, 1914, the Yosemite Power Company filed with the District Forester an application for a preliminary permit for that part of the Ward's Ferry project situated within the national forest. Final action on this application has not been taken. The Yosemite Power Company has two other applications pending before the Forester for power permits, involving lands on the Tuolumne River and tributaries. These are designated as the Golden Rock Ditch project and the Upper South Fork project. The company is now operating a plant with a capacity of about 900 k. w. at La Grange, California. The water used in this development is taken from the Tuolumne

River at a point above the La Grange dam of the Turlock and Modesto irrigation districts and returned to the stream below the dam. The alleged purpose of the proposed developments is to furnish power to farmers in the upper San Joaquin valley for pumping water to irrigate their lands.

Beginning with the year 1901 efforts were made on behalf of the city and county of San Francisco toward securing and developing a water supply in the upper watershed of the Tuolumne River. The history of those efforts is found in the records of the Department of Agriculture and of this Department. These efforts culminated in the passage of the act of Congress approved December 19, 1913 (38 Stat., 242), entitled—

An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes.

The grant in question is broad and comprehensive, authorizing the city and county of San Francisco to utilize the rights of way and lands granted—

for the purpose of constructing, operating, and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels, and conduits for conveying water for domestic purposes and uses to the city and county of San Francisco and such other municipalities and water districts as, with the consent of the city and county of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this act; for the purpose of constructing, operating, and maintaining power and electric plants, poles, and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating, and maintaining telephone and telegraph lines, and for the purpose of constructing, operating, and maintaining roads, trails, bridges, tramways, railroads, and other means of locomotion, transportation, and communication such as may be necessary or proper in the construction, maintenance, and operation of the works constructed by the grantee herein; . . .

The grant contains certain clauses with regard to hydroelectric development which must be considered in connection with the present controversy:

Sec. 9. Subd. L. *Grantee must sell at cost excess power* (over and above its own needs, exclusive of commercial sale) to certain Irrigation Districts for pumping, drainage or irrigation, or for the use of municipalities within the Districts.

No power plant shall be interposed on the line of the conduit except by said grantee or lessee.

After providing Irrigation Districts with power at cost, as above indicated, the grantee may sell electric energy for commercial purposes.

(m) Grantee must develop power as follows:

Within three years after completion of feasible power unit it must have 10,000 horsepower; within ten years, 20,000 horsepower; and within fifteen

years, 30,000 horsepower; and within twenty years, 60,000 horsepower, or less if so decided by the Secretary of the Interior.

Defines method of fixing power to be sold, including that to be sold to districts.

Grantee must conform to all State and Federal laws regarding power development.

(n) After twenty years, Secretary of the Interior may require grantee to develop additional power; should grantee refuse, Secretary may lease out power privileges.

(o) Power to be sold in accordance with State law, or in the absence of same, price to be fixed or approved by the Secretary of the Interior.

Prior and subsequent to the passage of this act, the city and county of San Francisco opposed the granting of the application for power permits sought by the Yosemite Power Company and its predecessor in interest. A representative of the Department of the Interior visited California, and protracted hearings were had, in which the city and county, the power company, and the Turlock and Modesto irrigation districts participated. An oral hearing was given the parties in interest by the Secretary of Agriculture and myself in January, 1916. At this hearing, evidence, oral and documentary, was submitted, and arguments made, by counsel for the city and county, the power company, and the irrigation districts. Briefly stated, the principal objections of the city and county of San Francisco to the allowance of the power company's applications, especially for the Poopenaut reservoir site, as set forth in protest filed, and amplified by its representatives at the oral hearing, are as follows: The ultimate development of the Hetch Hetchy project, as authorized by the act of December 19, 1913, *supra*, and planned by the city's engineers, contemplates the ultimate use of the Poopenaut reservoir site by the city for storage purposes as an adjunct to the Hetch Hetchy reservoir.

For some time to come the stream bed of the Tuolumne River will be utilized by the city as a conduit to carry the waters from the Hetch Hetchy reservoir to Early Intake, where they will be diverted into the tunnel aqueduct. The distance from the Poopenaut reservoir to Early Intake is about 9 miles, and the city claims there might be danger of pollution in this stretch of the river from construction camps, etc., if the power company is permitted to develop the Poopenaut reservoir site. Paragraph (*c*) of section 9 of the Hetch Hetchy act requires the irrigation districts to confine their storage to the portion of the Tuolumne drainage below Jawbone Creek, and the city claims that there is fully as much reason for restricting the power company in this respect.

The difference in elevation between the lower ends of the Poopenaut and Hetch Hetchy valleys is approximately 180 feet, so that with the 190-foot ram proposed by the power company, a portion of

the downstream side of the Hetch Hetchy dam would be flooded when the Poopenaut reservoir is full.

Section 9 of the act of December 19, 1913, requires the city and county to construct weirs or other structures for measuring the water flow and to keep records of the flow at several points on the river, including the outlet from the Hetch Hetchy reservoir. In compliance with this provision the city has constructed a gauging station about one-half mile below the Hetch Hetchy dam site, and the construction of the Poopenaut reservoir would cause the flooding of this station.

The city claims that any restraint of the natural flow of the Tuolumne River or its branches will create a vital interference with its project.

Other objections raised by San Francisco to the allowance of the power company's application are—

(a) That the proposed occupancy and use of public lands by the Yosemite Power Company * * * will not be in accord with the most beneficial utilization of the resources involved.

(b) That the works to be constructed * * * are incompatible with works to be constructed and operated by the city and county of San Francisco, as authorized by the act of Congress of December 19, 1913, and several departmental permits issued by the United States Departments of the Interior and Agriculture.

(c) That the use of water under any such proposed permit is incompatible with uses of water proposed to be made in a lawful manner by the city and county of San Francisco, so authorized as above set forth.

The questions involved in the disposition of this case are—

(1) What are the legal rights, if any, of the power company under its application and the various acts of Congress invoked by the several parties in interest?

(2) Whether or not the allowance of the power company's application and the construction of its proposed plants would interfere with San Francisco's plan of development under the act of December 19, 1913.

(3) Whether the intent of Congress, as expressed in the act of December 19, 1913, *supra*, was to give to the city and county of San Francisco, for its benefit and for that of the irrigation districts, the exclusive right and preference to use and utilize the area in question for development, transmission, and use of water and power for the purposes defined in the act.

It is contended on behalf of the power company that it has a vested right, by virtue of its appropriation under State laws, to the use of water at the Poopenaut reservoir, and that by sections 3 and 11 of the act of December 19, 1913, such rights are recognized and protected. Section 3 is as follows:

That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining, or other existing valid claim or claims shall

have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining, or other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: *Provided, however,* That this act shall not apply to any lands embraced in rights of way heretofore approved under any act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

This section specifically preserves the rights and claims of those persons who had made or filed entries or applications for entries under the homestead and mining laws of the United States, together with "other existing valid claim or claims which now in law constitute prior rights to any claim of the grantee." Does the above-quoted phrase in the statute, "other existing valid claims," embrace an ungranted application for a license such as was then being prosecuted by the power company? Does the rule *ejusdem generis* apply here, and is the saving clause thereby limited to claims of the same general character as those specifically mentioned in the section?—that is, claims which have been completed, approved, or allowed, and which "now in law constitute prior rights," or was it intended to embrace and protect unapproved or ungranted applications for easements or licenses?

I am of opinion that the rule described applies to this matter. The context seems to favor such a construction and is further supported by the concluding proviso of the section, which, dealing specifically with rights of way, protects those "acquired through previously approved applications." The statutory provision relating to water, relied upon, and contained in section 11 of the act, is as follows:

That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

In the cases of Inyo Consolidated Water Company *v.* Jess (161 Cal., 516, 119 Pac., 934) and Merritt *v.* Los Angeles (162 Cal., 47, 120 Pac., 1064), the Supreme Court of California held that one who had initiated, though only by paper record of appropriation, a right to the waters of any stream in the State of California, use of which would depend upon successful prosecution of an application for

easement or license upon or affecting reserved public lands of the United States, thereby obtained and possessed a vested right to the water so appropriated, which would continue so long as he might diligently pursue his application for such easement or license to allowance or rejection. In other words, such a claim was a vested right as against others, liable to be devested, however, by the happening of the contingency that the Secretary of the Interior might deny the appropriator's application for the easement or license.

The language of section 11 is similar to that contained in section 8 of the Reclamation act of June 17, 1902 (32 Stat., 388), and there is nothing in the language of either section to indicate that the intent of Congress was to go further than to recognize and prevent interference with the laws of the State relating to the appropriation, control, or distribution of water. There is nothing in the act in question which even by inference repeals existing statutes providing for and requiring the presentation to and approval by the Secretary of the Interior of applications for rights of way in the form of easements or licenses as a prerequisite to the occupation or use of any of the public lands or reservations of the United States for reservoirs, canals, plants, or other essentials to the storage, development, generation, transmission, or distribution of water or power. The right to so use and occupy reservations of the United States, without first obtaining such permission, was denied by the Supreme Court of the United States, in the case of the State of California *v.* Deseret Water, Oil and Irrigation Company, March 26, 1917.

In other words, section 11, the decisions of the Supreme Court of California cited, and the rights obtained by an appropriation of water under the laws of the United States, deal with water and the right to its use, but do not and could not undertake to dispose of the public lands and reservations of the United States or the right to use and occupy the same. The latter rights and privileges must be obtained under applicable Federal statutes, and in this instance, under the provisions of the act of February 15, 1901, *supra*, which vests in the Secretary of the Interior broad discretion.

It is suggested on behalf of the power company that its application may be now granted, notwithstanding the grant to the city and county of San Francisco by the law of December 19, 1913, unless there be such a manifest or palpable impingement of one scheme or plan upon the other as to render execution of both in some measure impracticable. It is urged, and there is no reason to dispute the contention, that all of the water resources of this locality should be conserved and utilized for the public good; that if all is not needed in connection with the grant to San Francisco, the remainder should be utilized for the benefit of lands in San Joaquin valley.

The city and county of San Francisco, however, do strenuously contend that the development of this reservoir and the accompanying plan of the power company would seriously interfere with the large and expensive plan of development contemplated by the city and county under its grant. These objections have been mentioned, among them being the plan for the ultimate use of the reservoir by the city and county for storage purposes; the use of the bed of the river as a conduit for some time in the future; the fact that the reservoir would flood the downstream side of the Hetch Hetchy dam in part; the destruction of the gauging station built by the city under the provisions of section 9 of the act; the restraint of the natural flow of the river which, under section 9, San Francisco must maintain under certain conditions for the benefit of the irrigation districts, and other minor interferences, among which may be mentioned the necessity for occupation of the lands along the river by the construction forces of the city's plant for several years, and the general undesirability of having two projects controlled by separate interests and under construction at the same time in such a restricted area.

While some of the matters at issue might be regulated by stipulation, it seems clear to me that a substantial interference would occur with the city's plans and operations if the power company's project were approved and constructed.

I am impressed with the view that the spirit and intent of the act of December 19, 1913, *supra*, was to give the city and county of San Francisco, for their benefit and for that of the irrigation districts and other municipalities and water districts mentioned in the act, the right to obtain the use of all of that portion of the Tuolumne watershed here involved without conflict or interference with or by other interests. The conditions imposed by the act were intended to secure the conservation and development of the full flow of the upper Tuolumne River for water for municipal and domestic use, with the incidental or accompanying development of hydroelectric power. Obligations were imposed upon the city and county with respect to the irrigation districts which impliedly necessitate full control by the city and county of this portion of the river.

Paragraph L of section 9 of the act of 1913 requires San Francisco, upon request, to sell, at cost, any excess electrical power which may be generated, to the Modesto and Turlock irrigation districts and municipalities within such districts. It also provides that—

> No power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein.

This seems to be an inhibition against allowing the Yosemite Company or any other interest, except the grantee or lessee, placing a power plant on the line of the city's conduit, and supports the view that it was the intent of Congress to grant to the city full control of this portion of the river and to exclude therefrom other interests.

I therefore conclude and find that the power company, by its water appropriation and application for license, secured no vested or other right to occupy public or park lands with the reservoir and development proposed; that the granting of the power company's application and the construction of its plants would interfere with the plan of development by San Francisco contemplated and required under the act of 1913; and that it was the intent and purpose of Congress, as expressed in said act, to extend to the city and county of San Francisco full and free opportunity to utilize and develop the water resources of this portion of the Tuolumne River without interference or diminution by applications for licenses like the one presented by the power company. The application of the latter, under the act of February 15, 1901, for the Poopenaut reservoir and incidental works or rights of way within the Yosemite National Park, is therefore denied and rejected.

ADJUSTMENT OF CONFLICTING CLAIMS TO NORTHERN PACIFIC RAILWAY LANDS IN WASHINGTON—ACT OF FEB. 27, 1917.

INSTRUCTIONS.

[Circular No. 548.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 28, 1917.

REGISTERS AND RECEIVERS,
U. S. LAND OFFICES AT NORTH YAKIMA, SEATTLE, SPOKANE, VANCOUVER, WALLA WALLA, AND WATERVILLE, WASHINGTON:

Appended hereto is a copy of the act of Congress approved February 27, 1917 (39 Stat., 946), providing relief for certain settlers on unsurveyed lands of the Northern Pacific Railway Company in the State of Washington. In order that the purposes of said act might be carried out without interference with the vested rights of the railway company and that the proper demands of the Department upon the company under the act might be mandatory, as under the general provisions of the act of July 1, 1898 (30 Stat., 597, 620), the company was on March 15, 1917, requested to accept the act and consent to its provisions. Under date of April 2, 1917, the company declined to accept the provisions of the act. The company having thus refused to give its consent to the provisions of the act, the De-

partment can not compel it to relinquish or reconvey its lands in favor of settlers, as is done under the general provisions of the said act of July 1, 1898, where the company waived its rights by its written acceptance of the said act.

However, a settler claiming the benefits of the said act of February 27, 1917, may file in the proper local office proof of the existence and maintenance of his claim and an election to hold or relinquish the land embraced therein. Such proof and election may be made on Form 4–381, modified where necessary to conform to the requirements of the act. If the settler elects to retain the lands claimed by him and his proof shows that his claim comes within the provisions of the act, this office will request the railway company to relinquish or reconvey the lands to the United States. Should the company relinquish or reconvey, the settler will be permitted to make entry of the lands and the company will be authorized to select other lands in lieu thereof in accordance with the provisions of the act. Should the company decline to relinquish or reconvey the lands involved the settler's only remedy will be to surrender the lands and transfer his claim to other lands. Upon receipt of the company's refusal to relinquish or reconvey, the settler will be notified thereof and accorded the privilege of relinquishing the lands and transferring his claim to other lands in accordance with the provisions of the act of July 1, 1898.

If, on the other hand, the settler in the first instance accompanies his proof of the existence and maintenance of his claim with his relinquishment of the lands settled upon by him and a request for the transfer of his claim to other lands, or in case he does so after notice of the refusal of the company to relinquish or reconvey as outlined in the preceding paragraph, this office will, if the proof is satisfactory, authorize the transfer of the settler's claim to other lands, after which he may make a lieu selection and perfect same in accordance with existing regulations under the act of July 1, 1898.

In those cases where the railway company has already been requested to relinquish the lands claimed by the settler under the special provisions of the act of July 1, 1898, and it has refused to do so, it would be useless to request it to relinquish or reconvey them under the said act of February 27, 1917. Manifestly it would be a waste of time and effort for settlers in this class of cases to elect to retain the lands settled upon by them. In this class of cases, therefore, the settler should file with his proof a relinquishment of the lands settled upon by him, together with a request for the transfer of his claim to other lands.

The regulations under the act of July 1, 1898 (28 L. D., 103), will govern so far as applicable in cases arising under the said act of

February 27, 1917, except in such matters as are specifically covered by the instructions contained herein.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

An Act for the relief of settlers on unsurveyed lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, prior to July first, nineteen hundred and thirteen, the whole or any part of an odd-numbered section within the primary limits of the land grant to the Northern Pacific Railway Company, within the State of Washington, to which the right of the grantee or its lawful successor is claimed to have attached by definite location, has been settled upon in good faith while unsurveyed, by any qualified settler, the same shall be subject to all the provisions of the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes at Large, pages six hundred and twenty to six hundred and twenty-two), relating to lands in said primary limits so settled upon prior to January first, eighteen hundred and ninety-eight, and said Act is hereby amended accordingly: *Provided,* That upon the relinquishment by said railway company of any of the lands so settled upon the selection of any lieu lands of approximately equal value by said company shall be confined to the State of Washington.

Approved, February 27, 1917.

RULE OF PRACTICE 94 AMENDED.

[Circular No. 549.]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 30, 1917.

Rule of Practice 94 is hereby amended to read as follows:

Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notice or any papers by mail from the General Land Office, except in case of notice to resident attorneys, in which case one day will be allowed.

In computing time for service of papers under these rules of practice, the first day shall be excluded and the last day included: *Provided:* That where the last day is a Sunday, a legal holiday, or half holiday, such time shall include the next full business day.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

DIAMOND COAL AND COKE COMPANY OF WYOMING ET AL.

Decided May 1, 1917.

SOLDIERS' ADDITIONAL RIGHT—RETURN OF SCRIP.

Where entries based on scrip are adjudged fraudulent and are canceled, an application for the return of the scrip is properly denied.

VOGELSANG, *First Assistant Secretary:*

The Diamond Coal and Coke Company of Wyoming has appealed to the Department from decision of the Commissioner of the General Land Office of January 29, 1917, denying its application for return of papers evidencing soldiers' additional rights in thirty-two entries made in the Evanston, Wyoming, land office, under sections 2306 and 2307, Revised Statutes.

The papers in controversy were filed and entries allowed thereon for land aggregating about 2,840 acres. Such entries passed to patent, and by decision of the United States Supreme Court in the case of Diamond Coal and Coke Company *v.* United States (233 U. S., 236), said patents were canceled upon a finding by the court that the entries were fraudulently made, the company having, through its agents at the time of the proceedings in the land department, knowledge that the lands involved were valuable for coal, and sought to obtain title for that reason.

The question presented upon this appeal is, Will the Department return to the said Diamond Coal and Coke Company this scrip which it used fraudulently to obtain title to lands knowing that the proceedings by which said title was obtained were unlawful and fraudulent?

In the case of Robert M. Stitt (33 L. D., 315), it is said (Syllabus):

> The granting of applications for the return of scrip rests in the sound discretion of the head of the land department, and is controlled substantially by the same principle that governs in the applications for the return of purchase money covered into the Treasury.

It has been the uniform practice of the land department to refuse repayment of moneys paid in connection with entries fraudulently made. The finding of the United States Supreme Court that the entries, with the scrip of which return is sought, were fraudulently made, is conclusive. Moreover, as said by the Commissioner—

> when these entries were approved and passed to patent, the soldiers' additional rights involved therein were fully satisfied, exhausted, and extinguished.

In view of the questions presented and the extended argument thereon in the brief submitted on behalf of the company, no reason

is found to hear oral argument in the case and request therefor is denied.

The decision of the Commissioner declining to return the papers was correct and is affirmed.

FRANCIS C. WILLIAMS.

Decided May 2, 1917

COAL LAND APPLICATION—APPRAISED VALUATION—DETERMINED AS OF WHAT DATE.

One whose coal land application was improperly allowed because at that time subject to an outstanding preferential right, will not be permitted to perfect such application by purchase and entry except upon making payment of the purchase price at the appraised valuation obtaining at the time the right of purchase became available to him.

VOGELSANG, *First Assistant Secretary:*

Francis C. Williams has appealed from the decision of the Commissioner of the General Land Office, dated January 7, 1916, requiring him to pay $21,800 to cover the appraised price of the land, in addition to the $4,800 paid by him on January 3, 1908, in connection with his coal-land application 02812, for the SE. ¼ SE. ¼, Sec. 9, SW. ¼ SW. ¼, Sec. 10, and W. ½ NW. ¼, Sec. 15, T. 57 N., R. 84 W., 6th P. M., Buffalo, Wyoming, land district, or suffer rejection of his application, without further notice.

From the record it appears that Williams, on November 16, 1907, filed the relinquishment of a homestead entry which covered the land, together with the waiver of contest right of one Thomas, and also his own coal-land application. These lands had been withdrawn by the Department in 1906, and on October 10, 1907, and June 20, 1908, were classified as coal lands and appraised at $30 per acre. Again, on August 24, 1910, they were reclassified as coal lands, with "price not fixed." In April, 1913, the SE. ¼ SE. ¼, Sec. 9, was appraised at $160 per acre; the SW. ¼ SW. ¼, Sec. 10, at $165 per acre, and the W. ½ NW. ¼, Sec. 15, at $170 per acre.

In accordance with the practice and regulations of the Department, Williams prosecuted his coal-land application by giving due notice thereof and submitting proof, and on January 3, 1908, paid $4,800 for the land, which was the then appraised price. A receipt for such sum was given, but no certificate of entry was issued. During the publication period and prior to payment, one Richard E. Gildroy, on December 31, 1907, filed a protest, setting up a superior right in the protestant to enter the land. Hearing was duly had, with the

result that by Departmental decision of January 10, 1913, it was held that Gildroy, by virtue of a junior contest against the antecedent homestead entry, was entitled to a preference right to enter the land. That decision concluded as follows:

> The Department is of opinion, therefore, that, upon the presentation by Gildroy, within thirty days from notice hereof, of an application, made in good faith, to purchase the land under the provisions of the coal-land laws, followed by timely proof and payment at the appropriate price per acre, he would be entitled to enter.
>
> No reason appears, however, for the present outright rejection of Williams's application. Subject, therefore, to a compliance by Gildroy with the above requirements, that application will remain intact, and, in the event Gildroy should fail to secure an entry, it will, in the absence of other objections, be passed to entry and patent.

As above stated, the tracts in April, 1913, were reappraised. Gildroy presented his application for the land, and in connection therewith the question of the price at which he could purchase arose. The Commissioner applied for instructions, and on April 17, 1913, the Department, without specifically deciding the matter, called attention to the former case of Christopher Clark, decided July 25, 1910, unreported, where a successful contestant was accorded the right to make a coal-land application, but it was held that the conditions and requirements respecting payment and entry would control such a preference right claimant the same as any other applicant seeking the land. Further instructions were issued June 10, 1913, in which the following appeared:

> The act of 1880 accorded a successful contestant the preference right of entry. The acceptance of any application for the land during such period of preferential right rests alone upon departmental regulations. Such applications have been permitted in order to prevent, as far as possible, any attempted disposition of the preference right accorded by the statute. It follows, however, that any such suspended application only springs into existence upon the failure of the successful contestant to avail himself of the preference right; so that it results that Williams's application to purchase this land has been held suspended and can only be considered when, and in the event, Gildroy forfeits his preference right. Under that state of facts it is apparent that in no event can Williams be allowed to perfect entry of this land at other than the existing price at the time when action can properly be taken upon his application.

The Commissioner having held in connection with Gildroy's application that he must pay the later appraised price, the Department, upon appeal, in its decision of July 16, 1915, affirming such action, said:

> The question as to what price Williams will be required to pay for the land under his application so long suspended and adjudicated inferior to the right of Gildroy is not now before the Department and will not be finally disposed of at this time. It is, however, considered proper to say that no reason appears

why it should be assumed that he will be permitted to take the land under his application at a valuation of $4,800, in case Gildroy fails to exercise his preference right and pay the larger sum required of him.

In the Commissioner's decision of January 7, 1916, he finally rejected Gildroy's application for failure to make the required payment, and the same was duly noted of record. At the same time Williams's application was considered, and he was required to make an additional payment of $21,800.

Counsel, in support of the appeal, argue that Williams's application and payment were made at a time when the land was subject to disposal at the price of $30 per acre, and that Williams fully complied with the requirements of the law and regulations. It is argued that the Government received the purchase price and has ever since retained the same, and that the reappraisal, which was made five years thereafter, should not be given effect as against his rights.

The Department is not persuaded by anything here made to appear that the position of counsel is correct. According to the final adjudication of the Department, Gildroy possessed a preference right to make entry for this land. Williams's application was properly received but was subject to such preferential right. As a matter of law, it occupied the status of a suspended application. The allowance of publication, proof, and payment was erroneous, because premature. In contemplation of law, Williams's rights rest only on a suspended application which became effective only after Gildroy's prior and superior right was finally foreclosed. At the time Williams's application properly became entitled to recognition the land was covered by the later reappraisal. He can be allowed to perfect his application by purchase and entry only by making payment at the price fixed at such time. In this respect the case at bar is analogous to that of Charles L. Ostenfeldt (41 L. D., 265), in which a coal-land application was presented for land which *prima facie* belonged to the State of Utah under its school-land grant. There the application was considered in the nature of a contest against the claim or right of the State. A hearing was had, with the result that the land was adjudicated to have been known coal land at the date the title to the State would have attached. It was there said:

> . . . An application to contest the claim or right of the State might be entertained and the application to purchase of Ostenfeldt was so treated, resulting, after answer and denial by the State, in a trial and the final holding by the Commissioner, June 6, 1911, that the lands did not pass to the State of Utah at date of approval of survey or at all, because of their known coal character. From and after this adjudication the lands became subject to application and entry under the coal-land laws but at the price then fixed under the regulations of the Department. No rights were obtained by Ostenfeldt when

he tendered his application to purchase, December 13, 1909, he occupying merely the status of a would-be contestant, without the privilege, sometimes extended by statute, of a preference right of entry in event of success. Even in those instances the successful contestant is only accorded a right to enter subject to the conditions existing at the time the right becomes available. After the records had been cleared of the claim of the State he, if the first qualified applicant, might enter the land if subject to disposition, but at the price, and subject to the conditions, then fixed. His entry may be allowed to stand only upon the payment of the price fixed and applicable June 6, 1911, and the decision of the Commissioner is accordingly affirmed.

The Commissioner's decision herein followed the Departmental instructions. The judgment of the Commissioner is found to be correct and is hereby affirmed.

HENRY ANDERSON.

Decided May 3, 1917.

CONTEST—PREFERENCE RIGHT OF SUCCESSFUL CONTESTANT—RUNNING OF THE STATUTE.

Time consumed by the land department in determining whether desert land is capable of reclamation, in connection with a contestant's application to make entry in the exercise of the preference right conferred by the act of May 14, 1880 (21 Stat., 140), will be deducted in computing the preference right period.

VOGELSANG, *First Assistant Secretary:*

May 11, 1912, Henry Anderson filed contest against homestead entry involving lot 4, and S. ½ NW. ¼, Sec. 4, T. 8 N., R. 53 W., Sterling, Colorado, land district. Said contest terminated in his favor, and on September 3, 1914, the General Land Office canceled the entry and directed the local officers to allow Anderson 30 days in which to exercise his preference right.

October 10, 1914, within the preference right period, he filed application to make second desert-land entry for said tracts under the act of September 5, 1914 (38 Stat., 712).

December 18, 1915, the General Land Office advised the local officers that applicant was entitled to make a second desert-land entry, and the application was returned, with instructions that it be transmitted to the Chief of Field Division for report as to the sufficiency of the alleged water supply and feasibility of the proposed plan of irrigation.

February 14 and December 9, 1916, a field examiner submitted reports recommending the rejection of the application, on the ground that there was no supply of water available for the irrigation of said lands.

Upon consideration of these reports, the Commissioner, under date of February 5, 1917, held said application for rejection, setting out in full the facts in the case which justified his conclusion that the land

cannot be irrigated and reclaimed by Anderson from any available known source of water supply, according the applicant, however, the right to apply for a hearing.

Anderson has appealed from that decision, and in the brief in support of said appeal it is stated by his attorney that:

> Notice of Anderson's right of preference of entry was issued September 10, 1914. *On the following day* one Lloyd R. Kious filed homestead application. Sterling 021528 for the land which is in question here. Anderson received notice of his right of preference of entry on the 12th of September, 1914, and on the 10th of October sought to exercise that right by the filing of desert land application, Sterling 021730. It will be observed that the Kious application was, necessarily, held suspended until action on Anderson's desert land application.

The appellant earnestly insists that he is entitled to the benefits of his preference right and urges in the event he should not be permitted to enter the tracts under the desert-land law, that he be allowed to convert his desert-land application into an application under the enlarged homestead law and amendments, notwithstanding the intervening application of Kious.

This proposition involves a discussion of the nature of the right earned by a successful contestant under the act of May 14, 1880 (21 Stat., 140). Said act confers upon a person who has "contested, paid the land office fees, and procured the cancellation" of the entry attacked, a preference right of entry for 30 days from the date of notice of such preference right, as against every one except the United States. During such period of 30 days the land is reserved from entry by other individuals, strangers to the record, awaiting the action of the contestant, though applications may be received during such period and held in abeyance (16 L. D., 334).

The right granted by said act is statutory and the land department has no authority, by regulation or otherwise, to disregard the act or deny the right. Beach *v.* Hanson (40 L. D., 607); Long *v.* Lee (41 L. D., 326).

In the case of Robeson T. White (30 L. D., 61), decided by the Department June 9, 1900, it was held (syllabus):

> A successful contestant who, in exercising his preference right, locates a soldiers' additional homestead certificate upon the land formerly covered by the contested entry, and thereafter, under the belief that the first certificate is defective, locates another soldiers' additional right upon the same land, does not thereby waive any rights secured by the first location.

In the case of Smith *v.* Whitehead (39 L. D., 208), decided by the Department September 14, 1910, it was held (syllabus):

> An application to locate a soldiers' additional right does not preclude the filing of an adverse application to enter the same land, subject to determination of the validity of the additional right; and in case the additional right be found invalid, the intervening adverse application attaches and bars substitution of another right in lieu of the one held invalid.

No claim of a preference right under the act of 1880, however, was involved in that case, the question relating entirely to the right to substitute a valid for an invalid soldiers' right, in the face of an intervening adverse claim, for surveyed public lands subject to filing and entry.

In the case of Robert Beveridge (41 L. D., 410), decided by the Department December 16, 1912, it was held (syllabus):

Where a successful contestant within the preference right period filed a soldiers' additional application, and after the expiration of that period filed a homestead application in attempted substitution for, and waived all claim under, the soldiers' additional application, he acquired no right under his homestead application so filed as against an adverse homestead application filed after cancellation of the entry and held suspended pending exercise by contestant of his preference right.

In this case Beveridge filed a waiver of all rights under the soldiers' additional application, and although there had been no adjudication as to the validity of this additional right, it was withdrawn two months after the expiration of the preference right period, because, presumably, bad, and the homestead application substituted therefor.

In the case here under consideration the preference right claimant was found by the Commissioner to be qualified to make entry under the law pursuant to which his application was filed. It was held, however, that there was no source of water supply available from which the lands could be irrigated, and for this reason they were not subject to entry under the desert-land law. But Anderson's application was regular and proper in all respects, and, so far as anything in the record shows, he was seeking in a perfectly legitimate manner to conserve and protect his rights. He offered a filing which, through no fault of his own, could not go of record during the preference right period. The Commissioner, after investigation, held, in effect, that the lands were not appropriable under the desert-land law, not because they were nondesert in character, but because water was not available for their reclamation.

The preference right is a reward offered to one who has expended his money and time in obtaining the cancellation of an unlawful holding of public land. Anderson had performed all the prerequisites imposed by the act and had presented an application, within the preference right period, which was without defect or infirmity, and it is not believed the reward held out should be denied because of a mistaken judgment that the land could be reclaimed as required by statute, when he is qualified to make entry under some other law and the land is subject to such entry. The delay necessary under the regulations in determining whether or not the lands are or might be irrigable should not operate to deprive Anderson of his preference right earned by contest.

It is held, therefore, that from and after October 10, 1914, when Anderson filed his desert-land application, until the date of the Commissioner's decision holding that the lands were not appropriable under the desert-land law, time did not run against him. Therefore, since his preference right period had yet one day to run when he presented his desert-land application, he may in that time file in the local office an application to enter and a petition for designation under the enlarged homestead law and amendments, upon which appropriate action will be had in accordance with the regulations.

The case is, accordingly, remanded for appropriate action pursuant hereto.

REGULATIONS FOR LEASING LANDS IN RECLAMATION PROJECTS.

[CIRCULAR.]

1. By the Secretary's order of April 24, 1917, all first form withdrawn lands may be leased for agricultural or grazing purposes, for the present.

2. Withdrawn lands which are susceptible of cultivation either by irrigation or dry farming methods should be leased for that purpose only and with such conditions as will insure cultivation. One year's lease charges shall be paid in advance and the lease should contain a provision for cancellation and forfeiture of payments made in case of failure to prepare and cultivate for the production of crops.

3. Withdrawn lands available for grazing purposes only may be leased in the usual way and at least one year's lease charges should be paid in advance.

4. The usual methods of competition should be adopted in making leases, and lands should be divided into tracts of suitable size to secure the greatest efficiency for the production of crops or for their use for grazing.

5. The period of lease shall be such as is deemed suitable by the Project Manager.

6. The standard form of lease shall be used with a reservation of the right to cancel on 3 to 6 months' written notice, with such modifications as local conditions may require.

MORRIS BIEN, *Acting Director.*

Approved May 7, 1917:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

YOUNGBLOOD v. STATE OF NEW MEXICO (On Rehearing).

Decided May 8, 1917.

SCHOOL INDEMNITY SELECTION—EFFECT UPON LAND.

A school indemnity selection *prima facie* valid and intact of record segregates the land involved.

SEGREGATION OF PUBLIC LAND—RESTORATION TO THE PUBLIC DOMAIN—WHEN PRIVATE APPROPRIATION PERMITTED.

Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

[See McMichael *v.* Murphy, 197 U. S., 304.]

VOGELSANG, *First Assistant Secretary:*

March 20, 1917, the Department on appeal rejected the homestead application of Alfred Y. Youngblood, [filed February 12, 1916,] for lots 2, 3, and 4, SE. ¼ NW. ¼, E. ½ SW. ¼ and W. ½ SE. ¼, Sec. 19, T. 20 S., R. 36 E., N. M. M., Roswell, New Mexico land district, because of conflict with a prior indemnity school land selection by the State. A motion for rehearing has been filed by Youngblood.

The State of New Mexico, on August 5, 1914, filed its selection for all of said Sec. 19, and on February 28, 1916, applied to amend the selection by substituting another base for a portion of the land selected, which application was allowed by the Commissioner under date of May 22, 1916. On April 4, 1916, the Commissioner held the selection for cancellation as to another portion of the said selection because the base assigned by the State had theretofore been used in another selection. The State thereupon filed application to amend to cure the said defect.

In the former Departmental decision it was held that inasmuch as the selection was intact and *prima facie* valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights by filing the same. Furthermore, it was held that his alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.

The decision complained of is in harmony with the recent Departmental decision of March 17, 1917, in the case of California and Oregon Land Company *v.* Hulen and Hunnicutt (46 L. D., 55), wherein it was held:

> Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

See also the case of May *v.* State of Washington (39 L. D., 377), wherein it was held (syllabus):

A homestead application tendered while the land applied for was embraced in a *prima facie* valid school indemnity selection, accompanied by a protest against the selection on the ground of insufficient base, does not present such an adverse claim as will prevent substitution by the State, in a proper case, of a good and sufficient base, where the defect charged in the protest was shown by the records of the General Land Office and action on that ground instituted against the State's claim before any cognizance of the protest was taken by that Office.

No error is seen in the former departmental decision, and therefore the motion for rehearing is denied.

TIMOTHY SULLIVAN, GUARDIAN OF JUANITA ELSENPETER.

Decided May 8, 1917.

ADDITIONAL HOMESTEAD ENTRY—TO WHOM LIMITED.

The right of the widow, heir or devisee of a homestead entryman to complete the entry initiated by him is statutory, and does not include the right to make an additional homestead entry based on the original entry.

Departmental decisions in Lillie E. Stirling (39 L. D., 346), Heirs of Davis (40 L. D., 573), and Bertha M. Birkland (45 L. D., 104), overruled.

VOGELSANG, *First Assistant Secretary:*

August 24, 1909, Marie Elsenpeter made homestead entry for the SW. ¼ NW. ¼, E. ½ NW. ¼, and SW. ¼ NE. ¼, Sec. 33, T. 1 S., R. 9 E., B. H. M. The entrywoman died, and upon submission of final proof on behalf of Juanita Elsenpeter, minor child of Marie, final certificate issued October 23, 1915, and patent on February 10, 1916.

March 25, 1915, Timothy Sullivan, as guardian of Juanita Elsenpeter, presented homestead application 030370 for the SW. ¼ SE. ¼, Sec. 28, E. ½ NE. ¼ and NW. ¼ NE. ¼, Sec. 33, same township and range, as additional to the homestead entry made by Marie Elsenpeter, and perfected on behalf of her minor child.

The register and receiver rejected the application for the reason that it was not shown that the heir was a resident upon the land embraced in the original entry. On appeal, the guardian stated that the child was but seven years of age and unable to reside upon the land; that the land is not of sufficient value that anyone could be hired to live on the same and care for the child, but that he is cultivating the land for the minor.

Upon consideration of the case, the Commissioner, citing the case of Heirs of Susan A. Davis (40 L. D., 573), affirmed the decision of the register and receiver. Appeal by the guardian brings the case before the Department.

The Commissioner's decision was in strict accord with the holding of the Department in the cases of Heirs of Susan A. Davis, *supra;* Bertha M. Birkland (45 L. D., 104), and Lillie E. Stirling (39 L. D., 346).

The conclusion reached in the decisions just cited is that when an additional entry is sought, complete compliance with the requirements of the law, which includes residence on either the original or additional entry, must be shown.

Upon full consideration of the applicable laws, the Department is forced to the conclusion that not only was the action of the register and receiver in rejecting this application correct, but that the decisions hereinbefore cited are incorrect, and not warranted by the existing laws.

Section 2291, Revised Statutes, provides that as a prerequisite to final certificate and patent—

> the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, * * * then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The additional homestead laws upon the statute book include section 6 of the act of 1889 (25 Stat., 854), which provides that every qualified person who has made and perfected a homestead entry for less than 160 acres of land shall be entitled "to enter as a personal right and not assignable" so much additional land as, when added to the quantity previously entered "by him, shall not exceed 160 acres." A proviso requiring residence upon the land in the additional entry in the manner prescribed by the homestead laws follows.

Section 2 of the act of April 28, 1904 (33 Stat., 547), provides that any homestead settler who has entered or may enter less than one quarter section may enter additional land contiguous to the original entry, but permits additional entry only for the benefit of the entryman who owns and occupied the lands covered by his original entry.

Section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), as amended by the acts of February 11, 1913 (37 Stat., 666), and March 3, 1915 (38 Stat., 956), provides:

> That any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: * * *

It will be seen from the language of the acts cited, providing for an additional homestead entry, that they all contemplate and require residence upon the lands embraced within either the original or the additional entry, and appear by the words employed to have in contemplation the exercise of the additional right only by the person who made and perfected the original entry. The language used rather negatives the idea that the right to make an additional homestead entry vests in the widow, heirs, or devisee of the person who made the original entry. Aside from this, however, it seems clear from the language of section 2291, Revised Statutes, that the statutory right of the widow of a deceased homestead entryman or of the heirs or devisees of such an entryman is to perfect the entry theretofore initiated by the husband, ancestor, or devisor. In other words, the beneficiaries of that statute take up, complete, and perfect the inchoate claim already initiated and obtained by the making of the original homestead entry, and compliance by the entryman with the requirements of the homestead laws to the time of his death.

The right to make a homestead entry or an additional homestead entry, until exercised, is intangible. One may be qualified in every respect to exercise the right, but may never do so.

Section 2291, Revised Statutes, as pointed out, operates upon a definite, existing, inchoate claim of record in the land office. The additional-entry right given by statute, until exercised, has no definite form or existence. It is attached to no land, it has been made of record in no office, and the original entryman might never have exercised it.

The contention that such a "right" descends or passes to or is cast upon a widow, heir, or devisee finds no support in the statute. That such a situation is not contemplated by the homestead laws is substantiated by the fact that those laws extend to such widow, heir, or devisee, if otherwise qualified, the right to make a homestead entry in his or her own right for the maximum amount. Therefore, if the land covered by the original homestead entry of the husband, ancestor, or devisor be of less than the maximum area permitted by the applicable laws, the widow, heir, or devisee may enlarge the holding by an entry or entries in his own right, and no good reason exists for attempting to construe the law to confer upon them an additional-entry right based upon the original entry. In fact, such a construction is against public policy, which limits the amount of land which may be entered by a single individual under the agricultural land laws.

The Department therefore concludes that section 2291, Revised Statutes of the United States, does not justify the conclusion that anything passes to the widow, heir, or devisee except the right, in the

manner prescribed by statute, to perfect the original entry, and that none of the additional homestead acts mentioned, including the one under which the application of Sullivan is made, warrants the conclusion that any right to make an additional entry, based upon the original of another, passed to or is conferred by law upon the widow, heir, or devisee.

The decision of the Commissioner in the case at bar is accordingly affirmed, and Departmental decisions in the cases of Davis, Stirling, and Birkland, *supra*, are overruled. The Commissioner of the General Land Office will issue appropriate instructions to the registers and receivers for their guidance in future cases in accordance with the conclusion herein reached. Entries heretofore allowed under the former and erroneous Departmental rulings mentioned, if perfected by the submission of final proof, will be referred to the Board of Equitable Adjudication for consideration.

CHAPMAN v. PERVIER.*

Decided May 9, 1917.

RECLAMATION LANDS—ENTRY INITIATED BY SETTLEMENT.

Entry of lands within a reclamation project can be initiated by settlement.

RECLAMATION ACT—LANGUAGE IN SECTION 3 CONSTRUED.

In section 3 of the act of June 17, 1902 (the Reclamation act), the word "only," in the proviso that "public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws," applies to and qualifies the clause "under the provisions of the homestead law."

VOGELSANG, *First Assistant Secretary:*

Elgin L. Pervier has appealed from Commissioner's decision dated May 22, 1916, holding for cancellation his homestead entry made on October 7, 1915, for farm unit "C" (NW. ¼ SE. ¼), Sec. 32, T. 49 N., R. 10 W., N. M. P. M., Montrose, Colorado, land district, upon the grounds that George G. Chapman made *bona fide* settlement upon said tract prior to the date of Pervier's application therefor, and that Pervier did not settle upon the land prior to the date of the allowance of his entry.

It is urged in the appeal that the Commissioner erred in holding that an entry of lands within a reclamation project could be initiated by settlement thereon, and second, in not holding that Pervier was a settler on the land in controversy at and before the time of Chapman's settlement.

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* See decision on petition to Secretary, *post*.

The first contention is based on the wording of section 3 of the act of June 17, 1902 (32 Stat., 388), which, so far as is material to the point in issue, reads as follows:

> That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, * * * that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided.

It is urged that the word "only" applies to and limits the word "entry" and not the words "under the provisions of the homestead laws," and that therefore rights to lands within reclamation projects can be acquired only by entry thereof. This proposition has been fully argued before and considered by the Department, and it is not believed that it can be sustained. It is settled law that the right to make homestead entry of lands subject to such entry may be initiated either by settlement or application, and that when entry is allowed rights thereunder date by relation to the time of settlement or application, as the case may be. The very arguments of the appeal in support of the contention that no rights to lands in reclamation projects can be initiated by settlement would apply as well to mere applications to enter. Of course, if for any reason lands applied for or settled upon are not subject to entry, neither settlement nor application could be the basis of any legal claim thereto, but when a homestead entry is properly allowed, rights thereunder must be held to relate in all cases to the date of the initial act, whether of settlement or application, by which the claim to the land is asserted.

Since the date of the passage of the act of June 17, 1902, *supra*, the land department has uniformly recognized settlement upon lands in reclamation projects as a lawful initiation to a claim thereto under the act of May 14, 1880 (21 Stat., 140), and it would require a clear and convincing showing of error to warrant a reversal of that construction of the law. No such showing has been presented. On the contrary, it is found that Congress has, in the act of August 13, 1914 (38 Stat., 686), amended section 5 of the Reclamation act to read as follows:

> That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the

Interior shall have established the unit of acreage per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law.

While it is true that the proviso above quoted relates only to a restricted class of lands, the expression therein "shall be subject to settlement and entry under the reclamation law" evidences not only that Congress knew of the construction placed by this Department upon the Reclamation act, but approved that construction. Indeed, Congress had adopted the Departmental view in the act of February 18, 1911 (36 Stat., 918).

The Commissioner in his decision stated fully the facts with reference to the alleged settlement of this appellant upon the land in controversy, and properly concluded that he did nothing upon the tract prior to the date of Chapman's settlement which could be regarded as an act of settlement or would have constituted notice of his claim to a junior settler.

The decision appealed from is accordingly affirmed.

RILEY v. BUNCE.

Decided May 9, 1917.

SOLDIERS' AND SAILORS' HOMESTEAD RIGHTS—UNDER ENLARGED HOMESTEAD ACTS.

Credit for military service rendered the United States in the Civil War is allowed on entries made under the Enlarged Homestead acts.

RESIDENCE—SEC. 2305, REVISED STATUTES—ENLARGED HOMESTEAD ACTS.

The requirement of Section 2305, Revised Statutes, as to at least one year's residence on the land by a soldier or sailor entitled to credit for military service, is satisfied by seven months' actual and five months' constructive residence thereon.

VOGELSANG, *First Assistant Secretary:*

Omer S. Riley has appealed from the decision of the Commissioner of the General Land Office, dated December 18, 1916, reinstating Rufus O. Bunce's original and additional homestead entries for the SW. ¼, Sec. 29, S. ½ SE. ¼, Sec. 30, and N. ½ NE. ¼, Sec. 31, T. 34 N., R. 41 E., M. M., Glasgow, Montana, land district, and allowing the filing of an amended contest affidavit as the basis for further hearing.

The decision appealed from set forth a correct history of the contest proceedings, as well as a summary of the affidavits since filed.

Appellant contends, in effect, that the soldier-entryman was not entitled to be absent for five months of the one year which he was required to reside upon the land, and that credit for military service during the Civil War can not be allowed on entries under the En-

larged Homestead act. The contrary has been the uniform holding of the Department.

That credit for military service can be allowed on entries under the Enlarged Homestead acts was held in the regulations of October 11, 1910 (39 L. D., 291), and February 28, 1914 (43 L. D., 138). The requirement of Sec. 2305, R. S., as to at least one year's residence by a soldier entitled to credit for military service is satisfied by a showing of seven months' actual and five months' constructive residence.

The decision is correct and is affirmed.

UNION LAND COMPANY, ASSIGNEE OF ALLEN.

Decided May 9, 1917.

REPAYMENT OF PURCHASE MONEY, FEES, AND COMMISSIONS—ACTS OF MARCH 26, 1908, AND JUNE 16, 1880—EFFECT OF STIPULATION AND DECREE.

Where suits brought by the Government to cancel patents to public lands are terminated by a stipulation of compromise and settlement entered into by both parties, and confirmed by decree of court, in which stipulation it is stated in terms that it shall be a complete settlement of all property rights in said lands arising or to arise between the parties, the acts of March 26, 1908 (35 Stat., 48), and June 16, 1880 (21 Stat., 287), are without application, and return of the money paid in connection with the entry of such lands will be denied, such money entering into and being a part of the claims settled and determined by the stipulation and decree.

VOGELSANG, *First Assistant Secretary:*

The Union Land Company has appealed from the decision of the Commissioner of the General Land Office, dated August 7, 1916, denying its application, as assignee of Norra Allen, for repayment, in connection with coal entry made on July 2, 1902, for the NW. ¼, Sec. 27, T. 5 N., R. 86 W., Glenwood Springs, Colorado, land district, upon which patent issued on September 29, 1905.

It appears that equity suit No. 5343 was instituted by the Government on July 29, 1909, in the United States Court for the District of Colorado, to annul patents to certain claims therein described, including the patent to the above-described tract.

At or about the same time, the Government also filed suits, No. 5765 in equity, and Nos. 5758 and 5759 at law, involving generally the same persons and properties.

There were also then pending in this Department certain appeals from decisions adverse to said Union Land Company.

Fraud in the acquisition and attempted acquisition of title from the United States was the sole basis of all said suits and controversies.

Pending disposition of the cases upon the merits, the defendants and the Government entered into a stipulation of compromise and settlement, wherein, among other things, it was agreed that title to

certain patented lands was to be confirmed in the defendants, and that patents for certain other lands, including the tract above described, should be set aside and annulled; that certain entries should be patented to defendants and certain other entries should be canceled. The scope and effect of the compromise are stated in the stipulation to be—

> a complete settlement of all existing contests, suits, and controversies, and a full settlement and compromise of all such litigation affecting in any manner the titles to the lands described in such entries hereinbefore mentioned, and of any and all property rights in and to such lands and any part thereof, arising or to arise therefrom, as between the parties to such contests, suits, and controversies.

Pursuant to said stipulation, a decree based thereon was entered in said equity suit No. 5343 by the United States District Court on the 17th day of October, 1912; all other suits hereinbefore mentioned were dismissed; certain patents were canceled; certain patents were issued; and all matters and things between the parties were settled and closed.

It is now urged by appellant, since the suits were thus settled and compromised with no finding of fraud and no specific waiver on its part of repayment of purchase moneys and commissions upon the canceled patents and entries, that such repayment is authorized by the act of March 26, 1908 (35 Stat., 48), which provides:

> That where purchase moneys and commissions paid under any public-land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

Upon mature consideration, the Department is convinced and finds that the questions of fraud and repayment were settled and determined by the stipulation and decree aforesaid, that neither was left open for future consideration or determination, and that said act of March 26, 1908, and the act of June 16, 1880 (21 Stat., 287), have no application whatever to the facts and circumstances of this case.

The stipulation being in terms a final settlement of any and all claims, titles, and property rights involved in the lands surrendered under the aforesaid decree of the court, the Department also finds that retention of the money paid in connection with the lands surrendered under the stipulation and decree was a part of the consideration for the acceptance of the defendants' offer of compromise upon which said stipulation and decree were based.

The decision of the Commissioner is correct, and is accordingly affirmed.

FORT PECK INDIAN LANDS—ENTRY UNDER COAL LAND LAWS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 12, 1917.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

I am in receipt of your letter of April 27, 1917 ("A" J. McP.), relating to the entry, under the coal-land laws, of lands within the ceded portion of the Fort Peck Indian Reservation, under the act of May 30, 1908 (35 Stat., 558).

The act of May 30, 1908, *supra*, in section 4, directed the President to appoint a commission "to inspect, classify, appraise, and value all of said lands." Section 6 requires the commissioners to "personally inspect and classify and appraise by the smallest legal subdivisions of forty acres." The lands were to be divided into the following classes: "First, agricultural lands; second, grazing lands; third, arid lands; fourth, mineral land, the mineral land not to be appraised."

Under section 7 the lands were to be disposed of under the general provisions of the homestead, desert-land, mineral, and townsite laws.

Section 8 provided that the lands "so classified and appraised" should be opened to settlement and entry by proclamation of the President. The President's proclamation was dated July 25, 1913 (see 42 L. D., 264).

Section 12 provided:

> That the lands within said reservation however classified, shall, on and after sixty days from the date fixed by the President's proclamation opening said lands, be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal land laws *at not less than the price therein fixed and not less than the appraised value of the land*, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to Indians or withdrawn under the provisions of this Act. [Italics the Department's.]

Under the above provisions it would seem clear that lands returned by the appraisers as mineral were subject to entry under the coal-land laws at not less than the price therein fixed. Certain lands, however, were returned by the commission as nonmineral and an appraised value set thereon, which lands, however, were classified by the Geological Survey as being coal lands. This latter class of lands was withdrawn by President's order of February 15, 1917, pending legislation, the particular bill then under contemplation being S. 4761, 64th Congress, 2d Session, which provided for an appraisal of the lands excluded from appraisal by the commission on account of the coal contained therein, for surface entry of such lands, and with a proviso that the coal purchaser should pay the amount fixed under the coal-land laws, and in addition thereto the appraised value

of the land provided for in that bill. S. 4761, however, failed of passage.

The act of February 27, 1917 (39 Stat., 944), provides for the appraisal of lands in ceded Indian reservations theretofore withdrawn or classified as coal lands, for surface entry of such coal lands at a price to be so fixed, and for entry under the coal-land laws of coal deposits underlying the lands whose surface has been entered under the nonmineral laws.

The Department's regulations of April 16, 1917, declare that the act of February 27, 1917, *supra*, contemplates that if the coal-land purchaser precedes the agricultural applicant, and thus secures title to both estates, he must pay for each at the prices fixed for the respective estates.

From your communication it would appear that the coal-land applications for Fort Peck lands now pending in your office may be classified into four separate classes:

(1) Applications for land returned by the appraisal commission as coal, in which the price fixed in the coal-land laws was paid by the applicant prior to the passage of the act of February 27, 1917.

(2) Applications for land returned as coal, but in which the price fixed in the coal-land laws was not paid prior to the passage of the act of February 27, 1917.

(3) Applications for land returned by the appraisal commission as nonmineral, but classified by the Geological Survey as coal, and in which merely the price fixed in the coal-land laws was paid prior to the withdrawal of February 15, 1917.

(4) Coal-land applications for lands returned by the appraisal commission as nonmineral, but classified by the Geological Survey as coal, in which no payment was made prior to the withdrawal order of February 15, 1917.

From the above it is clear that, under the first class, the applicants paid the proper price in effect at the time of payment, and such applications should be approved and patented, in the absence of other objection.

As to the second class, it is clear that under the act of February 27, 1917 (39 Stat., 944), and the circular of April 16, 1917, the applicant must pay both the price fixed in the coal-land laws and the appraised price to be established under the act of February 27, 1917.

The correct price to be demanded in cases of the third class depends upon the interpretation of the provisions of the act of May 30, 1908, particularly section 12 thereof. This section opened to purchase under the coal-land laws all of the ceded lands within the Fort Peck Reservation, however classified. The price fixed in that section is "not less than the price therein fixed *and* not less than the appraised value of the land." Under this section, should the entry-

man apply for land returned as mineral by the appraisal commission, there being no appraised value of the land as nonmineral, the price would be simply that fixed in the coal-land laws. The question as to the correct price where the coal-land entryman applied for lands appraised as nonmineral by the commission is more complex. The section is susceptible of two constructions; that is, that under such circumstances the coal entryman should pay the higher price, as the case might be, or should pay both prices. The word "and" may have various meanings, and sometimes is used in the sense of "in addition." From a reading of the section, the Department is of the opinion that it was the intention of Congress to permit of the entry under the coal-land laws, at the price fixed therein, of such lands as were returned as coal by the appraisal commission. Should, however, an entryman desire to purchase under the coal-land laws lands which were appraised as to their value for agricultural purposes by the commission, it was the intent of Congress that such coal purchaser should pay both values. This interpretation is in harmony also with the spirit of the act, which was designed to compensate the Indians for the value of their lands. The third class of applicants, therefore, should be required to pay both the price fixed under the coal-land laws and the appraised value as fixed by the appraisal commission.

Under the rule as above laid down as to class 3, it is clear that all applicants falling within class 4 must likewise pay both prices, and hereafter all coal applicants for lands within the Fort Peck Reservation who desire to obtain title to both the surface and the coal deposits must pay the prices fixed in the coal-land laws and the appraised value fixed by the act of May 30, 1908, or to be fixed under the act of February 27, 1917, *supra*, and the regulations of April 16, 1917.

The above renders a continuance of the order of withdrawal dated February 15, 1917, unnecessary, and the Director of the Geological Survey has been instructed to prepare a proper order of revocation and restoration for submission to the President.

Where applications are now pending before your office in which, under the above instructions, the applicant has not paid the full price, you will notify such applicants to complete payment within thirty days from notice, upon pain of the rejection of the application. Where the application is one for land appraised as coal and in which, under the above instructions, the applicant must pay the appraised price to be fixed under the act of February 27, 1917, and the circular of April 16, 1917, you will advise such applicants that their applications will be suspended pending the appraisal, and that they must make the additional payment within thirty days from notice of the appraised price. Such applicants as are unwilling to

perfect their applications under these instructions may be notified that they may withdraw their applications without exhausting their coal-land rights and without prejudice to securing repayment of any moneys heretofore paid.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

OPENING OF LANDS RELEASED FROM WITHDRAWAL OR EXCLUDED FROM NATIONAL FORESTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 17, 1917.

The act of September 30, 1913 (38 Stat., 113), provides:

That hereafter when public lands are excluded from national forests or released from withdrawals the President may, whenever in his judgment it is proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto.

SEC. 2. That where under the law the Secretary of the Interior is authorized or directed to make restoration of lands previously withdrawn he may also restrict the restoration as prescribed in section one of this act.

The methods of accomplishing restoration to entry of large areas of withdrawn or segregated lands heretofore followed have produced considerable confusion and controversy and have demonstrated the need of some material modifications.

It is believed that persons desiring to obtain a home on the public domain should be given the preference over persons seeking to appropriate the lands under other laws. Accordingly I hereby establish the following rules and regulations:

1. Lands embraced in withdrawals or in pending applications for withdrawal under the act of March 15, 1910 (36 Stat., 237), lands embraced in approved segregations or in pending applications for segregation under section 4 of the act of August 18, 1894 (28 Stat., 372, 422), commonly called the Carey act, as well as lands embraced in withdrawals under the Reclamation act or for forestry purposes, are not subject to settlement nor to application, entry, or other filings under the public land laws, saving and excepting (1) applications for easements presented pursuant to the various statutes made and provided in that behalf; (2) applications for homestead entries pursuant to Act of Congress of June 11, 1906 (34 Stat., 233), where any

of the lands ordered to be restored have been previously listed for such entry; (3) applications for homestead entry where lands previously withdrawn for reclamation have been embraced in established farm units and public notice of the availability of water duly published; and (4) applications for homestead entries of lands within areas withdrawn for reclamation, which lands had been embraced in an entry or in entries made prior to June 25, 1910, where such entry or entries may have been relinquished subsequent to that date (Act of Congress of February 18, 1911, 36 Stat., 917).

2. Upon elimination of lands from the segregations, withdrawals, and applications for segregation or withdrawal mentioned in the preceding paragraph, the order of restoration should provide that, subject to valid rights and the provisions of other withdrawals, the lands so restored will be subject to homestead entry only on a date to be named therein, and to settlement and all proper forms of entry, selection and location seven days after such date. Due and adequate provision will be made for the preservation and protection of the equitable rights of entry possessed by persons on whose applications lands have been listed for entry pursuant to the statute of June 11, 1906, *supra* (Instructions, 42 L. D., 425), as well as for the preferred rights of entry which may have been earned by and awarded to contestants of previously existing entries of lands within areas withdrawn for reclamation (Circular of August 24, 1912, 41 L. D., 171). All orders of restoration shall embrace instructions to prospective applicants for entry of the restored lands concerning their privilege to execute their applications, in the manner provided and prescribed by law, and to present the same, together with the amount of money requisite for the payment of fees and commissions, to the proper local land office, in person, by mail, or otherwise, within the twenty days next preceding the date on which the lands will become subject to entry of the form described by such applications. They should also be given to understand that all applications so filed, together with such as may be submitted at the hour fixed for restoration, will be treated as though simultaneously filed, and will be disposed of as directed by the regulations of May 22, 1914 (Circular No. 324, 43 L. D., 254).

3. The order of opening should also contain the following:

Warning is hereby given that no settlement initiated prior to seven days after the date for homestead entry above named will be recognized, but all persons who go upon any of the lands to be restored hereunder and perform any act of settlement thereon prior to 9 o'clock a. m., standard time (here insert date of seventh day after the date for homestead entry), or who are on or are occupying any part of said lands at such hour, except those having valid, subsisting settlement rights initiated prior to withdrawal from settlement and since maintained, will be considered and dealt with as trespassers and will gain no rights whatever under such unlawful settlement or occupancy; provided, however,

that nothing herein contained shall prevent persons from going upon and over the lands to examine them with a view to thereafter appropriating them in accordance herewith. Persons having prior settlement rights, as above defined, will be allowed to make entry in accordance with existing law and regulations.

4. The foregoing limitations as to homestead entry only will not be applied in those cases where the circumstances make it advisable to make other provisions.

5. Proposed orders for restoration should make provision, in proper cases, for selections by the State under the act of August 18, 1894 (28 Stat., 394), by announcing that such selections can be made during the sixty days prior to twenty days immediately preceding the day named for homestead entry. The preference-right period of the State under the act of March 3, 1893 (27 Stat., 592), will begin to run on the seventh day following the date fixed for homestead entry, in accordance with the instructions of January 2, 1914 (43 L. D., 31).

6. All prior regulations in conflict herewith are hereby revoked.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SIMPSON, ASSIGNEE OF BURGESS.

Decided May 25, 1917.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE—VALIDATING ACT OF AUGUST 18, 1894.

The act of August 18, 1894 (28 Stat., 372, 397), validated soldiers' additional homestead certificates, theretofore issued by the land department, in the hands of *bona fide* holders for value, and the soldier's right so validated can not be readjudicated, but must be recognized for the full area certified.

VOGELSANG, *First Assistant Secretary:*

Appeal has been taken from the decision of March 3, 1917, by the Commissioner of the General Land Office, in the above entitled case, involving the application of William Lee Simpson to enter lots 9 and 12, Sec. 4, T. 52 N., R. 104 W., 6th P. M., Lander, Wyoming, land district, aggregating 48.90 acres.

The application was filed under Section 2306, Revised Statutes, based on military service of Artis Burgess in the Army of the United States for more than ninety days during the Civil War, and on homestead entry made by the soldier for 83.20 acres at Chillicothe, Ohio, February 10, 1871, and which was patented April 25, 1877. The entryman paid for the excess of 3.20 acres over the area of 80 acres, and it appears that the excess was considered as a cash payment for said area and the soldier's additional right was certified as for 80 acres on April 25, 1883. It was recertified to John M. Rankin as a *bona fide* purchaser on March 28, 1907, for the same area, and was assigned by Rankin to Ted E. Collins on March 30, 1907, and by Collins to the applicant Simpson to the extent of 48.90 acres November 24, 1916.

The Commissioner in the decision appealed from quoted Departmental decisions in the case of Guy A. Eaton (32 L. D., 644), and George Heinrich Sprenger (33 L. D., 274), to the effect that the right to make soldiers' additional homestead entry is limited to such an amount of land as added to the amount previously entered shall not exceed 160 acres, even though the entryman may have paid cash for a portion of the original entry as excess land. He, therefore, held that the correct area of the additional right was 76.80 acres, and stated that a notation to this effect would be made on the recertified certificate of right, and suggested that the owner could obtain evidence as to the extent of the unused portion of the right by procuring a certified copy of the certificate showing such notation as provided in the case of Sledge, Fishing and Mining Company (39 L. D., 133).

The Commissioner also referred to circular of April 1, 1910 (38 L. D., 517), which discontinued the practice of recertifying soldiers' additional rights, and he appears to have acted upon the supposition that the additional right in question should be readjudicated in the light of the decisions referred to and independently of the certification. But this can not properly be done. The said circular which discontinued the practice of recertifying such rights, recognizes the force of the validating act of August 18, 1894, and makes reference to that act as follows:

> The act of August 18, 1894 (28 Stat., 372, 397), operates on *existing certificates*, theretofore issued, in the hands of *bona fide* purchasers for value. It in no way affects the basic right, or alleged right, for which no "certificate" had been issued, or, if issued, had been lost or destroyed prior to transfer for value.

The said act of August 18, 1894, provides:

> That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

In the case of John M. Rankin (21 L. D., 404), it was held (syllabus):

> It was the intention of Congress in the act of August 18, 1894, to validate all outstanding certificates of soldier's additional homestead rights in the hands of bona fide holders.
>
> One who buys a certificate of additional right without notice of the illegality of said certificate at its inception, or of its invalidity for any other reason, is a bona fide purchaser under said act.

It would, therefore, appear that this right as certified for 80 acres was validated and confirmed by the act mentioned. Being so confirmed, it is valid to the full extent thereof and can not be reduced as for invalidity in part.

Therefore, the Commissioner's decision to the extent appealed from is reversed.

AMENDING PROCEDURE FOR FORFEITURE OF LOTS UNDER ALASKAN RAILROAD TOWN-SITE REGULATIONS.

CIRCULAR No. 554.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 22, 1917.

Circular No. 458, dated February 16, 1916, being the rules of procedure to govern the forfeiture of lots under the Alaskan railroad town-site regulations, is hereby amended as follows:

The notice provided for by paragraph 3 must be prepared in quadruplicate, the fourth copy to be forwarded to the Land and Industrial Department of the Alaskan Engineering Commission.

Paragraph 14 is revoked.

Paragraphs 15 and 16 are renumbered 14 and 15, respectively, and the latter amended to read as follows:

The Alaskan Engineering Commission will make all needful rules and regulations covering the period prescribed by the town-site regulations for the improvement of streets, sidewalks, and alleys, the promotion of sanitation and fire protection or other municipal improvements, and said commission is further authorized to levy and collect such assessments as may be necessary in the premises. If any claimant shall fail to comply with such regulations and requirements, all the facts in each case shall be reported to the Chief of Field Division, who will then proceed in accordance with the instructions contained hereinbefore. If any claimant shall fail to pay any and all assessments as required by the Alaskan Engineering Commission, the case will be reported to the Commissioner of the General Land Office, with a complete statement of the proceedings had, for submission to the Secretary of the Interior, who, after such notice as he may deem proper, will declare a forfeiture of the lot involved or make such other disposition of the case as the record may warrant.

Notice of delinquency in the payment of assessments will be given by the Alaskan Engineering Commission to the Register and Receiver of the United States Land Office within whose jurisdiction the lot or tract involved is situated for notation upon their records and transmission to the Commissioner of the General Land Office, and such notice will operate as a caveat against the issuance of patent or other evidence of title until the same is finally disposed of.

CLAY TALLMAN, *Commissioner.*

Approved, June 22, 1917.

FRANKLIN K. LANE, *Secretary.*

CAREY ACT LANDS IN IDAHO—ACQUISITION OF AREA IN EXCESS OF LEGAL LIMIT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 27, 1917.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

I am in receipt of your letter of May 29, 1917, concerning certain lands segregated under the Carey Act to the State of Idaho, which appear to have been the subject of reports by special agents of your office. From the memorandum accompanying your letter it would appear that certain tracts of land so segregated to the State had been acquired by one individual by the use of dummy entrymen, the entries having been made under the laws of the State of Idaho. Some of these tracts are already included in patents issued to the State, and for others patent to the State has not yet issued. You desire the advice and instructions of the Department as to whether compliance with the Federal laws in the disposition of these lands by the State is to be left entirely to the good faith of the State and regarded as directory only, or whether the land department can refuse patent to the State, notwithstanding that the water supply has been provided, because of the failure to dispose of the lands as required by the Carey Act.

Section 4 of the act of August 18, 1894 (28 Stat., 422), generally known as the Carey Act, provided, in brief, that the Secretary of the Interior could make a contract with the State—

> to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, * * * as thoroughly as is required of citizens who may enter under the said desert land law.

The act further provided that the State was authorized—

> to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

The above act was amended by the act of June 11, 1896 (29 Stat., 434), which authorized the State to create a lien against the lands granted for the actual cost and necessary expenses of reclamation. The act further provided that—

> when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation.

From the above quotations it is clear that the original Carey Act required the patenting to the State of all such lands as had been irrigated, reclaimed and occupied and of which not less than 20 acres of each 160-acre tract had been cultivated by actual settlers. These provisions, however, have been omitted by the later act of June 11, 1896, *supra*, whereunder, as between the State and the United States, patent shall issue by the United States when the water is actually furnished, without regard to settlement or cultivation. Under the existing law, therefore, it is the duty of the land department to issue patents to the State, under its contract with the United States, when the water is actually supplied, and apparently the question of settlement and cultivation is no longer material as far as the United States is concerned.

The Carey Act was accepted by the State of Idaho (See Sec. 1613, Idaho Revised Codes). Section 1626 of the Idaho Codes permits any citizen of the United States—

> to make application to enter any of said land in an amount not to exceed one hundred and sixty acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation, and settlement in accordance with the act of Congress and the laws of this State relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration.

Section 1628, as amended by the act of March 9, 1911 (Session Laws, Idaho, 1911, page 666), requires the settler to cultivate and reclaim not less than one-sixteenth part of the land settled upon within one year from the date of notice that the irrigation works are complete, and one-eighth of the land filed upon within two years from said notice. Within three years the settler must make final proof of reclamation, settlement and occupation, and that he has been an actual settler on the land and has cultivated and irrigated not less than one-eighth part of his tract, and such further proof, if any, as may be required by the regulations of the Department of the Interior, or the State Board of Land Commissioners. The proof so made is submitted to the said Board, the act providing that "upon approval of the same by the Board, the settler shall be entitled to his patent." Section 1631, Idaho Revised Codes, authorizes the Board of Land Commissioners to provide suitable rules "for the entry of and payment for the land by settlers, and for the forfeiture of entry by settlers upon failure to comply with the provisions of this chapter." Under section 1634, all suits or action brought by the Board shall be instituted in the name of the people of the State of Idaho.

It can not be doubted that the provisions of the Idaho laws are in harmony with, and probably intended to carry into execution, the

provisions of the Carey Act of August 18, 1894, as to the irrigation, reclamation, cultivation and occupation of each tract of 160 acres by an actual settler. The situation presented by your report, therefore, is that by means of false applications for entry to the State, and by means of dummy entrymen, an individual has acquired a greater area than the State law, passed in pursuance of the Federal provision, permits. It would appear that there is a regulation of the State Board of Land Commissioners which prohibits contest against entries after the final proof required by section 1628 of the Idaho Code has been submitted. I assume that such final proofs have been made in this instance, the record here, however, being silent as to whether the State patent has been issued or not. Primarily, there having been apparently a violation of the statutes of Idaho, that State should be advised thereof in order that it may take such steps as it may deem desirable to enforce its laws.

Since the act of June 11, 1896, *supra*, has limited the proof to be submitted by the State to the actual supply of water, without regard to settlement or cultivation, it would appear that the provisions as to the sale of the land to actual settlers, contained in the act of August 18, 1894, are left for execution to the good faith of the State. As stated by you, the situation is analogous to that of the Swamp Land acts, as to which the Supreme Court held that the provision requiring the State to expend the proceeds of the lands for the purpose of reclamation, etc., imposed an obligation resting upon the good faith of the State, no trust thereby attaching to the lands themselves. (See Mills County *v.* Railroad Companies, 107 U. S., 557; Hagar *v.* Reclamation District No. 108, 111 U. S., 701.) A similar ruling was made as to the school land grant in the case of Alabama *v.* Schmidt (232 U. S., 168), which held that while the trust created by a compact between the States and the United States that section 16 be used for school purposes is a sacred obligation imposed on the good faith of the State, the obligation is honorary, and the power of the State, where legal title has been vested in it, is plenary and exclusive. The matter presented, therefore, is one for action by the State of Idaho. As to lands already patented to the State no further action by the land department can be taken except to advise the State of the information it has which tends to disclose that a fraud has been committed in violation of the State law. The State should also be advised of any information you have as to the lands for which patent has not yet been issued by the United States, and you will in the meantime withhold such patents until advised by the State as to what action it desires to take.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

JOHN McCOY.

INSTRUCTIONS.

ALASKA HOMESTEADS—FRONTAGE ON NAVIGABLE WATERS—ACTS OF MAY 14, 1898, AND MARCH 3, 1903—APPROXIMATION RULE.

WASHINGTON, D. C., *July 6, 1917.*

VOGELSANG, *First Assistant Secretary:*

I have your [Commissioner of the General Land Office] communication of January 24, 1916, submitting for instructions the application of John McCoy for additional homestead entry under Section 6 of the act of March 2, 1889 (25 Stat., 854), which was suspended by the local officers for the reason that the tracts applied for had a frontage of more than 160 rods along the meander line of the Chena River, which appears to be navigable. The tracts applied for are the N. ½ NE. ¼, and lots 5 and 6, Sec. 11, T. 1 S., R. 1 E., Fairbanks Meridian, containing 131.44 acres. The N. ½ NE. ¼ appears to be a regular 80-acre tract, while the lots are irregular and front upon the stream. The north line of said lots is coterminous with the south line of the 80-acre tract, and said line is 160 rods in length. The south line of the two lots, being the meander line along the stream, is considerably more than 160 rods.

The act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), provides that no entry shall be allowed extending more than 160 rods along the shore of any navigable water, and that along such shore a space of at least 80 rods shall be reserved from entry between all such claims. The instructions for the administration of the law provide that in determining the extent of the water front of claims abutting on navigable waters, the measurements shall be made along the meanders of the shore. See 29 L. D., 95; 32 L. D., 91; 32 L. D., 424, and 39 L. D., 513.

You state that the present case is only one of a number of other similar cases, and that no doubt others will be presented in the administration of the land laws pertaining to Alaska. You further state that prior to the extension of the system of public surveys in Alaska, it was practicable to locate claims according to actual shore line measurement, as such claims were surveyed as individual claims without reference to the survey of the adjacent public lands. Therefore, when a person applied to enter a tract of land bordering upon navigable waters the length of shore line could be surveyed and the remaining portion of the acreage adjusted and surveyed with reference thereto. The Department appreciates the difficulty of this situation. If the shore frontage were made the controlling feature of the surveys, so as to form tracts representing the 160 rods which may be taken in a body along navigable water, and the 80 rods of re-

served area, or proportionate parts thereof, the surveys would of necessity depart entirely from the system of surveying townships and sections in rectangular form and in cardinal directions and with a view to uniformity as to the size of surveyed tracts, which system was adopted in the early history of the nation, and according to which the greater part of the public lands have been disposed of. The surveys would thus be regular with reference to length of shore line, and irregular in all other respects, which would be just the reverse of the established system, which results in regular tracts generally and the irregular tract as an exception.

In view of this situation, it is believed entirely proper to apply the principle of approximation in a manner similar to that employed with reference to excess acreage where, because of irregularity in the surveys, it is not practicable to confine an entry to the exact area allowed by law without division of a surveyed tract. This rule has long been in force as an administrative remedy. You suggest a similar rule to meet the present difficulty with reference to the surveys in Alaska along navigable waters. It is believed that a rule as stated below will effect a proper adjustment under the law, viz:

In consideration of applications to enter lands shown upon plats of public surveys in Alaska, abutting upon navigable waters, the restriction of 160 rods along the shore of such waters, provided by the act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), to which entries are limited, shall be determined as follows: The length of the water front of a subdivision will be considered as represented by the shortest distance between the two side lines of the subdivision, measured from the shore corner nearest the back line of the tract; and the sum of the distances of each subdivision of the application abutting on the waters, so determined, shall be considered as the total shore length of the application. Where, as so measured, the excess of shore length over 160 rods is greater than the deficiency would be if an end tract or tracts were eliminated, such tract or tracts shall be excluded, otherwise the application may be allowed if in other respects proper.

This principle shall also be applied with reference to the reservation of 80 rods between claims along the shore of such waters.

This rule will be applied only where the lands involved are surveyed under the system of public surveys. As to individual surveys, the administrative necessity for this rule does not obtain and they will be governed by the old rule as set forth in the case of Shirley S. Philbrick (39 L. D., 513).

You are, therefore, directed to apply the above rule to the present case and any similar cases. If no other objection be found, the application of McCoy should be allowed.

COAL-LAND LAWS AND REGULATIONS THEREUNDER.

NOTE: All laws and provisions relating exclusively to coal lands in the Territory of Alaska have been omitted from this circular for the reason that the Alaska coal land leasing circular of May 18, 1916, as amended, fully covers the field.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1917.

The following coal-land laws relating to the public-land States, together with the rules and regulations as now applicable, are herewith published for the instruction of the local land officers and the information of intending applicants. All rules and regulations in conflict herewith heretofore issued under said laws are hereby abrogated.

PART I.

TITLE XXXII, CHAPTER SIX, REVISED STATUTES.

MINERAL LANDS AND MINING RESOURCES.

Entry of coal lands, 3 March, 1873, c. 279 s. 1, v. 17, p. 607.

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Preemption of coal lands. Ibid., s. 2.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Preemption claims of coal land to be presented within sixty days, &c. Ibid., s. 3.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Only one entry allowed. Ibid., s. 4.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Conflicting claim. Ibid., s. 5.

SEC. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Rights reserved. Ibid., s. 6.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

RULES AND REGULATIONS.

1. The sale of coal lands is provided for—

(*a*) By ordinary *cash entry* under section 2347;

(*b*) By *cash entry* under a *preference* right to purchase acquired by compliance with the provisions of section 2348.

2. Coal lands may be entered only after survey and by legal subdivisions. The lands must be vacant and unappropriated coal lands of the United States, unreserved, unwithdrawn, and must contain workable deposits of coal and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years who is a citizen of the United States or has declared his intention to become such, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

A married woman may make entry if the laws of the State in which she applies permit married women to purchase and hold for themselves real estate; but she must make the entry for her own benefit, and not in the interest of her husband or any other person, and she will be required, in addition to the other affidavits required herein, to show, by affidavit, whether she is single or married, and, if married, that the purchase price is furnished from her own separate funds in which her husband has no interest.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less; also by the acquisition of a preference right of entry unless sufficient cause for the abandonment thereof is shown. Assignment of a preference right of entry under section 2348, Revised Statutes, has not been recognized since April 12, 1907.

6. (*a*) Coal withdrawals, and all withdrawals under the withdrawal act of June 25, 1910 (36 Stat. L., 847), as

amended by the act of August 24, 1912 (37 Stat. L., 497), prohibit the allowance of coal filings, applications, and entries while the withdrawals are outstanding. No preference or other right under the provisions of sections 2347–2352, inclusive, United States Revised Statutes, may be initiated or acquired on withdrawn coal lands or lands withdrawn under the provisions of said withdrawal act, subsequent to their withdrawal and prior to their restoration to coal-land entry.

(*b*) An Executive order of withdrawal is operative immediately at the time it is signed by the President.

(*c*) With reference, first, to cases where qualified persons or associations of qualified persons legally and in good faith went into possession of and opened and improved coal mines on the public domain within less than 60 days preceding the date when the lands upon which such mines are situated were withdrawn from coal entry or otherwise withdrawn under said withdrawal act and who have not filed coal declaratory statements; and second, to cases where qualified persons or associations of qualified persons in good faith filed coal declaratory statements in the proper local land office prior to the date on which the lands covered thereby were withdrawn from coal entry or otherwise withdrawn under said withdrawal act and who, in consequence of such withdrawal orders, have thereby not been permitted to proceed to entry within the preference period, it is to be observed that said withdrawal act and withdrawals made thereunder make no provision whatever for the protection of or passing to patent of any coal-land claim, filing, or application; hence, before such persons in said cases, and other similar cases, may proceed to obtain title, it will be necessary to modify the withdrawal order.

In all these cases your procedure will be to receive, give proper serial numbers to, and suspend the offered coal filings or applications and forward same, together with showing in support thereof, to the General Land Office, by special letter, and your report and recommendation thereon, whereupon said office will consider the same with a view of reporting to the Department the advisability of recommending that the President modify the outstanding withdrawal order, to the extent of the land involved and only for the purpose of permitting the specified claimants to proceed to entry. In these cases such claimants will, if duly qualified and in the absence of other objections, be permitted upon modification of the withdrawal to purchase at the price existent at the date of the opening and improving of the mine of coal; subject, of course, and in proper cases, to the provisions of the law with reference to the distance of the land from a completed railroad at date of application and payment, and upon the further condition that the claimant or claimants diligently prosecute his, its, or their claim to

completion within the time required by law and regulations.

The showing in support of the coal claimant's equities must be in duplicate, under oath and made by the claimant and such other individuals as are personally conversant with all of the facts in the case; be full and complete in every particular and should contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also enable the proper officers of the Government in Washington, D. C., to determine whether the case made by the claimant or claimants is such as to entitle him or them to favorable consideration, as hereinabove set forth.

(*d*) Information by means of schedules or diagrams, or both, will be furnished registers and receivers by the Commissioner of the General Land Office of the price at which all coal lands in their respective districts may be entered under the coal-land laws.

(*e*) Until the register and receiver at the proper local land office are in receipt of the *coal classification and appraisal*, (preliminary to which, generally, the lands are withdrawn under said act of June 25, 1910, as amended by said act of August 24, 1912, from coal filings, applications, and entries, although occasionally lands are classified without withdrawal, in which case the classification, or classification and appraisal, when made, occupies, so far as concerns proceedings under the coal-land laws, the same status as lands classified and appraised after withdrawal), *accompanied by notice of the Executive order of restoration*, they are not authorized to allow any coal filings, applications or entries for lands covered by Executive withdrawals, and if any such filings are presented they should be rejected outright, subject to the usual right of appeal.

(*f*) Lands classified as coal lands, appraised and restored to filing and entry, are, *after* the proper local land officers have been duly notified thereof and in the absence of other objection, subject to sale, under the coal-land law (entry, under nonmineral land laws of designated classes, of lands withdrawn or classified as coal lands, or valuable for coal, being permitted at any time prior to application therefor under the coal-land laws where the nonmineral entryman makes such entry with a reservation to the Government of the title to the coal deposits within the entered premises—see Addenda—in which event the coal deposits only may be entered, provided, always, that such coal deposits have then been restored to disposition under the coal-land laws and the regulations in force), at the appraised (or, if reappraised, at the reappraised price), unless shown by the applicant to be of such character as to be subject to entry under some other law; *except*, that when lands which were, at the time of appraisal, more than 15 miles from a railroad are brought within the 15-mile limit by the beginning of

operation of a new road, all values given in the original appraisal shall be doubled by the register and receiver.

(*g*) All public lands, and the coal deposits therein contained, (1) which have been withdrawn and thereafter *classified,* only, *as coal* and restored, (2) which have been withdrawn and thereafter classified as coal *"price not fixed"* and restored, (3) which have been withdrawn and thereafter *restored without classification,* or, (4) which have never been withdrawn, but which contain workable deposits of coal, are, if vacant, and otherwise available and so long as such lands are unaffected by, or embraced within, a coal withdrawal or other withdrawal under said withdrawal act, subject to coal filing and entry, unless shown by the applicant to be of such character as to be subject to entry under some other law.

As to the lands and the coal deposits therein contained, mentioned in said subdivision "g," the price thereof is, when same are sold under the coal-land laws, not less than $10 per acre when the land is situated more than 15 miles from a completed railroad and $20 per acre when the land is situated within 15 miles of a completed railroad. When lands lie partly without such limit, the higher price must be paid for each smallest legal subdivision the greater part of which lies within 15 miles of such railroad. The term "completed railroad" is construed to mean a railroad *actually constructed, equipped,* and *operating* at the date the applicant filed proper application to purchase and paid the price of the land. The distance is to be calculated from the point on such railroad nearest the land applied for, and the facts in each case, including cases where the appraisal does not show that the appraised land is within the 15-mile limit, must be shown by the affidavit of the applicant, corroborated by the affidavits of two disinterested credible persons having actual knowledge thereof.

(*h*) Lands classified as non-coal are *prima facie* non-coal in character. You will advise any person presenting an application under the coal-land laws for lands classified as non-coal that he will be allowed 30 days in which to submit evidence, consisting preferably of the sworn statements of experts or practical miners, that the land is in fact coal in character, together with an application that it be reclassified, and that in the event of failure to furnish said evidence within the time specified the application will be rejected. Such application will be given proper serial numbers and notation thereof made upon the records, and when accompanied by the necessary evidence they will be forwarded to the General Land Office, where, if upon the showing made, and such other inquiry as may be deemed proper, the land is classified as coal land, the coal-land application will be returned for allowance in the absence of other objection. If reclassification be denied, the applicant may, within 30 days from receipt of notice, appeal or apply for a hearing, at which hearing he will be afforded an opportunity to show that the classification is

improper, in which event he must assume the burden of proof. If he should fail to apply for a hearing within the time allowed, or to appeal, his application to enter or file will be finally rejected.

(*i*) In so far as any of the preceding subdivisions of this paragraph relate to the selling price of the land under the coal-land laws, they are to be considered and observed in connection with what is hereinafter set forth in paragraph 18 of these regulations.

7. A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed. The statute clearly contemplates the actual opening of a mine of coal and its improvement as such. Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential. What specific work or workings constitute the opening of a mine, or what accomplishes the improvement of a mine when opened, are matters as to which no arbitrary and inflexible rule can be laid down. Each case as it arises must be determined upon the facts disclosed; but, work, merely for prospecting purposes, does not meet the requirements of the coal-land laws conferring a preference right of purchase upon one who opens and improves a coal mine upon the public domain.

There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the *opening* and *improving* of the mine as a condition precedent to a preference right under section 2348 of the Revised Statutes. A violation of the law in this regard may subject the offending party to an action for damages for the trespass committed.

As to the circumstances under which nonmineral entrymen may, of right, use, for domestic purposes, upon the entered land, deposits of coal belonging to the United States, see the statutes in the Addenda.

To preserve a preference right of entry specified in the statute the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days from the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. When the township plat is not on file at the date of such improvement such declaratory statement must be presented within sixty days from the receipt of such plat at the district land office. [See, in this connection, paragraph 6, subdivisions (*a*) and (*c*).]

8. At any time prior to the issuance of patent protest may be filed against the patenting of the land applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings, or upon any other ground sufficient to deny the issuance of patent.

Protests filed will be received and acted upon by the local officers in accordance with the Rules of Practice and such rules will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands and deposits of coal. Government protests in connection with coal claims in Forest Reserves will be governed by the provisions of the joint regulations of September 4, 1915 (44 L. D., 360), and amendments thereto.

FEES OF REGISTERS AND RECEIVERS.

9. In Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming, registers and receivers are allowed by law a fee of $3 for each coal-land declaratory statement filed.

In Arkansas, North Dakota, and South Dakota, registers and receivers are allowed by law a fee of $2 for each coal-land declaratory statement filed.

Declaratory statement fees are earned irrespective of the action taken upon the declaratory statement.

Each applicant must, at the time he presents his application to purchase, either in the exercise of a preference right or otherwise than in the exercise of a preference right, deposit with the receiver a filing fee of $10.

10. When it is sought to purchase otherwise than in the exercise of a preference right the party will himself make oath to the following application, which must be presented to the register:

I, ——— ———, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the —— quarter of section ——, in township —— of range ——, in the district of lands subject to sale at the land office at ———, and containing —— acres; and I solemnly swear that no portion of said tract is in the possession of any other party or parties who has or have commenced improvements thereon for the development of coal; that I am twenty-one years of age; a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held, except ——, or purchased any lands under said act, either as an individual or as a member of an association; that I make this application in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

11. Where a preference right of entry is sought to be preserved the required declaratory statement must be substantially as follows:

I, ——— ———, do hereby declare my intention to purchase, in the exercise of a preference right, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the —— quarter of section —— of township —— of range ——, in the district of the lands subject to sale at the district land office at ———; and I do solemnly swear that I am —— years of age and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I have never, either as an individual or as a member of an association, held, except ——— or purchased any coal lands under the aforesaid provisions of the Revised Statutes; that I was in possession of, and commenced improvements on, said tract on the —— day of ———, A. D. 19—, and have ever since remained in actual possession continuously; that I have opened and improved a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows: (Here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

12. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but the local officers will allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract. No notice will be given to parties whose declaratory statements have expired by limitation under the law.

13. A claimant who has failed to file declaratory statement within the 60-day period may, in the absence of intervening adverse rights in, or disposition of, the land involved, file declaratory statement at any time subsequent to such period and within the ensuing year, but a declarant will not be permitted to exercise a preference right of purchase after the expiration of the statutory period.

14. When it is sought to purchase, in the exercise of a preference right, the applicant must himself make the following affidavit, which must be presented to the register:

I, ——— ———, claiming, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the preference right to purchase the —— quarter of section ——, in township —— of range ——, subject to sale at the district land office at ———, hereby apply to purchase and enter the same; and I do solemnly swear that I have not hitherto held, except ——— or purchased, either as an individual or as a member of an association, any coal lands under the aforesaid provisions of the law; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of ——— dollars, the nature of such improvements being as follows: ——— ———; that I am now in the actual possession of said mines, and make the entry in good faith for my own

benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

15. Where purchase and entry, whether in the exercise of a preference right or otherwise, is made by an association, each member thereof must subscribe and swear to the application or affidavit, the necessary changes being made to cover the joint possession and expenditure and the purchase and entry in their joint interest.

16. Each application, declaratory statement, and affidavit, forms whereof are given above, must be verified before the register or receiver or some officer authorized by law to administer oaths in the land district wherein the lands involved are situate. (Amendment of April 29, 1908, 36 L. D., 368.)

Necessary changes should be made in the application, declaratory statement, affidavit and sworn statement where it is sought to acquire possession of or title to the coal *deposits* only.

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14 the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

After an application to purchase has been received no other person will be permitted to file on the land embraced therein under any public-land law until such application shall have been finally disposed of adverse to the applicant.

Notations should be made upon the tract books and other records of the local land offices of the filing of all coal declaratory statements and applications to purchase under the coal-land law, and said coal declaratory statements and applications to purchase should be properly indorsed so as to show the date of filing, the filing fees and purchase money paid. All such coal declaratory statements and applications to purchase, except rejected unappealed coal declaratory statements and ap-

plications to purchase, should also be noted upon the tract books of the General Land Office.

The local land officers will forward with the returns for each month all coal declaratory statements and applications to purchase received by them during the month, whether protested or not, unless the same are rejected or suspended by them.

Rejected coal declaratory statements and applications to purchase must be held for appeal, and transmitted to the General Land Office with the returns for the month during which the appeal is filed, or for the month in which the time allowed for appeal expires. There must be attached to each rejected coal declaratory statement or application to purchase a "rejection slip" (Form 4–659), or copy of notice of rejection, properly signed, and the final disposition must be plainly noted on such rejection slip, or copy of notice of rejection, before the papers are transmitted with the monthly returns, together with all proofs of service.

Except as otherwise provided for in these regulations, suspended coal declaratory statements and applications to purchase must be forwarded with the returns for the month during which the suspension was removed.

When proper application to purchase coal land, whether at private entry under section 2347, Revised Statutes, or in the exercise of a preference right under section 2348, Revised Statutes, is filed and is not, for any reason, rejected or suspended by the local land officers, the register will, at the time such application to purchase is filed, prepare the proper notices for publication and forward copy thereof to the Chief of Field Division or the proper forest officer, if the lands are in a national forest, and to the State, if in a school section. The register and receiver will thereafter forward the application to purchase, indorsed so as to show the date of filing and the amount of filing fee paid, with the returns for the month in which the application to purchase was filed, together with their written report as to the amount, if any, of purchase money paid (see 41 L. D., 417), and as to the action taken by them with reference to publication of notice, delivering copy of same to the Chief of Field Division and other parties entitled to such copy. When the proofs are completed they must forward the same as provided by Circular No. 105, as amended.

Contests should be duly noted upon the records as required by the circular of August 4, 1910 (39 L. D., 150–151).

The register and receiver will promptly report to the General Land Office, with appropriate recommendation, all coal-land applications wherein proof and payment are not made within the time required. See, in this connection, amended paragraph 18.

18. After the 30 days' period of newspaper publication has expired the claimant will furnish from the office of

publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said 30 days' publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of 30 days, the certificate to state distinctly when such posting was done and how long continued, giving the dates.

The claimant will be required within 30 days after the expiration of the period of newspaper publication to furnish the proofs specified in this paragraph, whereupon, and after receipt of report of chief of field division, as required in paragraphs 5 and 6 of circular approved April 24, 1907, the register and receiver will examine the proofs submitted, and if all be found regular and the application allowable will, by registered mail or personal service, so notify the applicant in writing, requiring him, within 15 days from receipt of notice of such allowance, to make payment of the purchase money unless it has theretofore been made. Should the specified proofs and purchase money be not furnished and tendered within the time prescribed, the local officers will reject the application subject to appeal. In the exercise of a preference right of purchase, the publication and posting of notice should be completed and the proof thereof filed within the year fixed by the statute.

Applicants to purchase under section 2347 of the Revised Statutes may at their option pay for the land at the time of filing their applications to purchase, or at any time thereafter, up to 15 days from and after receipt of notice from the register and receiver, as hereinbefore provided. The price to be paid will be that existent at date of actual payment of the purchase money by the applicants to the register and receiver, and a subsequent increase in the price will not affect their right to complete the applications, if proceedings be diligently prosecuted to final proof and entry. Where payments are not made at time of filing applications to purchase, but are deferred to a later date, and an increase in valuation has occurred subsequent to application to purchase, but before the actual tender and payment of the purchase money, the applicants will in all such cases be required to pay the new or higher price.

The foregoing is not applicable to coal-land claimants who have initiated claims under section 2348 of the Revised Statutes, by the opening and improving of a mine of coal on public land, and who have diligently prosecuted their claims to completion, as required by the law and regulations. Such claimants will be required to pay the price fixed and existent at the time of the initiation of

their claims. (As amended December 30, 1912, 41 L. D., 417, 418).

When the purchase price is paid the receiver will deposit the same to his official credit as "Trust Funds" (Unearned Moneys) and the same may be held until earned and applied or returned.

19. Of the following forms, the one appropriate to the sections of the Revised Statutes under which application is made should be used for publication of all notices of application to enter coal lands:

(Amendment of July 9, 1912, 41 L. D., 100, 101).

Notice for publication.

COAL ENTRY.

(Sec. 2347, R. S.)

——— ——— LAND OFFICE,
——— ———, *19—*.

Notice is hereby given that ——— ———, of ———, county of ———, State of ———, has this day filed in this office his application to purchase, under the provisions of section 2347, U. S. Revised Statutes, the —— of section No. ——, township No. ——, range No. ——.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by the applicant, should file their affidavits of protest 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.*

Notice for publication.

COAL ENTRY.

(Secs. 2348–2352, R. S.)

——— ——— LAND OFFICE,
——— ———, *19——*.

Notice is hereby given that ——— ———, of ———, county of ———, State of ———, who, on the —— day of ———, 19——, filed in this office his coal declaratory statement for the ——— of section No. ———, township No. ——, range No. ——, has this day filed in this office his application to purchase said land under the provisions of sections 2348 to 2352, United States Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by the applicant, should file their affidavits of protest in this office during the 30-day period of publication immediately following the first printed issue of this notice.

——— ———, *Register.*

The necessary changes should be made in the notice in all cases where the coal *deposits* only are sought to be entered.

20. An application for cash entry will be subject to any valid adverse right which may have attached to the same land pursuant to section 2348, Revised Statutes.

21. Qualified persons or associations who are lawfully in possession of tracts of coal lands which are still unsurveyed may, under sections 2401, 2402, and 2403, Revised Statutes, as amended by the act of August 20, 1894, apply to the surveyor-general for the survey of the town-

ship or townships, or portions thereof, embracing the lands claimed, to be specified as nearly as practicable. Each such application must be accompanied by the affidavit of the applicant or applicants, duly corroborated by at least two competent persons, setting forth the qualifications of the former as claimant or claimants of the land, the facts constituting their possession, the character of the land, and such other facts in the case as are essential in that connection. If the surveyor-general approves the application he will thereupon transmit it to the General Land Office with the affidavits and his report.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

ADDENDA.

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

(*Act March 3, 1909, 35 Stat. L., 844.*)

An Act For the protection of the surface rights of entrymen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Public lands.
Confirmation of entries on lands erroneously deemed nonmineral.
Preservation of coal rights to United States.
Disposal under coal land laws.
Right of owner of surface.
Provisos.
Domestic use of coal.
Rights of entryman.

(*Act June 22, 1910, 36 Stat. L., 583.*)

An Act To provide for agricultural entries on coal lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have

Public lands.
Classified, etc., coal lands.
Agricultural entries for surface allowed.

R. S., sec. 2290, p. 420.
Vol. 19, p. 6071.
Vol. 28, p. 422.
Vol. 32, p. 388.
Right to prospect, etc., for coal reserved.
Limit and conditions.
Vol. 35, p. 639.

been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" *Provided,* That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act.

Proviso.

Perfection of present entries.

Applications to state nature of entry.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act.

Patents to reserve coal rights.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by

Disposal of coal deposits.

Entry for prospecting, etc.

reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have 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: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Damages to surface owners.

Provisos. Mining for domestic use.

Right of entryman to disprove coal classifications.

Acts supplementing the above act of June 22, 1910.

The act approved April 23, 1912 (37 Stat., 90), opening coal lands in Alabama to agricultural entry, reserving to the United States the title to the coal deposits in the land. For instructions of March 24, 1912, under said act, see 41 L. D., 32.

The act approved April 30, 1912 (37 Stat., 105), relative to disposal of lands to States, and as to isolated tracts, where the title to the coal in the land is reserved to the United States. See instructions of May 24, 1912 (41 L. D., 30); January 11, 1915 (43 L. D., 491), and June 4, 1912 (41 L. D., 89), thereunder.

The act approved August 3, 1914 (38 Stat., 681), pertaining to the disposition, where the entryman reserves to the Government the title to the coal in the land, of certain coal lands within the ceded portion of the Fort Berthold Indian Reservation in North Dakota, and also the coal deposits.

(*Act June 25, 1910, 36 Stat. L., 847*).

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

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

Public lands. Temporary withdrawals by President for power sites, irrigation, etc., authorized.

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

Mining rights continued.

SEC. 2.[1] That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

Exceptions.

Provisos.

Rights of bona fide oil or gas claimants.

Status of prior claims.

Homestead, etc., settlements excepted.

Restriction on new forest reserves.

Report of withdrawals to Congress.

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

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

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

An Act To provide for stock-raising homesteads, and for other purposes.

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

* * * * *

Coal and mineral deposits reserved.

SEC. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in ac-

Disposal under mining laws.

[1] Sec. 2 of the above act was amended by act of August 24, 1912 (37 Stat., 497) to permit exploration, location, and purchase of withdrawn lands containing metalliferous minerals only. (See, in this connection, circular of October 21, 1912, 41 L. D., 345.)

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

Locating and prospecting allowed.

Surface entries for mining purposes permitted.

Conditions.

Proviso. Mining patents subject to grazing rights, etc.

(*Act February 27, 1917, 39 Stat. L., 944.*)

An Act To authorize agricultural entries on surplus coal lands in Indian reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any Indian reservation heretofore or hereafter opened to settlement and entry pursuant to a classification of the surplus lands therein as mineral and nonmineral, such surplus lands not otherwise reserved or disposed of, which have been or may be withdrawn or

Indian Reservations. Agricultural entries allowed for surface of coal lands in.

classified as coal lands or are valuable for coal deposits, shall be subject to the same disposition as is or may be prescribed by law for the nonmineral lands in such reservation whenever proper application shall be made with a view of obtaining title to such lands, with a reservation to the United States of the coal deposits therein and of the right to prospect for, mine, and remove the same: *Provided*, That such surplus lands, prior to any disposition hereunder, shall be examined, separated into classes the same as are the nonmineral lands in such reservations, and appraised as to their value, exclusive of the coal deposits therein, under such rules and regulations as shall be prescribed by the Secretary of the Interior for that purpose.

Proviso.

Classification, appraisal, etc.

Conditions of applications.

SEC. 2. That any applicant for such lands shall state in his application that the same is made in accordance with and subject to the provisions and reservations of this act, and upon submission of satisfactory proof of full compliance with the provisions of law under which application or entry is made and of this act shall be entitled to a patent to the lands applied for and entered by him, which patent shall contain a reservation to the United States of all the coal deposits in the lands so patented, together with the right to prospect for, mine, and remove the same.

Issue of conditional patent.

Coal deposits subject to laws in force.

SEC. 3. That if the coal-land laws have been or shall be extended over lands applied for, entered, or patented hereunder the coal deposits therein shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right at all times to enter upon the lands applied for, entered, or patented under this act for the purpose of prospecting for coal thereon, if such coal deposits are then subject to disposition, upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting.

Bond for prospecting.

Mining entries, etc., permitted.

Any person who has acquired from the United States the coal deposits in any such lands, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for personal use upon the land for domestic purposes at any time prior to the disposal by the United States of the

Provisos.

Coal for personal use.

coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications made under the applicable land laws of the United States for any such surplus lands which have been or may be classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Application to disprove classification as coal lands.

SEC. 4. That the net proceeds derived from the sale and entry of such surplus lands in conformity with the provisions of this act shall be paid into the Treasury of the United States to the credit of the same fund under the same conditions and limitations as are or may be prescribed by law for the disposition of the proceeds arising from the disposal of other surplus lands in such Indian reservation: *Provided*, That the provisions of this act shall not apply to the lands of the Five Civilized Tribes of Indians in Oklahoma.

Proceeds to credit of Indians.

Proviso. Lands of Five Civilized Tribes excluded.

EXCERPTS FROM THE SEPTEMBER 7, 1909, INSTRUCTIONS (38 L. D., 183, 185) UNDER THE ACT OF CONGRESS APPROVED MARCH 3, 1909 (35 STAT. L., 844), FOR THE PROTECTION OF SURFACE RIGHTS OF ENTRYMEN.

DISPOSAL OF THE COAL DEPOSITS.

7. Where election to accept patent with the prescribed reservation has been made by the nonmineral claimant coal deposits in the land may be prospected for, mined, and removed under the existing coal-land laws, provided the person desiring so to do first procures the consent of the surface owner, or furnishes such security for payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. But no coal declaratory statement or application to purchase under sections 2347–2352 of the Revised Statutes, and the regulations of this office, will be received until the nonmineral claimant has elected to take a patent containing the prescribed reservation.

Appeals shall be allowed in all proceedings brought hereunder as in other cases. (As amended Nov. 21, 1912, 41 L. D., 358.)

CERTIFICATES AND PATENTS.

8. Coal declaratory statements, certificates, and patents issued under the provisions of this act will describe the land by legal subdivisions as under the general coal-land laws, and payment will be made at the price fixed for the whole area, but appropriate conditions and limitations will be incorporated in the patent fully defining the interests and rights of the respective parties. To this end you will note on each coal receipt and certificate issued by you, in pursuance thereof, the words "Patent will contain conditions and limitations of the act of March 3, 1909 (35 Stat., 844)."

EXCERPTS FROM THE SEPTEMBER 8, 1910, INSTRUCTIONS (39 L. D., 179, 183) UNDER THE ACT APPROVED JUNE 22, 1910 (36 STAT. L., 583), TO PROVIDE FOR AGRICULTURAL ENTRIES ON COAL LANDS.

DISPOSAL OF COAL DEPOSITS.

6. *Right to prospect for coal—Bond to be filed.*—By section 3 of the act it is provided that upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the land so patented, together with the right to prospect for, mine, and remove the same; and that the coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Said section 3 also provides that any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval of the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting; and that any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages.

As a condition precedent to the exercise of the right mentioned in this act to prospect for coal, the person desiring so to prospect must file in the office of the Commissioner of the General Land Office, for submission to the Secretary of the Interior for his approval, a bond or undertaking to indemnify the nonmineral claimant in lawful possession under this act from all damages that may accrue to the latter's crops and improvements on such lands by reason of such prospecting, the right to prospect to date from receipt of notice of approval of the bond. There must be filed with such bond evidence of service of a copy thereof upon the nonmineral claimant. The bond must be executed by the prospector as principal, with two competent individual sureties, or a corporate surety that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), as amended by the act approved March 23, 1910 (36 Stat., 241), in the sum of $1,000, as per form hereto annexed. Except in the case of a bond given by a qualified corporate surety, there must be filed therewith affidavits of justification by the sureties, and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Coal declaratory statements for and applications to purchase the coal deposits in lands entered, selected, or withdrawn under the reclama-

tion act, as provided in section 2 of act, will be received and filed at any time after such entry or selection has been received and allowed of record or such withdrawal has become a matter of record in your office; coal declaratory statements for and applications to purchase the coal deposits in those lands embraced in nonmineral entries, selections, or locations made in good faith, described in, and protected by the proviso in section 1 of the act will be accepted and filed after it shall have been determined and become a matter of record in your office that such nonmineral entryman, selector, or locator shall receive the limited patent prescribed in the act: *Provided always,* That such lands, or the coal deposits therein, have then been restored to disposition under the coal-land laws and the regulations in force. (As amended Oct. 26, 1914, 43 L. D., 424.)

APPLICATIONS, CERTIFICATES, AND PATENTS.

7. (*c*) Coal declaratory statements, applications to purchase, certificates, and patents issued under the provisions of this act will describe the coal within legal subdivisions, and payment will be made at the price fixed for the whole acreage. Coal declaratory statements and applications to purchase under sections 2347–2352, Revised Statutes, for coal deposits disposable under this act, must have noted across the face of same, before such coal declaratory statements or applications to purchase are signed by the coal claimants and presented to you, the words—

Patent will convey only the coal in the land and rights incident thereto in accordance with the conditions and limitations of the act of June 22, 1910 (36 Stat., 583).

You will make like notation on each coal entry, final certificate, and notice of allowance issued by you for coal deposits disposable under this act. (Amendment of Sept. 27, 1910.)

There will be incorporated in patents to coal claimants for coal deposits disposed of under this act substantially the following words:

Now know ye, that there is, therefore, pursuant to the law aforesaid, hereby granted by the United States unto the said grantee and to the heirs or successors and assigns of said grantee all the coal and the coal deposits in the land above described, together with the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions of and subject to the limitations of the act of June 22, 1910 (36 Stat., 583), entitled "An act to provide for agricultural entries on coal lands."

FORM OF BOND.

[Approved by Department, Sept. 8, 1910.]

(Under act of June 22, 1910, 36 Stat., 583.)[1]

KNOW ALL MEN BY THESE PRESENTS, That I ——— ——— of ——— (or we ——— ——— of ——— and ——— ——— of ———, as the case may be), a citizen (or citizens) of the United States, or having declared my (or our) intention to become a citizen (or citizens) of the United States, and never having held or purchased lands from the United States under the coal-land laws, either as an individual or as a member of an association, as principal (or principals), and ——— ——— of ———, and ——— ——— of ———, as sureties, are held and firmly bound unto ———

[1] NOTE: Act of June 22, 1910 (36 Stat. L., 583), printed in full on this bond.

———, his heirs, executors, administrators, or assigns, in the full sum of one thousand dollars ($1,000), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this ——— day of ———, 191—.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above bounden ——— ——— is desirous of entering upon the ———, section ———, township ———, range ———, ——— land district, ———, for the purpose of prospecting for coal thereon under the provisions of the act of June 22, 1910 (36 Stat., 583); and, whereas, the above-named ——— ——— is the lawful claimant of said land,

NOW THEREFORE, if the said above bounden parties, or either of them, or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the said claimant, his heirs, executors or administrators, or assigns, for all such damages to the crops and improvements on said lands as the said claimant, his heirs, executors, administrators, or assigns shall suffer or sustain by reason of his, the above bounden principal's, prospecting for coal on said described land, then this obligation shall be null and void; otherwise the same shall remain in full force and effect.

——— ———
Principal.

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

——— ——— ——— ———
Surety.

Residence ——— ——— Residence ——— ———

——— ——— ——— ———
Surety.

Residence ——— ——— Residence ——— ———

EXCERPTS FROM THE JANUARY 27, 1917, INSTRUCTIONS (45 L. D., 625) UNDER THE ACT APPROVED DECEMBER 29, 1916 (39 STAT. L., 862), TO PROVIDE FOR STOCK-RAISING HOMESTEADS, AND FOR OTHER PURPOSES.

DISPOSAL OF COAL AND OTHER MINERAL DEPOSITS.

14. (*a*) Section 9 of the act provides that all entries made and patents issued under its provisions shall contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same; also that the coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Said section 9 also provides that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the

damages to crops or other tangible improvements to the owner thereof under agreement; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon. This bond, the form whereof will be found printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), and must be in the sum of not less than $1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

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

owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owner of the lands, said register and receiver may, if all else be regular, approve the bond.

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

* * * * * * *

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

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

Patent shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (Public, 290), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

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

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

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

BOND FOR MINERAL CLAIMANTS.

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

KNOW ALL MEN BY THESE PRESENTS, That ——————————
(Give full name and address.)
——— citizen— of the United States, or having declared ——— intention to become ——— citizen— of the United States, as principal—, and ——————————
(My or our.) (Give full name and address.)
and ——————————
as sureties, are held and firmly bound unto the United States of America, for the use and benefit of the hereinafter-mentioned entryman or owner of the hereinafter-described land, whereof homestead entry has been made subject to the act of December 29, 1916 (39 Stat. L., 862), in the sum of ——————————
dollars ($————), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

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

THE CONDITION OF THIS OBLIGATION IS SUCH, That, whereas the above-bounden ——

ha—— acquired from the United States the ——————————
deposits (together with the right to mine and remove the same) situate, lying, and

being within the ——————————————————————
of section ——————, township ——————, range ——————, ——————m.;
——————————— land district, ———————————————————
and whereas homestead entry, serial No. ——————————— has been made at
——————————— land office, of the surface of said above-described land, under the provisions of said act of December 29, 1916, by ——————————

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

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

FULL NAME OF WITNESS.	ADDRESS.	(The principal should sign first.)
——————,	——————,	AS TO ☞
——————,	——————,	——————[SEAL.] (Principal.)
——————,	——————,	" ——————[SEAL.] (Principal.)
——————,	——————,	" ——————[SEAL.] (Principal.)
——————,	——————,	" ——————[SEAL.] (Surety.)
——————,	——————,	" ——————[SEAL.] (Surety.)
——————,	——————,	" ——————[SEAL.] (Surety.)

Give address of each witness.

☞Two witnesses to each signature.

☞Adhesive or impression seals required.

☞Sign full names.

☞Any erasure, insertion, or mutilation must be certified to as made before signing.

DISPOSITION OF SURPLUS COAL LANDS RESTORED FROM INDIAN RESERVATIONS (46 L. D., 79).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, April 16, 1917.

Registers and receivers, United States land offices.

SIRS: Attention is directed to the act of Congress approved February 27, 1917 (Public, No. 358), entitled "An act to authorize agricultural entries on surplus coal lands in Indian reservations," copy of which is appended hereto.

With the exception of the lands of the Five Civilized Tribes, the act applies to all Indian reservations that have been or which may be hereafter restored where the surplus lands are or may be divided into mineral and nonmineral classes.

It recognizes that such surplus coal lands have two distinct values, coal and nonmineral or agricultural. It provides for the disposition of the two estates therein created, the coal deposits and the nonmineral, and directs that the proceeds derived from both be placed to the credit of the Indians in the manner provided for other surplus lands. But while the estates may be so separated, no sale of the coal deposits only may be made in advance of the disposition of the nonmineral estate. It does not extend the coal-land laws to areas not otherwise subject thereto, except to permit of the purchase of the coal deposits where the lands have been disposed of under the act with a reservation of such deposits, and then only where the coal-land laws shall have been extended to such areas at the time of such coal purchase. It does not repeal or modify the coal-land laws where otherwise applicable, nor prevent the acquisition of both estates thereunder, but in providing for the disposition of the two estates and in directing the payment to the Indians of the proceeds arising from each, it necessarily contemplates that if the coal-land purchaser precede the agricultural applicant and thus secure title to both estates, he must pay for each at the prices fixed for the respective estates.

Where the law providing for the separation of the lands into mineral and nonmineral classes placed a flat price on the nonmineral lands or authorized the disposal of such lands at a general price which has been so fixed, this act does not require a specific tract appraisal of the coal lands to be disposed of thereunder with a reservation of the coal deposits and in all such cases the nonmineral or agricultural estate may be disposed of at the prices so fixed for the nonmineral lands. Where the law requires that the nonmineral lands shall be separated into further classes and appraised either by tracts or by such groups, no disposition of the coal lands in such reservation may be made either under this act or under the coal-land laws until such surplus lands have been separated into classes and appraised as to their value exclusive of the coal deposits in the manner provided for nonmineral lands, and in such cases the act has the effect of withdrawing from entry under the coal-land laws the coal lands in such reservations until such coal lands shall have been appraised without reference to the coal deposits, in the manner provided for the nonmineral lands.

If the nonmineral lands and the coal lands with the reservation of the coal deposits be withdrawn from other disposition for the purpose of sale, no entry under the coal-land laws may be allowed therefor until such lands shall have been sold with the reservation of such deposits or restored. The coal deposits in lands sold or otherwise disposed of with a reservation of the coal, if otherwise subject to disposition, may be purchased under the coal-land laws at prices fixed thereunder, and if any of the coal lands so withdrawn for sale shall be restored unsold, both estates may be purchased under the coal-land laws upon the payment of the nonmineral and coal prices.

If, under the law authorizing the disposal of the nonmineral lands, a proclamation of the President or order of the Secretary is required

before the restoration can take effect, the coal lands with the reservation of the coal deposits will not become subject to disposal under the provisions of this act until so restored.

Very respectfully,

C. M. BRUCE,
Acting Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

CLASSIFICATION AND VALUATION OF PUBLIC COAL LANDS.

(NOTE.—The classification and valuation of public coal lands are made by the U. S. Geological Survey. Notice thereof is sent to the proper local officers by the General Land Office.)

REGULATIONS, FEBRUARY 20, 1913 (41 L. D., 528).

I. CLASSIFICATION.

1. Land shall be classified as coal land if it contains coal having—

(*a*) A heat value of not less than 8,000 B. t. u. on an air-dried, unwashed or washed, unweathered mine sample.

(*b*) A thickness of or equivalent to 14 inches for coals having a heat value of 12,000 B. t. u. or more, increasing 1 inch for a decrease from 12,000 to 11,000 B. t. u., 1 inch for a decrease from 11,000 to 10,500 B. t. u., 1 inch for each decrease of 250 B. t. u. from 10,500 to 10,000, and 1 inch for each decrease of 100 B. t. u. below 10,000.

(*c*) A depth below the surface for a bed of coal 6 feet or more thick of not more than 100 feet for each 300 B. t. u. or major fraction thereof, and for a bed of minimum thickness for that coal a depth of not more than 500 feet, and for beds of any thickness between the minimum and 6 feet a depth directly proportional to that thickness within these limits, provided that, if the coal lies below the depth limit but within a horizontal distance from the surface not exceeding 10 times the depth limit, or if its horizontal distance from the foot of a possible shaft (not deeper than the depth limit) plus 7.5 times the depth of such shaft does not exceed 10 times the depth limit, the land shall be classified as coal land; provided, further, that the depth limit shall be computed for each individual bed, except that where two or more beds occur in such relations that they may be mined from the same opening the depth limit may be determined on the group as a unit, being fixed at the center of weight of the group, no coal that is below the depth limit thus determined to be considered.

2. Classification shall be made by quarter-quarter sections or surveyed lots. (As amended Feb. 16, 1915, 43 L. D., 520.)

II. VALUATION.

3. For purposes of valuation the price per ton for a noncoking, nonanthracite coal 6 to 10 feet thick shall be one-tenth of a cent for each 1,250 B. t. u.:

(*a*) Provided that the price per ton may be increased by not more than 100 per cent if the coal is coking, smokeless, or anthracitic or has other enhancing qualities; or it may be decreased for high sulphur or ash, friability, or nonstocking or other qualities that reduce the value; and

(*b*) Provided, further, that if the coal in one bed is over 10 feet thick the price on each foot above 10 feet shall be reduced 1 per cent for each such foot (thus the reduction will be 1 per cent on the eleventh foot, 2 per cent on the twelfth foot, and so on); or if the coal is less than 6 feet thick the price shall be reduced by multiplying the normal value by $\frac{4+t}{10}$, where t equals thickness in feet; and

(*c*) Provided that where the thickness of any bed varies irregularly its computed thickness (CT) over any area shall be equal to the average of the measurements (AM) less the sum of the differences between each measurement and the average of the measurements (SD) divided by the sum of the measurements (S):

$$CT = AM - \frac{SD}{S}$$

4. The value of any acre within 15 miles of a railroad in operation shall be determined at the rate per ton prescribed above on an estimated recoverable tonnage of 1,000 tons to the acre-foot:

Provided that if the coal is in several beds having an aggregate thickness of more than 10 feet if beds less than 6 feet thick are considered at the reduced thickness as prescribed above, the value due to each foot above 10 feet shall be reduced 1 per cent for each such foot (as in computing the price per ton on a single thick bed) up to a thickness of 80 feet, above which any additional thickness shall be valued at 30 per cent of the normal value.

5. This price shall be decreased one-half if the land is more than 15 miles from a railroad in operation, or if it is within that limit but inaccessible owing to topographic conditions; but no land shall be valued at less than the legal minimum price, nor shall the price of any land exceed $300 an acre except in districts which contain large coal mines and where the character and extent of the coal are well known.

6. Within the above restrictions a graded allowance shall be made for increasing depth, and allowance may be made for any special conditions enhancing or diminishing the value of the land for coal mining.

7. If only a part of a smallest legal subdivision is underlain by coal the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but this price shall be not less than the minimum provided by law.

8. When lands which were at the time of classification more than 15 miles from a railroad are brought within the 15-mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

9. Review of classification or valuation may be had only on application therefor to the Secretary, accompanied by a clear and specific statement of conditions not existing or not known to exist at the time of examination.

AMENDMENT OF PAR. 108 AND REPEAL OF PARS. 109 AND 110, U. S. MINING REGULATIONS APPROVED AUG. 6, 1915.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 14, 1917.

Paragraph 108 of the U. S. Mining Regulations approved August 6, 1915 (44 L. D., 247), has this day been amended to read as hereinafter set forth, and paragraphs 109 and 110 of said regulations have this day been repealed:

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

The foregoing changes will be effective on and after September 1, 1917.

CLAY TALLMAN,
Commissioner.

Approved August 1, 1917:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EAGLE RIVER MINING COMPANY.

Instructions, July 31, 1917.

TERMINAL TRACTS IN ALASKA—MEASUREMENT OF WIDTH ALONG SHORE LINE—SECTION 6, ACT OF MAY 14, 1898.

The width of terminal tracts under section 6 of the act of May 14, 1898 (30 Stat., 409, 411), along shore lines at or near tide water in Alaska, is not to be measured along the meander line of the shore, but determined by the distance, not exceeding 40 rods, between the side boundaries of the tract, extending back from the shore line.

VOGELSANG, *First Assistant Secretary:*

February 17, 1916, the Commissioner of the General Land Office asked for instructions as to the rule to be applied in measuring the

tide water frontage of the Eagle River Mining Company's terminal claim, covering 14.43 acres abutting on Lynn Canal, Alaska, application for which was filed February 4, 1911, under the provisions contained in section 6 of the act of May 14, 1898 (30 Stat., 409, 411), the Company at the same time filing an application for right of way for a tramway from its mine at Amalga to its wharf and terminal grounds on Lynn Canal, a distance of about 6¼ miles. With his request the Commissioner submitted the Company's plat of survey of its terminal site, the survey having been made in May, 1909.

The concluding portion of the Commissioner's communication is as follows:

As shown by the plat, the grounds have a frontage of 1285.90 feet on Lynn Canal, tidal water, measured along the meandered shore line. Among other things, Section 6 of said act provides that such lands when located at or near tide water, shall not extend more than forty rods *in width* along the shore line. A straight line drawn coterminous with the frontage of the grounds measures about nine hundred feet. While this is in excess of the *width* allowed by the statute, before returning the plat for correction, in view of the equities apparent in this case as shown by the foregoing statements, as well as the necessity for a rule of procedure in this and other cases, this office requests instructions as to how the frontage should be measured.

In this connection attention is called to my letter of January 24, 1916, presenting practically the same question so far as it is applicable to entries generally along the shore of navigable waters in Alaska.

The letter of January 24, 1916, mentioned by the Commissioner, related to John McCoy's homestead application 0413, Fairbanks, which covered a surveyed 80-acre tract and two lots, the latter fronting on the navigable Chena River for a distance of more than 160 rods. In that matter, the Department in its instructions of July 6, 1917 (46 L. D., 129), announced a rule of adjustment as follows:

In consideration of applications to enter lands shown upon plats of public surveys in Alaska, abutting upon navigable waters, the restriction of 160 rods along the shore of such waters, provided by the act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), to which entries are limited, shall be determined as follows: The length of the water front of a subdivision will be considered as represented by the shortest distance between the two side lines of the subdivision, measured from the shore corner nearest the back line of the tract; and the sum of the distances of each subdivision of the application abutting on the waters, so determined, shall be considered as the total shore length of the application. Where, as so measured, the excess of shore length over 160 rods is greater than the deficiency would be if an end tract or tracts were eliminated, such tract or tracts shall be excluded, otherwise the application may be allowed if in other respects proper.

This principle shall also be applied with reference to the reservation of 80 rods between claims along the shore of such waters.

This rule will be applied only where the lands involved are surveyed under the system of public surveys. As to individual surveys, the administrative necessity for this rule does not obtain and they will be governed by the old rule as set forth in the case of Shirley S. Philbrick (39 L. D., 513).

Under its terms, the rule has no direct application here. The principle of determination set forth, however, may not be inapplicable. The statute here controlling reads as follows:

* * * said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States. * * *

The language employed in the statute, "forty rods in width," imports a tract or area having length or depth extending back from the shore and "width along the shore line." Under the public-land system, a normal 20-acre tract (one-half of a forty) is 80 rods in length and 40 rods in width. Such a tract, if one end abut upon a true north-south or east-west shore line, could obviously be taken under the law. A tract of lesser area and of like or narrower width, although its actual shore line following the sinuosities should exceed forty rods, may well be considered as within the limitations of the law. In other words, the width of a terminal tract may be determined by the measured distance, not exceeding forty rods, between the side boundaries thereof extending back from the shore line. Where the shore line is irregular or takes a diagonal course, the fact that the shore boundary exceeds 40 rods in extent should not be held as an objection to the validity of the claim. The principle involved is the same as that invoked in the rule above quoted and applied to lot subdivisions and to the 80-rod reserve spaces between claims along the shore in surveyed areas. It is believed that such a construction and application of the law would amply serve the purposes intended and fully protect the Government and the public interests along the shore frontages.

The Department is aware that the general instructions issued and the practical administration of the law governing shore land limitations in Alaska have been to the effect that water frontages should be measured along the meander line of the shore. See Instructions, 29 L. D., 95; Circular, 32 L. D., 90; Regulations, 32 L. D., 424; and the case of Shirley S. Philbrick, 39 L. D., 513.

So far as advised, this is the first occasion that the Department has had to specifically consider and pass upon the limitations governing terminal sites. After mature consideration, it is concluded that the restriction of 40 rods in width along the shore line applies to the tract or body of land sought, and not to the measurement along the meanders of the shore.

According to the plat of survey filed by the Company, the width of its terminal claim, measured directly across from corner No. 1 to

corner No. 5, the extremities of its water frontage, is about 875 feet. The width of the back portion of the claim, measured perpendicularly from corner No. 2 to the opposite side line 4–5, is over 1,300 feet. These excesses above the statutory maximum width of 40 rods, or 660 feet, must be eliminated.

Inasmuch as the Company appears to have acted in good faith with reference to this claim, to have constructed and actually used its tramway, and to have erected and maintained appropriate and valuable improvements upon its terminal site, most, if not all, of which improvements can be retained when the claim is reduced to statutory width, it is directed that the Company be granted a reasonable time from notice, which time will be fixed by the Commissioner, within which to prepare and file an amended plat showing a survey of its terminal claim within the statutory limit of 40 rods in width between its easterly and westerly boundary lines. No area outside of such width of 40 rods can be retained or included in the claim. It would appear that the lines of a new survey can be so laid as to include within proper limits both the Company's ship ways along the shore on the east and its stable and wharf approach on the western portion of the claim.

The plat will be returned to the Commissioner of the General Land Office, who will take further appropriate action in accordance with the views above set forth.

MALLMANN v. HALFF (On Rehearing).

Decided August 2, 1917.

CONTESTANT—DISQUALIFICATION TO MAKE ENTRY CEASING.

Where, during contest proceedings, a contestant becomes qualified to make entry under another law than that stated in his application to contest, he may take advantage of the changed condition.

WITHDRAWAL OF CONTEST—MUST BE UNCONDITIONAL.

A withdrawal of contest, to be acceptable, must be without conditions.

ADDITIONAL ENTRY UNDER SEC. 3, ENLARGED HOMESTEAD ACT—MAY BE PERFECTED ALTHOUGH ORIGINAL ENTRY CANCELED.

An original entry of record, although subject to cancellation upon proper proceedings, may nevertheless be basis for an additional entry under section 3 of the Enlarged Homestead act, and the additional entry may be perfected, even should the original be canceled.

PRACTICE—PAPERS RECEIVED AFTER APPEAL TAKEN—PROCEDURE.

Where appeal is taken from the decision of the local land office, such office is without further jurisdiction in the case, and papers afterwards filed should be forwarded without action other than notation upon the records of their receipt.

VOGELSANG, *First Assistant Secretary:*

Sarah W. Mallmann has filed motion for rehearing in the matter of her application to contest the homestead entry of Abraham Halff, made January 8, 1912, for NE. ¼, Sec. 35, T. 1 S., R. 10 E., B. H. M., Rapid City, South Dakota, land district, wherein the Department, by decision of May 17, 1917, affirmed the decision of the Commissioner of the General Land Office holding, in effect, that should contestant secure the cancellation of the entry described she would not thereby acquire any right to the adjoining tract applied for by Halff under section 3 of the Enlarged Homestead act.

On July 19, 1915, Halff applied to enter the SE. ¼ Sec. 26, said township, as an additional entry under section 3 of the Enlarged Homestead act, filing therewith a petition for the designation thereof, and of the land embraced in his original entry. Both tracts were later designated as of the character contemplated by the Enlarged Homestead act, effective January 16, 1916. It does not appear that Halff's application for additional entry has been allowed.

Mallmann's contest was initiated July 13, 1915, the charge being abandonment, and it being set forth in the application to contest that she desired to acquire title to the SE. ¼, Sec. 26, which was then embraced in the entry of one Fikema, against which Halff was prosecuting a contest. The Fikema entry was canceled by relinquishment July 15, 1915, and Halff's application was filed four days later. Mallmann's application to contest was forwarded to the Commissioner of the General Land Office for instructions, and by decision of February 5, 1916, the local officers were directed to allow Halff's application for additional entry, if he was qualified and no objection appeared other than the contest of Mallmann, and to allow the latter to proceed with her contest, "but such contest, if successful, will not necessarily cause cancellation of the additional entry." Contestant appealed, and by decision of May 17, 1917, the ruling of the Commissioner of the General Land Office was affirmed.

Meanwhile, on February 26, 1917, Mallmann filed a second application to contest the entry, making, in effect, the same charge as in the first affidavit, but adding thereto the charge that residence had never been established on the land described in the application to make an additional entry, and setting forth that she desired to acquire title to the land under the Stock-raising act. With the second application to contest was filed a withdrawal of the appeal from the decision of the Commissioner,

and requests that the case be closed of record, as the present action involves all of the facts in connection with that protest, and also includes an action against the original entry of said protestee and claimant, but this withdrawal is in no wise to be deemed as a waiver or to be considered as such relative to the facts embraced in protestant's original protest.

The local officers on February 27, 1917, rejected the second application to contest—

for the reason that there is now pending on appeal before the Department another action between the same parties concerning the same land, the question being whether the contestant should proceed with the contest under the terms set forth in the Commissioner's letter of February 5, 1916.

The withdrawal presented with this last application to contest is likewise not accepted by reason of it containing reservations with respect to the contest withdrawn. No conditional withdrawal of a contest will be accepted. Contestant can await the outcome of the first proceeding or withdraw the same. If the first contest is withdrawn, no future right to contest this entry will be recognized. No right of appeal in this matter will be recognized, as you have one appeal pending relative to this entry. You must stand or fall on your former proceeding.

The motion for rehearing is, in effect, an appeal from the decision of the local officers dated February 27, 1917.

From statements set forth in the motion, it is apparent that contestant, in filing the second affidavit, was of opinion that she would be bound by the statements in her first affidavit as to her intention to acquire title to the SE. ¼ said Sec. 26 under the provisions of the Enlarged Homestead act.

Rule of Practice 2 requires an application to contest to contain a statement of the law under which applicant intends to acquire title, and facts showing that he is qualified to do so. The reason for this rule is obvious. It was intended to prevent contests by persons who were not qualified to exercise the preference right awarded to successful contestants. However, if during the pendency of a contest a contestant becomes qualified to make entry under a law other than that stated in the application to contest, no reason exists why he should not, if he so desires, take advantage of the changed condition.

The rule is that a second contest, by the same person, upon substantially the same charges as in the first, will not be permitted, even though the entryman was not served with notice of the first contest, unless satisfactory explanation is made why the first contest was not prosecuted. Wickham *v.* Heirs of Uber (46 L. D., 53).

The local officers were correct in holding that a conditional withdrawal can not be accepted. As the conditional withdrawal was made a part of the second application to contest, the rejection of the withdrawal carries with it the second contest.

Nothing that contestant has set forth in any paper filed could, if proven, secure for her a preference right of entry for the tract described in the additional application of Halff. His original entry being intact, and its lifetime not having expired, he has the right to make an additional thereto under section 3 of the Enlarged Homestead act, whether or not he has complied with the law as to the original entry. The additional entry, if allowed, can be perfected even

though the original be canceled; and until the additional application becomes an entry and is thereafter regularly canceled on contest, there are no proceedings by which Mallmann can acquire a preference right of entry as to the tract.

However, the local officers erred in taking any action on the second application to contest and the conditional withdrawal of the appeal. The matter was pending before the Department, and the local officers were without jurisdiction. All the papers should have been forwarded in the usual manner, without action.

As already stated, contestant could acquire no greater right under the second contest than under the first. She will therefore be allowed to proceed under her first contest, the motion for rehearing being denied.

Ex Parte TETER.

Decided August 7, 1917.

INTERMARRIAGE OF HOMESTEADERS—ELECTION AS TO RESIDENCE—ACT OF APRIL 6, 1914.

The marriage of a homestead entrywoman to a settler on lands not subject to entry because unsurveyed is not within the scope of the act of April 6, 1914 (38 Stat., 312), which requires, among other things, that both parties shall have made entries.

VOGELSANG, *First Assistant Secretary:*

Appeal has been filed by Mrs. Lee W. Teter, formerly Hattie Anderson, who made homestead entry, Havre 021219, on June 4, 1913, under the act of February 19, 1909 (35 Stat., 639), for the E. ½, Sec. 33, T. 34 N., R. 23 E., M. M., from the decision of the Commissioner of the General Land Office, dated June 17, 1916, rejecting the joint election of her husband and herself, under the act of April 6, 1914 (38 Stat., 312), to live on the lands claimed by the husband.

The election was rejected on the ground that the act of April 6, 1914, has no application in this case, for the reason that the husband has no entry, but is only a settler on unsurveyed lands, not subject to entry. No other question is involved.

The said act is as follows:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: *Provided*, That the provisions hereof shall apply to existing entries.

The appellant states that before she and her husband married (January 4, 1916) they made inquiries of various persons and were

informed that they could elect upon which lands they desired to live, notwithstanding the fact that the lands claimed by her husband were unsurveyed.

The said act of April 6, 1914, refers only to "entryman," "entrywoman" and "entries." A careful examination of said act fails to disclose that it was the intention of Congress that settlers on unsurveyed lands should be entitled to the benefits thereof. While the statute is no doubt in the nature of a remedial one and should be liberally construed, the Department, after mature consideration, is of the opinion that it is not justified in reading into the law that *settlers* are entitled to its benefit, since such action would, to say the least, be encroaching upon the legislative powers of Congress.

The decision appealed from was correct, and is hereby affirmed.

KNUTE ARITHEON.

INSTRUCTIONS.

WASHINGTON, D. C., *August 13, 1917.*

ENTRY UNDER SECTION 7, ENLARGED HOMESTEAD ACT—CREDIT FOR RESIDENCE ON FORMER ENTRY.

Where an additional homestead entry under section 6 of the act of March 2, 1889, is changed by amendment to an entry under section 7 of the Enlarged Homestead act, including additional contiguous land, residence thereon under the first-named act will be credited to the period required by the later law.

VOGELSANG, *First Assistant Secretary:*

The Department is in receipt of your [Commissioner of the General Land Office] request of August 3, 1917, for instructions as to whether Knute Aritheon is entitled to credit for residence on his amended entry from May 19, 1915.

Aritheon perfected by three-year proof a homestead entry for 80 acres within the Lemmon, South Dakota, land district, and on November 9, 1914, made an additional entry for 80 acres in the Dickinson, North Dakota, district, under section 6 of the act of March 2, 1889 (25 Stat., 854), on which tract you report he established residence May 19, 1915, and still resides. Under date of August 25, 1916, the additional entry was by you changed in character to an entry under section 7 of the Enlarged Homestead act and amended by adding thereto a tract of 160 acres of contiguous land.

The section 7 referred to was added to the Enlarged Homestead law by the act of July 3, 1916 (39 Stat., 344), and the regulations thereunder were approved five days later (45 L. D., 208). Paragraph 2 of the regulations provides:

A person whose two incontiguous entries do not make up 320 acres, who has submitted proof on the first and occupies his unperfected second claim, may amend the latter by adding land contiguous thereto, so as to aggregate that area, subject to the requirements of this act respecting residence and cultivation.

It is true, as stated by you, that the entryman by making the additional entry on November 9, 1914, exhausted his homestead right; but while residing on the land Congress enlarged that right. The regulations, *supra*, allowed the amendment of the additional entry, and as amended it became subject to all of the requirements of the Enlarged Homestead act. Its character was changed by the amendment without any formal statement to that effect by you.

The entryman stands in the position of one who establishes residence on land prior to entry, and is entitled to claim credit for residence from the date it was actually established on any portion of the land.

Ex parte SANDS, NICHOLSON and SCHMIDT.

Decided August 14, 1917.

SIMULTANEOUS SETTLEMENTS—DIVISION OF LAND—INSTRUCTIONS OF MAY 22, 1914 (Circular 324).

Where the rights of two or more persons to a tract of public land are equal, by virtue of simultaneous settlement thereon at a time when the land is subject to settlement, as distinguished from rights acquired merely as the result of *applications* simultaneously filed, the tract should not be disposed of by lot, but by an equitable division thereof, saving to each settler, as far as practicable, his improvements.

VOGELSANG, *First Assistant Secretary:*

The NW. ¼ SW. ¼ and the W. ½ NE. ¼ SW. ¼, Sec. 25, T. 5 N., R. 17 W., S. B. M., California, containing 60 acres, were excluded from the Santa Barbara National Forest and made subject to settlement under the homestead laws on and after August 11, 1915, at 9 o'clock a. m., and subject to entry and other disposition under the public land laws on September 8, 1915, at 9 o'clock a. m.

August 19, 1915, William E. Sands, George O. Nicholson and Henry H. Schmidt filed homestead applications 027154, 027160 and 027305, for the above described tracts, each of said claimants filing with his application a corroborated affidavit alleging settlement on the land at 9 o'clock a. m., August 11, 1915.

The applications of Sands, Schmidt and Nicholson having been filed within the twenty days immediately prior to September 8, 1915, the date the lands were made subject to entry, they were treated—and properly so—as having been filed simultaneously, in accordance with instructions of May 22, 1914 (43 L. D., 254).

As the result of a hearing, held during five days, beginning October 6, 1915, on the conflicting allegations of settlement, the local officers, by decision of January 24, 1916, found that the settlements of Sands, Schmidt and Nicholson were simultaneous. They also recommended that Schmidt be permitted to make entry of the 20-acre tract (W. ½ NE. ¼ SW. ¼) upon which subdivision his house and improvements were located, and that the right of Sands and Nicholson to enter the 40-acre tract (NW. ¼ SW. ¼) be determined by a drawing between them in the manner prescribed by paragraph 4 of the regulations of May 22, 1914, *supra*.

The Commissioner of the General Land Office, on September 30, 1916, found that settlement was initiated simultaneously by all three parties to the record; that Schmidt's improvements were located on the 20-acre tract (W. ½ NE. ¼ SW. ¼) and those of Nicholson on the 40-acre tract (NW. ¼ SW. ¼). The Commissioner further held, however, that the record as compiled did not disclose whether Sands's improvements were located on the NW. ¼ SW. ¼ or W. ½ NE. ¼ SW. ¼. Under the circumstances, further hearing was ordered, the issue to be confined to the exact location of Sands's improvements, after which the rights of each as to the legal subdivision on which his improvements were located would be determined by a drawing, in accordance with the regulations hereinbefore referred to (43 L. D., 254). From this decision Sands and Nicholson appealed and Schmidt applied for further hearing.

Prior to final action upon this proceeding, and especially in order to obviate, if possible, the necessity of further hearing, the Department required that Nicholson and Sands submit corroborated affidavits and diagrams clearly showing the extent and exact location of their respective improvements. Said affidavits and diagrams have been submitted.

In the first place, the Department, after careful consideration of the voluminous testimony submitted at the hearing heretofore held, is clearly of the opinion that the testimony sustains the conclusion reached by the decision below in so far as it held that settlement by Sands, Schmidt and Nicholson was initiated simultaneously.

The record as supplemented by the affidavits and diagrams referred to now clearly reveals the exact location of the homes and major portion of the improvements placed on the lands by Sands, Schmidt and Nicholson.

Nicholson's house, improvements and cultivation extend principally over the east 20 acres of the 40-acre tract, or upon the E. ½ NW. ¼ SW. ¼. Schmidt's house and major portion of his improvements are located upon the south 10 acres of the 20-acre tract, or the S. ½ W. ½ NE. ¼ SW. ¼. Sands's house and greater portion of his im-

provements and cultivation are situate upon the north 10 acres of the 20-acre tract, or N. ½ W. ½ NE. ¼ SW. ¼.

Having definitely ascertained the exact location of the improvements of each party, or major portion thereof, the question to be determined by the Department upon this proceeding is whether the rights of the various parties to the record should be determined by a drawing in the manner prescribed by regulations of May 22, 1914, *supra*, or, the rights of all three in the premises being equal, whether the two tracts should be considered as a unit and divided so that Sands, Schmidt and Nicholson might retain their respective homes and at the same time receive equal areas.

The regulations referred to (43 L. D., 254) provide:

> 3. If two or more conflicting applications are received, each containing allegations of prior settlement, a hearing shall be ordered to determine the priority of right, and it shall be restricted to those alleging such right.
>
> 4. Where there are applications conflicting in whole or in part *in which no one of the several applicants claims prior settlement* the register and receiver will write on cards the names of the several applicants, and each of these cards shall be placed in an envelope upon which there is no distinctive or identifying mark, and * * * after all the envelopes containing the names of the several applicants shall have been thoroughly mixed in the presence of such persons as may desire to be present, they shall be drawn and numbered in order. [Italics the Department's.]

In the case at bar the rights of Sands, Schmidt and Nicholson are equal, not necessarily by virtue of having filed their applications within the twenty days immediately prior to the date the land became subject to entry, but because of their simultaneous settlement at a time when the land was subject to settlement. The regulations referred to have no application in a case where the rights are based upon simultaneous settlement, but are restricted to cases where the applications are filed simultaneously and "no one of the several applicants claims prior settlement."

The Department has heretofore had occasion to so rule in the case of Georgia Watts, Lula Menzie and Claude M. Stanton (Great Falls 038831, 038828, 038740), decided December 15, 1916, unreported. In that case, as in the case under consideration, the three claimants settled on the land simultaneously and the Commissioner directed a drawing under the regulations cited. The Department ordered an equitable division of the land, holding that—

> Examination of circular No. 324 discloses that it was designed to effect the disposition of applications, filings and selections, and does not provide a means for determining settlement claims. The Commissioner was, therefore, in error in requiring the claimants in this case to submit to a drawing under the facts presented.

The issue at bar is similar in all essential respects to that involved in the Watts-Menzie-Stanton case, and the Department is not in-

clined to deviate from the rule as laid down therein. (See also Fowler *v.* Dennis, 41 L. D., 173, and Jeannot *v.* Mast, 45 L. D., 586.)

Upon the facts as presented by this record, the rights of all claimants being equal, each is entitled to his home, and, therefore, the 60 acres involved will be treated as a unit and divided so that Sands, Schmidt and Nicholson may each retain 20 acres, including therein the particular tract, or part thereof, upon which his home and the greater portion of his improvements and cultivation are situate.

The land in question will be awarded as follows: To Nicholson, the E. ½ NW. ¼ SW. ¼; to Sands, the N. ½ W. ½ NE. ¼ SW. ¼ and N. ½ W. ½ NW. ¼ SW. ¼; and to Schmidt the S. ½ W. ½ NE. ¼ SW. ¼ and S. ½ W. ½ NW. ¼ SW. ¼.

The decision below is modified accordingly.

McKENZIE v. HALL.

Decided August 22, 1917.

REINSTATEMENT OF CANCELED ENTRY—NOTICE—WHEN CONTEST FOR ABANDONMENT LIES.

A claimant is entitled to personal or constructive notice of the reinstatement of his canceled entry, which is not thereafter subject to contest upon a charge of abandonment until six months from receipt of notice.

SAME—CONSTRUCTIVE NOTICE—REGISTERED LETTER—REQUIREMENTS.

To charge a claimant with constructive notice of the reinstatement of his canceled entry, upon his failure to call for the registered letter containing notice thereof, such letter must have remained in the post office of the claimant's record address, subject to call, during the entire thirty-day period required, and then returned to the land office as uncalled for.

VOGELSANG, *First Assistant Secretary:*

Georgina McKenzie has appealed from the decision of the Commissioner of the General Land Office, dated April 10, 1917, denying her application to contest the homestead entry of James R. Hall, for the S. ½ SW. ¼ and SW. ¼ SE. ¼, Sec. 28, T. 44 N., R. 2 E., B. M., Coeur d'Alene, Idaho, land district.

Said entry was made by Hall on July 5, 1905. He alleged settlement on the land since July 24, 1901. July 8, 1905, the State of Idaho filed indemnity school land list for the land, having applied for the survey of the township July 6, 1901. Such proceedings were had, as to the conflicting claims to the land, that on May 6, 1914, the State's selection was canceled and the homestead entry of Hall reinstated (it having been canceled during the course of the proceedings *supra*), notice of which was sent to the entryman at his record address, and returned undelivered.

June 27, 1916, Georgina McKenzie filed application to contest said entry, charging, in substance, that Hall was guilty of perjury in his application; that he had never at any time settled on nor made any improvements whatever upon said land; that said land had been abandoned by Hall for more than six months last past and ever since his pretended settlement on July 24, 1901; and that he has not at any time complied with any of the requirements of law as to settlement, residence, or improvement of said land.

Said application was denied by the local officers, who held that contestant had failed to state facts sufficient to constitute grounds of contest. McKenzie appealed to the Commissioner, who affirmed the action of the local officers.

In her appeal before the Department, McKenzie contends that this entry has been subject to contest at all times since January 6, 1906, while it remained an entry of record, on the ground of abandonment, subject only to the determination of the prior proceedings of the State while pending against said entry.

Hall was entitled to personal or constructive notice of the reinstatement of his entry, which was not subject to contest, charging abandonment, until six months after such notice. The proceedings leading up to the reinstatement of the entry had the effect of suspending the same during the period thereof. The record shows that the local officers notified Hall of the reinstatement of his entry on April 26, 1916, by registered letter. May 31, 1916, they reported that the registered notice had not been received, nor had the letter at that time been returned unclaimed. The statement appears in the brief and argument on appeal by the attorney for contestant, that said registered notice was returned unclaimed on June 8, 1916. To charge Hall with constructive notice, if he failed to call for the registered letter containing the notice of reinstatement, the rules and regulations of the Department require that such letter must have remained in the post office of his record address, subject to call, during the entire period it was required to be so held, to wit, thirty days, and must be returned to the local office as uncalled for at the end of that period, as evidence of that fact. McGraw *v.* Lott (44 L. D., 367). The record shows informally, but not officially, that this has been done. In such event, Hall's entry did not become subject to contest until the expiration of the entire period of constructive notice and six months thereafter, and upon default on his part in complying with the law and failure to cure such default prior to contest, it became thereafter subject to contest by the first duly qualified contestant. The record showing that the contest at bar was filed before said entry was subject to contest, it follows that same was prematurely instituted.

The decision appealed from is affirmed.

MILITARY SERVICE BY HOMESTEADERS DURING WAR. ACT OF JULY 28, 1917 (PUBLIC No. 32).

INSTRUCTIONS.

[Circular No. 564.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 22, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The act of July 28, 1917 (Public No. 32), provides:

That any settler upon the public lands of the United States, or any entryman whose application has been allowed, or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who, after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence, without reference to the time of actual service: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

SEC. 2. That any settler upon the public lands of the United States, or any entryman whose application has been allowed, or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who dies while actually engaged in the military or naval service of the United States, as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, then his widow, if unmarried, or in case of her death or marriage, his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon such entry or application thereafter allowed, and shall be entitled to receive Government patent for such land; and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead.

WHO ENTITLED TO CREDIT FOR MILITARY SERVICE.

2. The present war began, as to the United States, April 6, 1917. The special privileges given by the act accrue, as to each homestead

claimant, on that date if he was already in the United States service; otherwise from the time, after that date, when he enlisted or shall enlist in the United States Army, Navy, or Marine Corps, or when, as a member of any other organization for offense or defense authorized by Congress, he was or shall be mustered into or engaged in the military or naval service of the United States. The benefits of the act do not extend to any persons not engaged in the service for offense or defense as set forth therein. In these instructions the word "soldier" will be used to indicate any person coming within the purview of the act.

3. The benefits of the act are conferred upon a person who, before going into the service, had actually made a homestead entry, had effected and maintained a valid settlement upon a tract properly subject to entry by him, or had filed an allowable application for the land. This last includes one who had filed a petition for designation under the Enlarged Homestead act or the Stock-raising Homestead law, accompanied by an application to enter, provided his entry be allowed pursuant to a designation made while the war lasts, and credit will be given for the service of such soldier had after the date of the designation. The act does not protect any entry from cancellation on account of defaults of the homesteader occurring before he went into the service.

PERIOD OF CREDIT ALLOWED—RESIDENCE REQUIRED.

4. A soldier is entitled to credit on the residence and cultivation prescribed by the homestead law for the time of his service during the war; but one whose discharge is on account of wounds received or disability incurred in the line of duty is entitled to credit for the entire term of his enlistment, without reference to the time of actual service. However, the homesteader will be required to show at least one year's residence and cultivation in connection with his entry, regardless of the length of his service or the fact that he has been discharged on one of the grounds indicated. During each year's residence which he may be required to show he is entitled to the five months' absence privilege like other homesteaders.

RIGHTS OF WIDOW, MINOR CHILDREN, HEIRS, OR DEVISEES.

5. If the soldier dies while actually engaged in the military or naval service of the United States, his widow, if unmarried, may at once submit proof on his entry, if one has been made; if there is no widow, or she has remarried, his minor children may, through their guardian, thus submit the proof; and if he leaves no widow, or the widow has remarried, and if all of his children, if any there be, are not minors, then proof may be submitted by his heirs in general or by his devisees, as the case may be.

In the event the soldier had not made entry for the land claimed, then the right to make entry therefor and submit proof accrues to the parties indicated at once or as soon as the land becomes subject to entry. In such proof it will be necessary only to prove the identity of the entryman, settler, or applicant with the soldier; that he died while actually engaged in the service, and that the person or persons submitting proof bear to him one of the relations mentioned. When the claim is based on settlement only, the facts with respect thereto must be shown, otherwise the manner and method of submitting final proof will follow the usual practice.

NO CREDIT WHERE CLAIM INITIATED AFTER ENTERING SERVICE.

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

CONTEST—MUST PROVE ABSENCE NOT DUE TO MILITARY SERVICE.

7. No application hereafter filed to contest a homestead entry on the ground of abandonment will be allowed by you unless there is an allegation therein that the entryman's alleged absence from the land was not due to his employment in the Army, Navy, or Marine Corps, or other organization described in the act. No allegation of abandonment will be sustained against a homestead settler in connection with a contest initiated after April 6, 1917, unless it has been proved at the hearing, if one be had, that the entryman's alleged absence from the land was not due to his employment in military or naval service as indicated.

NOTICE TO LAND DEPARTMENT OF ENTERING MILITARY SERVICE.

8. While the law thus protects entrymen engaged in the military service from contests against their entries on the ground of abandonment and it is not obligatory upon them to advise the land department as to their reasons for leaving their claims, it is advisable that each shall notify the local United States Land Office of the facts in that regard.

FINAL PROOF BY ENTRYMAN IN MILITARY SERVICE.

9. The entryman, if desirous of submitting proof, may give his own testimony before any officer authorized to administer oaths and having an official seal at the place where he is then stationed, but the testimony of the witnesses must be taken within the proper county or land district and publication and posting of notice must

be duly made. It is not obligatory upon the homesteader thus to submit the proof, though the period given by law for its submission be about to expire; he will be allowed a reasonable time after his discharge for that purpose.

SETTLER ON UNSURVEYED LAND—NOTICE OF ENLISTMENT.

10. Following the practice under the provisions of the act of July 3, 1916 (39 Stat., 341), any qualified person who in good faith makes settlement upon and improves unsurveyed, unreserved, unappropriated public land of the United States with intention to enter it under the homestead laws after survey thereof, who has plainly marked on the ground the exterior boundaries of the tract claimed by him, and who, as a soldier, becomes entitled to the benefits of the act of July 28, 1917, may file at the local United States Land Office a notice of his enlistment and that he claims the benefits of that act. A tract is regarded as unsurveyed within the meaning of the homestead laws until a survey has been accepted and the plat thereof filed.

11. You will give the current serial numbers to such notices, make due record of them on your serial number registers, with a plain notation at the top of the page that no entry has been made, and will forward the notices with your monthly returns. You will also make note of such papers on your tract books where the description of the land is given therein by section, township, range, and legal subdivisions.

CIRCULAR NO. 506 NOT SUPERSEDED.

12. These instructions do not supersede those of September 27, 1916 (Circular 506, 45 L. D., 488), relating to special privileges accorded homestead settlers on account of military service rendered in connection with operations in Mexico or along the border thereof or in mobilization camps elsewhere.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

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DEPOSITS BY INDIVIDUALS FOR SURVEY OF PUBLIC LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 9, 1917.

UNITED STATES SURVEYORS GENERAL AND
REGISTERS AND RECEIVERS OF U. S. LAND OFFICES:

Paragraph 21 of Circular of Instructions dated August 7, 1895, relative to deposits by individuals for the survey of public lands under Section 2401, Revised Statutes, as amended by the Act of August 20, 1894, is hereby revoked.

The revoked paragraph reads as follows:

Such certificates hereafter issued will not be regarded as assignable or receivable until the township for the survey of which the deposit was made has been surveyed, and the plat thereof filed in the district land office.

CLAY TALLMAN,
Commissioner.

Approved, August 9, 1917:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

ARTHUR CROWLEY et al.

Decided August 23, 1917.

MILL SITE LOCATION BY OWNER OF LODE CLAIM—OCCUPANCY OR USE FOR MINING OR MILLING.

A mill site location made by the owner of a lode claim is invalid unless the ground claimed is used or occupied for mining or milling purposes.

ADVERSE PROCEEDINGS BY LAND DEPARTMENT—MAY BE BROUGHT WHEN.

The land department has ample authority to entertain adverse proceedings to determine the validity of an asserted mill site claim within a national forest before application for patent is filed.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Arthur Crowley, W. B. Wallace, and J. W. Crowley from a decision of the Commissioner of the General Land Office, dated March 6, 1917, declaring to be null and void the mill site location, known as the Cherokee Mill Site claim, situate in Sec. 15, T. 17 S., R. 31 E., Visalia, California, land district, within the Sequoia National Forest.

Proceedings against the mill site location were ordered and had upon an adverse report by an officer of the Forest Service, from which the following charges were formulated:

1. That the land is not used or occupied for mining or milling purposes.

2. That the land contains no quartz mill, reduction works, or ore dump.

3. That the location was not made in good faith for mining or milling purposes but for the purpose of controlling and speculating in land valuable as a site for summer residences.

After hearing duly had, the local officers found and held, from the testimony adduced, in favor of the locators. Upon appeal by the Forest Service, this action was reversed by the Commissioner, and further appeal by the locators brings the matter before the Department.

It was admitted by the locators, in their answer to the charges, that the land had not been used and occupied for mining or milling purposes, but it is their contention that such use and occupancy need not be shown until they make application for patent, and in support of this contention there is cited Hard Cash and Other Mill Site Claims (34 L. D., 325); Alaska Copper Company (32 L. D., 128); Silver Peak Mines *v.* Valcalda *et al.* (79 Fed. Rep., 886), and Valcalda *et al. v.* Silver Peak Mines (86 Fed. Rep., 90).

The record discloses that the Cherokee mine and mill site were first located by Arthur Crowley, James W. Crowley and W. B. Wallace in 1897. On July 26, 1900, the same parties relocated the Cherokee mine, and on August 2, 1900, located the mill site in connection therewith. Wallace thereafter conveyed his one-third interest in the mine and mill site to his co-locator, Arthur Crowley. The locators testified that the annual assessment work had been regularly kept up on the Cherokee mine, and that a vein or lode bearing gold had been disclosed thereon. They admitted, however, that the mill site had not been used for mining or milling purposes.

It appears that the mill site is situate some two or three miles from the Cherokee lode claim, at a lower elevation, and the locators allege that the site was selected because of its protection from snowslides, which have in the past been very destructive in the locality.

Witnesses for the Government testified that some ten or twelve cabins had been constructed upon the mill site and occupied by various persons during the summer months. These cabins were constructed under permits obtained from the Forest Service, and without the consent of the locators.

The Department has carefully considered the cases cited in support of the locators' contention that they are under no obligation to

show a use of the mill site for mining or milling purposes until application for patent is made, but finds no support in said cases for such contention. In the case of Alaska Copper Company, *supra*, it was held (syllabus):

> The statute requires that a mill site be used or occupied by the proprietor of the vein or lode for mining or milling purposes; and some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy the mill site at the time patent is applied for to come within the purview of the statute.

In the case of Hard Cash and Other Mill Site Claims, *supra*, it was held (syllabus) that—

> Section 2337 of the Revised Statutes contemplates that at the time application is made for patent to a mill site claim the land embraced therein is being used or occupied for mining or milling purposes.

The words, "at the time application for patent is made," as used in these decisions, simply prescribe the showing that must be made as to use and occupancy in order to entitle the applicant to a patent, and were not intended to indicate that a mill site claimant might hold and control such a claim by a mere paper location.

The case of Silver Peak Mines *v.* Valcalda *et al.*, *supra*, also cited by counsel for the locators in the appeal to the Department, arose upon an action of ejectment between private claimants to land, wherein it was sought to recover possession and the rights to the waters of certain springs thereon. The defense asked the court to instruct the jury that where land is located for mill site or milling purposes, the party locating and claiming the same must, within a reasonable time, use the land for the purpose for which the location was made. The instructions were refused and the U. S. Circuit Court said:

> If the instructions asked for had been given without any further qualifications or explanation, it would have tended to confuse, instead of enlighten the jury upon the controlling issues in the case.

The court further said:

> The right to the waters of the springs depended upon the prior appropriation, occupation, possession, and use. Did the plaintiff have such a possession thereof as amounted to its dominion and control over the property? The jury were not called upon to determine what was necessary for plaintiff to prove in order to entitle it to a patent from the United States to the springs of water upon the land located by it as a mill site.

The court further said in this case:

> The rights of the United States in the premises were not in any manner involved. In so far as the laws of the United States had any application to this case, the plaintiff's right to the water of the springs, acquired under the local customs, laws, and the decisions of courts, are recognized by the provisions of section 2339 of the Revised Statutes.

It may be further observed that in the opinion of the U. S. Circuit Court of Appeals in this case (86 Fed. Rep., 90), it was found that the land involved had been used for mining or milling purposes. In this connection the court said:

> During the years 1888 and 1889 work was done and money was expended by the corporation upon its mine, and a tunnel was run on the mill site for the purpose of increasing the supply of water from the said springs. * * * From the time of its location of said mill site, the corporation had made use of the water of the springs by hauling it in wagons a distance of four or five miles, for use at the mines, for its employes, and for culinary purposes.

In the case here under consideration no use or occupancy for mining or milling purposes had been made of the land up to the time of serving notice of charges, and the claimant's asserted rights are based solely upon a paper location.

In Lindley on Mines, third edition, page 1176, it is said:

> The mere location of a mill site does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession and use.
>
> Where the land is not actually used, the claimant must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes.
>
> Mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law.

In the case of H. H. Yard (38 L. D., 59), and in the case of J. P. Nichols and Cy Smith (46 L. D., 20), the Department held that it had ample authority to proceed against and determine the validity of a mining location prior to application for patent.

In the case here involved the Department finds that the land had been located for a number of years and has not been in any manner improved, occupied, or used, for mining or milling purposes. It must, therefore, be held that there is no valid basis for the claimants' asserted right to the land. The mill site claim is accordingly adjudged to be null and void, and the lands will be administered as a part of the public domain, subject to the reservation for forest purposes.

The decision appealed from is affirmed.

NON-RESIDENCE HOMESTEADS IN IDAHO—ACT OF AUG. 10, 1917.

INSTRUCTIONS.

[Circular No. 566.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 25, 1917.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES IN IDAHO:

By section 10 of the act approved August 10, 1917 (Public No. 40), section 6, of the act of June 17, 1910 (36 Stat., 531), providing

for a non-residence homestead in Idaho, was amended to read as follows:

SEC. 6. That whenever the Secretary of the Interior shall find any tracts of land in the State of Idaho, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible he may, in his discretion, designate such tracts of land, not to exceed in the aggregate one million acres, and thereafter they shall be subject to entry under this act without the necessity of residence upon the land entered: Provided, That the entryman shall in good faith cultivate not less than one-sixteenth of the entire area of the entry which is susceptible of cultivation during the first year of the entry, not less than one-eighth during the second year, and not less than one-fourth during the third year of the entry and until final proof: Provided further, That after six months from the date of entry and until final proof the entryman shall be a resident of the State of Idaho.

EFFECT OF THE AMENDMENT.

(1) The amount of land which the Secretary of the Interior is authorized to designate as non-residence homestead land is increased from three hundred and twenty thousand acres to one million acres.

(2) One-sixteenth the area of the entry is required to be cultivated during the first year of the entry, whereas no cultivation during that year was formerly required; the cultivation requirements during the second, third, fourth, and fifth years remain unchanged, being one-eighth for the second year, and one-fourth for each succeeding year and until final proof is submitted.

(3) The former requirement that entryman after six months from date of entry and until final proof must reside not more than twenty miles from the land entered is so modified that the entryman need only be a resident of the State of Idaho during the said period.

(4) The provision for leave of absence has been eliminated and is obviously unnecessary, nor does the law as amended require that the entryman shall be personally engaged in cultivating the land and harvesting the crops.

ENTRIES ALLOWED PRIOR TO AMENDMENT.

The requirement of cultivation during the first year will not affect entries allowed prior to the amendatory act; on the other hand, after the date of the act, such entrymen may avail themselves of its provisions with respect to residence and personal employment in cultivating the land.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
Acting Secretary.

ROBINSON v. NORTHERN PACIFIC RAILWAY COMPANY.

Decided August 29, 1917.

SUPERVISORY AUTHORITY OF THE DEPARTMENT—CERTIORARI.

The supervisory authority of the Department may properly be invoked by *certiorari* where a substantial failure of justice, due to action taken by a subordinate tribunal, would otherwise occur.

FAILURE TO APPEAL—RULES OF PRACTICE—SUPERVISORY AUTHORITY OF DEPARTMENT.

Failure to appeal within the time permitted by the rules of practice will not preclude consideration by the Department, in a meritorious case, in the exercise of its supervisory authority.

RULES OF PRACTICE—HOW FAR CONTROLLING.

The Rules of Practice of the land department were adopted to facilitate the administration of the public-land laws, and where such rules conflict with the Department's due exercise of its supervisory authority, they will not be followed.

VOGELSANG, *First Assistant Secretary:*

May 21, 1915, the Department allowed a writ of certiorari in this and two other cases decided herewith.

June 6, 1900, the Northern Pacific Railway Company selected the SE. ¼, Sec. 28, T. 7 S., R. 8 W., W. M., by list 13, under the act of March 2, 1899 (30 Stat., 993). The land is within the Tillamook (now Siuslaw) National Forest, established by Executive proclamation of March 2, 1907. The land was then unsurveyed, and, December 21, 1907, Alvin Robinson filed contest affidavit against the selection, alleging settlement about March 1, 1900, and that he had a dwelling house and clearing on the land at the date of selection, was residing thereon with his family, and was a *bona fide* settler. This and the other cases were several times before the Department under the title of Frank *et al. v.* Northern Pacific Railway Company. On review (37 L. D., 502) the Department held:

> Without going into the legal question more or less involved therein, it is certainly true that if these alleged settlers were not possessed of the necessary qualifications to make entry of the lands settled upon by them under the homestead law, it goes far toward saying that these settlements were not made in good faith. This thought would have special force in this case because of the allegation, presumably well founded, that these lands are very valuable for the timber which they contain and it may be true that it was the purpose of these settlers to acquire valuable tracts of timber rather than to take these lands under the homestead law, and the Department is quite clear that unless these settlements were made in good faith they did not operate to reserve said lands from appropriation by the railway company under said act. * * *
>
> That there may be no misapprehension as to the future contingent rights of the parties, it is thought expedient at this time to call attention to the order of March 2, 1907, establishing the Tillamook Forest Reserve. While it necessarily follows from what has been said that if it be satisfactorily established at the

hearing hereinafter ordered, that these settlement claims were *bona fide* and subsisting on June 6, 1900, the railway company's selection must fail, it does not necessarily follow that these claimants will be permitted to enter the land. The proclamation establishing said forest reserve excepts from its force and effect "all lands * * * upon which any valid settlement has been made pursuant to law," but this is subject to the proviso that the "settler continues to comply with the law under which the * * * settlement was made."

It is thus clear, as between the railway company and the settler, the question of qualification of the settler was to be determined at the hearing. A hearing was had before the local office, wherein the claimant, Robinson, appeared and testified in substance that he settled on the land about January 28, 1900, and was living there in a comfortable house with his family on June 6, 1900, when the selection was made; the house was comfortably furnished and he had made a small clearing, which was planted to garden, about 50 x 100 feet. He continued to reside there until towards fall, when he left the land because it had been selected by the railroad parties and he was in doubt whether he would ever succeed in getting an entry. He testified that his wife was with him on the land about a month. Jacob Webster testified that claimant's wife was on the land two weeks, and Albert N. Robinson, father of the claimant, testified that his wife was on the land for three weeks. The claimant testified that he was 35 years of age and a native born citizen of the United States, and he settled with intent to take the land as his homestead. He gave no other evidence as to qualification. He did not say that he had never previously exercised his homestead right or had not acquired 320 acres of land under the public land laws since August 30, 1890, nor did he testify that his settlement was made for his own sole benefit and not for the benefit of any other person or corporation, or that he was not the agent of or in collusion with any other person to give him the benefit of the land or timber. There was, therefore, no evidence which would have justified the local officers in finding that he was a qualified homestead settler; nor, in fact, did they so find.

June 29, 1910, the local office, in a decision of four pages, found that:

> The acts of the contestant in the present case, as set forth in the above summary of the evidence submitted at the hearing, show that he made settlement on the land in controversy with a view to making it a home before it was selected by the contestee and that his claim was subsisting at the time of the selection.

The summary of evidence referred to does not include the necessary facts to show his qualification to make homestead entry above mentioned. There was, therefore, neither evidence nor finding that he was a qualified entryman at the time of his settlement, yet the local office recommended cancellation of the selection.

No appeal was filed by the railway company, in accordance with the Rules of Practice, and on August 4, 1910, the claimant filed a relinquishment of his claim. The Commissioner reviewed the record June 21, 1911, and finally canceled the entry. Petition for certiorari was filed [by the railway company] July 10, 1911.

The Rules of Practice were adopted for the purpose of facilitating the administration of the public land laws of the United States, and will not prevent the Department from exercising its supervisory authority in meritorious cases to the end that justice be done. This is a case where an injustice would be done the railway company if the Department did not exercise such authority herein. The office of the writ of certiorari is to enable the Department to review decisions which are not appealable under the Rules of Practice, with a view of doing full justice to the rights of parties in cases calling for supervisory action.

The decision of the Commissioner of June 21, 1911, is reversed, and the selection, in the absence of other objection not disclosed by the record, will be approved.

THOMAS D. WALTON.

Decided August 29, 1917.

STATE SELECTION—TERMS OF GRANTING STATUTE SPECIFIC.

Where the granting statute specifically directs the manner in which a class of State selections shall be made and approved, disposition thereof in any other manner is precluded.

UTAH ENABLING ACT (ACT OF JULY 16, 1894)—SECTION 2449, U. S. REVISED STATUTES.

Public lands granted to the State of Utah by section 12 of the act of July 16, 1894, are not affected by the provisions of section 2449, U. S. Revised Statutes.

STATE SELECTION—SEGREGATIVE EFFECT.

A State selection of record, even though unapproved and invalid, bars allowance of an application to make entry of the land selected.

STATE SELECTION—CONFLICTING APPLICATION—CANCELLATION AS RESULT OF CONTEST.

An application to make entry of land embraced in a State selection confers upon the applicant no right to attack it either before the land department or the courts; and there being no statutory right of contest against a State selection, no preference right of entry inures to one who procures its cancellation.

VOGELSANG, *First Assistant Secretary:*

On May 18, 1916, Thomas D. Walton filed his application (Salt Lake City 017619) to purchase the N. ½ SW. ¼ and N. ½ SE. ¼, Sec. 31, T. 12 S., R. 10 E., S. L. M., under the coal-land laws, which was rejected by the local office, and, on appeal, by the General Land

Office, on the ground that the lands were embraced in certified lists of selections made by the State of Utah under section 12 of the act of July 16, 1894 (28 Stat., 107, 110), and the case is now before this Department on his appeal from the decision rendered by the Commissioner on January 16, 1917.

Walton made no attack on the State's selection at the time he applied to purchase, but he supported his appeal to the General Land Office with his uncorroborated sworn statement that the lands were known to contain valuable deposits of coal at the time they were selected, and that veins of coal were being worked on part of the lands before that time.

In the appeal now under consideration Walton urged that the Commissioner erred in not suspending action on his application for the purpose of permitting him to prove the character of the land and show that the selections were fraudulently made and their certification fraudulently induced, in order that a suit for their cancellation might be brought in the courts.

It is well settled that the issuance of a *prima facie* valid patent removes the lands patented from the jurisdiction of the land department, and precludes further inquiry as to their mineral character for the purposes of adjudications by it; but this doctrine has not been applied with strictness in cases where title is attempted to be passed by certification under section 2449, Revised Statutes, because that section in terms declares all selection lists "perfectly null and void" if the lands certified are not of the character granted by the act upon which the selection is based, and hence authorizes inquiry as to the character of the lands subsequent to certification. Weeks *v.* Bridgeman (159 U. S., 541); Garrard *v.* Silver Point Mines (82 Fed., 518); English *v.* Leavenworth, etc., R. R. Co. (23 L. D., 343); Stokes *v.* Pensacola (24 L. D., 396); Scott *v.* Nevada (26 L. D., 629); Manser Lode Claim (27 L D., 326).

But it does not appear that the rule announced by these authorities can be applied in cases where lands are selected under granting statutes which make specific and different direction as to the manner in which selections shall be made and approved.

Section 2449, Revised Statutes, declares that title shall pass upon certification by the Commissioner of the General Land Office, and leaves nothing for the Secretary to do in connection with the passing of the title except through the exercise of his general powers of supervision over the acts of the Commissioner, under which he may annul and vacate the Commissioner's certification. The provisions of that section are general and apply to all grants which are silent as to the manner in which title is to be passed out of the Government, but it is not the only method by which title is vested in grantees by Depart-

mental action, and has no application in cases where specific direction is given by the granting acts for action thereunder by the Secretary of the Interior, as was the case in the act of March 3, 1853 (10 Stat., 244, 247), where selections made under a grant of indemnity lands to California were "subject to the approval of the Secretary of the Interior," or "with the approval of the Secretary of the Interior," as in the grants made to the Dakotas, Montana, and Washington by section 10 of the act of February 22, 1889 (25 Stat., 676, 679).

In such cases the "approval of the Secretary passed the title without regard to the Commissioner's certificate and unaffected by section 2449 of the Revised Statutes," as was said by Attorney General Gregory in his opinion November 19, 1915, addressed to this Department, in which he supported this statement by a citation of Mullen *v.* United States (118 U. S., 271, 273, 278) and Johanson *v.* Washington (190 U. S., 179, 184).

If the title passed in such cases "unaffected by Sec. 2449," it necessarily follows that the provisions of that section, which confers the power to inquire into the character of the land subsequent to certification, would not be operative, and the Secretary's approval of a *prima facie* valid selection list would prevent such inquiry and carry the lands beyond the jurisdiction of the land department and leave the courts with the sole power to inquire into and determine the validity of the selection, if there was nothing in the granting act itself akin to the provisions of Sec. 2449 R. S. which gives this Department the power of subsequent inquiry and attack.

Applying this principle to the case under consideration, we find that the statute under which the selections in question were made provides, in its Section 13—

> That all land granted in quantity or as indemnity by this act shall be selected under the direction of the Secretary of the Interior.

This is tantamount to saying that these selections must receive Departmental approval, and that title to them could not pass under the Commissioner's certification under Section 2449, or be affected by the provisions of that section.

Each of these selection lists, after being certified in the usual form and manner by the Commissioner of the General Land Office, bears the following endorsement signed by the then Secretary of the Interior:

> The foregoing list of selections is hereby approved subject to any valid interfering rights existing at the date of selection.

It will be observed that this approval makes no reference to and is not in terms a ratification of the Commissioner's certification, but is an independent approval of the lists, sufficient in itself to pass the

title unaffected by Section 2449, and the title so passed cannot now be questioned in this adjudication.

The appellant in this case is not in a position to insist that a suit be brought to cancel these selections. Even if the selection lists were still unapproved and if the selection be conceded to be invalid, it was sufficient to prevent the allowance of Walton's application to purchase (Niven *v.* California, 6 L. D. 439; George Schimmelpfenny, 15 L. D. 549; Cal. and Ore. Land Co., 33 L. D. 595), and his application gave him no right to attack the approved selection, either before this Department or before the courts (Story *v.* So. Pac. R. R. Co., 4 L. D. 396; Wright *v.* California, 8 L. D. 24). He cannot claim a legal right to contest the selection or obtain a preferred right of entry thereby even if he did secure its cancellation. DeLong *v.* Clark, 41 L. D. 278.

For these reasons it is not necessary to here consider the question as to whether these selections can now be attacked by the Government or whether such an attack is now barred by the statute of limitations. The decision appealed from is, therefore, in so far as it held adverse to the application to purchase and appellant's request for a hearing, hereby affirmed, and final action herein will be taken in accordance herewith.

CHAPMAN v. PERVIER (On Petition).

Decided August 31, 1917.

RECLAMATION LANDS—SUCCESSFUL CONTESTANT'S PREFERENCE RIGHT—SETTLEMENT BY THIRD PERSONS.

Lands subject to entry within reclamation projects are no exception to the rule of law that an outstanding preference right of entry of certain lands is not, of itself, a bar to settlement thereupon, the settlement being subject, however, to the preference right if exercised.

VOGELSANG, *First Assistant Secretary:*

The Department has considered the petition for exercise of supervisory authority, filed on behalf of Elgin L. Pervier in the above-entitled case, wherein prior decisions were rendered May 9 and August 4, 1917, on appeal and motion for rehearing, respectively, directing cancellation of Pervier's homestead entry 09664, made October 7, 1915, for farm unit "C" (NW. ¼ SE. ¼), Sec. 32, T. 49 N., R. 10 W., N. M. P. M., Montrose, Colorado, land district, upon the ground that George G. Chapman was a *bona fide* settler on the land prior to the date Pervier filed application therefor; the Department further finding that Pervier did not initiate his settlement on the land prior to the date of allowance of his entry.

The main issue at bar, namely, whether or not lands irrigable under a United States reclamation project and opened as provided by the act of August 13, 1914 (38 Stat., 686), are subject to settle-

ment under the homestead laws, was the subject of careful and extended consideration when this case was decided upon appeal and motion. The present petition affords no good and sufficient reason, with respect to this particular feature of the case, that would warrant the Department in deviating from the rule as heretofore laid down, and it is accordingly adhered to.

The contention of counsel for petitioner, that the particular farm unit here in controversy (unit "C") was subject to the preference right of Mary A. Pervier, and therefore, during that preference right period, was not subject to settlement by George G. Chapman, is without merit.

It appears that Joseph L. Pervier successfully contested the homestead entry of one James B. Young, made upon the S. ½ NE. ¼, W. ½ SE. ¼, Sec. 32, T. 49 N., R. 10 W., N. M. P. M., and Mary A. Pervier, widow of the deceased successful contestant, whose preference right of entry was restricted to one farm unit, on October 7, 1915, entered farm unit "A". The superior right of entry of that particular farm unit ("A") is not in issue upon this proceeding.

The fact that Mary A. Pervier possessed the preference right of entry as heir of the deceased successful contestant did not prevent settlement, within the preference right period, upon any one or all of the farm units. All settlements, however, upon the various farm units, platted from the tracts formerly embraced in the homestead entry which was canceled as the result of Joseph L. Pervier's contest, were subject to the preference right of Mary A. Pervier, which, when exercised, affected merely the settlement upon, or right of entry to, the particular farm unit entered in the exercise of that right.

It has long been recognized by the Department as a sound rule of law that an outstanding preference right of entry of certain lands is not, of itself, a bar to settlement thereupon, the settlement being subject, however, to the preference right if exercised.

The petition must be and is hereby denied.

GILMORE et al. v. STATE OF IDAHO (On Rehearing).

Decided September 11, 1917.

RELINQUISHMENT ACCOMPANIED BY APPLICATION FOR SAME LANDS—ATTACHMENT OF OUTSTANDING RIGHT—CAREY ACT SELECTION IN CONFLICT WITH SETTLEMENT RIGHT.

An unconditional relinquishment by a State of lands included within a Carey Act selection, accompanied by an application for the same lands as part of another Carey Act selection in the interest of other parties and contemplating a different system of irrigation, will not prevent the attachment of a valid outstanding homestead settlement right duly asserted.

Prior decisions distinguished.

VOGELSANG, *First Assistant Secretary:*

The State of Idaho has filed a motion for rehearing in the matter of its segregation list No. 53, under the Carey Act, wherein the Department, by decision of May 18, 1917, reversed the decision of the Commissioner of the General Land Office dated November 13, 1915, rejecting the homestead applications of Aretas L. Gilmore, Mabel L. Gilmore and Marcus L. Higgins for certain lands situated in Sec. 30, T. 6 N., R. 30 E., B. M., Blackfoot, Idaho, land district, and dismissing their contests against said list 53.

The Department in its decision distinguished the case at bar from the cases cited by the Commissioner (Mary Stanton, 32 L. D., 260, and California and Oregon Land Company *et al.*, 33 L. D., 595), in support of the conclusion that the relinquishment of segregation list No. 36 and the filing of segregation list No. 53 were parts of the same transaction.

Counsel for the State of Idaho asserts his inability to "follow the logic" of the Department in distinguishing the cases cited from the one under consideration.

In the California and Oregon Land Company case, *supra*, the State of Oregon having sold the selected lands before obtaining title thereto, asked the advice of the land department, and was informed that its vendee could be protected by assignment of a new and valid base for the selection, or by the delivery to him of a relinquishment of the lands, to be presented at the local office with his own application for said lands. This amounted to a recognition of the right of the real party in interest to amend his claim to lands to which, under the rules of the Department, no adverse interest had or could have attached.

In the case of Mary Stanton, *supra*, it was said (page 261):

> This was not an ordinary relinquishment and it is not believed that it should be treated as such . . . It was proffered conditionally and should have been received and held to await the action of the Department upon her application.

In the case at bar the real parties in interest under the State's segregation list No. 36 had no connection whatever with the Blaine County Irrigation Company, in whose behalf the State filed segregation list No. 53. Said Irrigation Company had filed a protest against the segregation of certain lands included in said list 36, as well as against any grant of easement for the irrigation system intended to provide for the reclamation of those lands. The protest was not acted on by the land department, but the State of Idaho, having knowledge of the protest, filed a relinquishment of said list 36 as to the lands here involved, with other lands, and at the same time filed segregation list No. 53, covering the lands relinquished from list 36. For the irrigation of the lands in list 53 the State proposed a system owned by the Blaine County Irrigation Company.

The partial relinquishment of list 36 was not conditional, and the segregation list 53 was filed on behalf of a company whose interests were antagonistic to the company for whose benefit list 36 was filed. List 53 was not filed to protect any rights which were asserted under list 36, but the relinquishment and new list were filed because it was apparent that the Dubois project could not irrigate all the land embraced in list 36, while the tracts relinquished therefrom were believed to be irrigable from the irrigation system of the Blaine County Irrigation Company.

Both lists were filed in the name of the State of Idaho, but the State is only nominally interested, the real parties in interest being the company promoting the Dubois project on the one hand (list 36), and the Blaine County Irrigation Company (list 53) on the other. The elements which were controlling in the cases discussed, and which made the relinquishment and the selection in each case one transaction, are absent from the case now before the Department.

The motion is denied; but in view of the specific denials of the claimed settlements of the appellants, attached to said motion, the Commissioner of the General Land Office will direct a hearing upon that issue.

HANDEL v. LANE.[1]

In the Court of Appeals, District of Columbia.

PUBLIC LANDS—MANDAMUS.

Mandamus will not lie to compel the Secretary of the Interior to issue to the relators a patent for coal land which they entered when it was still unreserved, unsurveyed, and unclassified public land, although after its classification as coal land and appraisal they applied to purchase it and conformed to the requirements of secs. 2347 and 2348, U. S. Rev. Stat. Comp. Stat. 1913, secs. 4659, 4660, which permit the entry of coal lands upon payment of prices per acre therein specified and give a preferential right of entry to persons who have opened and improved, and shall thereafter open and improve, any coal mine upon such lands, and shall be in actual possession of the same,—where the Secretary's refusal to issue a patent to the relators was based upon the ground that not having opened a mine on the land until after its classification and appraisal, they would have to pay the appraised price of the land, and not the price fixed by the statute.

No. 2952. Submitted October 3, 1916. Decided November 14, 1916.

HEARING on an appeal by the relators from a judgment of the Supreme Court of the District of Columbia, dismissing a petition for a writ of mandamus to compel the Secretary of the Interior to issue a patent for coal lands of the relators.

Affirmed.

[1] Reported in 45 App. D. C., 389, and printed with the permission and through the courtesy of Charles Cowles Tucker, Esquire, Reporter.

The COURT in the opinion stated the facts as follows:

Appellants Fred W. Handel and Mae Handel, filed a petition in the supreme court of the District of Columbia for a writ of mandamus to compel Franklin K. Lane, the Secretary of the Interior of the United States, to issue them a patent for certain coal lands located in the state of Montana. From the order dismissing the petition, relators have appealed.

It appears that relators took possession of the land in question in the fall of 1907, when it was still unreserved, unsurveyed, and unclassified public lands of the United States. They complied with all the requirements of the law with respect to mere possessory claimants upon the land to entitle them to enter the same as coal land under the acts of Congress, as soon as surveyed. The survey was made in June, 1909, and in July following relators filed a declaratory statement for the land. April 19, 1910, the land was classified as coal land, and appraised at prices ranging from $72 to $80 an acre.

May 21, 1910, relators made application to purchase the land, and in July following paid to the register and receiver of the local land office $20 per acre, instead of the appraised price.

Mr. W. P. Fennell, for the appellants:

1. Sections 2347 and 2348, U. S. Rev. Stat. confer a right of entry, not a power of sale.

2. Act of June 25, 1910, gives authority to classify, not appraise.

3. The Secretary may not add anything to these statutes, nor supply a method to carry out a supposed intent, where none is prescribed in the statute. Mr. Justice Story, in *Smith* v. *Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100; *United States* v. *George*, 228 U. S. 21; *United States* v. *Goldenberg*, 168 U. S. 103; *Rosencrans* v. *United States*, 165 U. S. 263; *Re Wise*, 93 Fed. 445; *Thornley* v. *United States*, 113 U. S. 315; *United States* v. *Temple*, 105 U. S. 99; *International Bank* v. *Sherman*, 101 U. S. 406; *Leavenworth, etc., R. Co.* v. *United States*, 92 U. S. 751; *United States* v. *Union P. R. Co.* 91 U. S. 85; *United States* v. *Hewecker*, 79 Fed. 64; *Murphy* v. *United States*, 68 Fed. 911; *Northern P. R. Co.* v. *Sanders*, 46 Fed. 249, 47 Fed. 604; *Virginia Coupon Cases*, 25 Fed. 645; *United States* v. *Bassett*, 2 Story, 403; *Griffin's Case*, 13 Ct. Cl. 258; *Ex parte Lange*, 85 U. S. 875; *United States* v. *United Verde Coffee Co.* 196 U. S. 207.

4. Effect of contemporaneous construction long in force. *Clinton* v. *Conant*, 29 Land Dec. 637, 13 Land Dec. 399, 1 Land Dec. 689; *United States* v. *Johnson*, 124 U. S. 236; *United States* v. *McMillan*, 165 U. S. 515; *Bate Ref. Co.* v. *Sulzberger*, 157 U. S. 1.

5. The Secretary is not a real estate agent whose duty it is to get the highest possible price for his principal. *United States* v. *Trinidad Coal Co.* 137 U. S. 170; *El Paso Brick Co.* v. *McNight*, 233 U. S. 259; *Osborn* v. *Froyseth*, 216 U. S. 571.

6. Executive discretion is not unlimited. Must not be arbitrary. *Cornelius* v. *Kessel*, 128 U. S. 461; *United States* v. *George*, 228 U. S. 21; *United States ex rel. Newcomb Motor Co.* v. *Moore*, 30 App. D. C. 464; *Ballinger* v. *United States; Daniels* v. *Wagner*, 237 U. S. 557; *Hoglund* v. *Franklin K. Lane*, W. L. R.

7. Comparison with other statutes conferring power of sale pari materia. 41 Land Dec. 398, 43 Land Dec. 520.

8. Section 2348 contains no reference to price and no preference right is involved in this case.

9. Rights conferred by Congress not to depend upon policy of administration.

10. Official reports and speeches by individual members of Congress are not authority.

11. Development not price, the intent of Congress. *United States* v. *Universal Coal Co.* 137 U. S. 170; *El Paso Brick Co.* v. *McNight*, 233 U. S. 259.

12. Mandamus lies in this case: *Marbury* v. *Madison*, 1 Cranch, 137; *United States* v. *Schurz*, 102 U. S. 167; *Roberts* v. *United States*, 176 U. S. 445; *Butterworth* v. *United States*, 112 U. S. 657; *United States* v. *Black*, 128 U. S. 40–48; *Brownsville* v. *Loague*, 129 U. S. 493; *United States ex rel. West* v. *Hitchcock*, 19 App. D. C. 333; *United States ex rel. Newcomb Motor Co.* v. *Moore*, 30 App. D. C. 464; *Semon* v. *Calivert*, 27 Wash. 679; *Svan Hoglund* v. *Franklin K. Lane*, Wash. L. Rep.

Mr. Alexander T. Vogelsang and *Mr. C. Edward Wright*, for the appellee, in their brief cited:

Brown Bear Coal Asso. 42 Land Dec. 320; *Clinton S. Conant*, 29 Land Dec. 637; *Com.* v. *Brown*, 210 Pa. 29; *Drake* v. *State*, 5 Tex. App. 649; *Hankins* v. *People*, 106 Ill. 628; *Wm. G. Plested*, 40 Land Dec. 610; *Plested* v. *Abbey*, 228 U. S. 42; *Rusch* v. *Davenport*, 6 Iowa, 443; *Stewart* v. *Griswold*, 134 Mass. 391; *Stimson* v. *Pond*, Fed. Cas. No. 13,455; *United States* v. *Midwest Oil Co.* 236 U. S. 459; *United States* v. *Munday*, 222 U. S. 175; *United States* v. *Trinidad Coal Co.* 137 U. S. 170; *Worth* v. *Peck*, 7 Pa. 268.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

The provisions of the law here involved are embraced in secs. 2347 and 2348, U. S. Rev. Stat. Comp. Stat. 1913, secs. 4659, 4660. Section 2347 provides that "every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated

or reserved by competent authority, not exceeding one hundred sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

The portion of sec. 2348, U. S. Rev. Stat. material reads as follows: "Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved."

When the case came before the Secretary for final approval, he held that relators were not "entitled to a preference right of entry," since, upon the proofs adduced, they had not opened a coal mine within the requirements of the statute. The decision was based upon a prior departmental decision in the case of *Re Brown Bear Coal Asso.* 42 Land Dec. 320, wherein it was held that, "where a tract of land was classified and appraised after the opening and improving of a mine of coal thereon, the filing of a declaratory statement, and the making of the expenditure required by sec. 2348, Revised Statutes, the applicant is entitled to purchase at the price existent at the date of the opening and improving of the mine."

Had relators had a mine opened and improved prior to the date of classification and valuation of the land, under the ruling in the Brown Bear Case they would have been entitled to the land at the minimum price of $20 per acre, but, not having such a mine, it was held that they must pay the appraised price.

Counsel for relators takes the broad ground that the Secretary is without legal authority to make an appraisement of coal lands and charge entrymen in excess of the minimum price named in the statute,—$20 per acre when the land is located within 15 miles of any completed railroad, or $10 per acre when situated more than 15 miles from such railroad,—and that his action, being without authority of law, is void. It can only be on this broad contention that the petition here could be entertained.

We think, however, that the action of the Secretary in withholding the patent to this land has not been of that purely arbitrary character which would justify the issuance of a writ of mandamus to compel the issuance and delivery of a patent. The Secretary is given by law general supervision and control of the disposition of the public lands of the United States, and, when not expressly limited by statute, his rulings and decision, if based upon reasonable regulations promul-

gated by authority of law expressly vested in him (U. S. Rev. Stat. sec. 2351, Comp. Stat. 1913, sec. 4663), or upon the construction or interpretation of a statute, will not be controlled by any extraordinary process of the courts. The jurisdiction of the Secretary of the Interior, as head of the Land Department has been clearly defined in numerous decisions. In *Brown* v. *Hitchcock*, 173 U. S. 473, 476, 43 L. ed. 772, 773, 19 Sup. Ct. Rep. 485, it was held that "until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the Land Department." In the earlier case of *United States* v. *Schurz*, 102 U. S. 378, 396, 26 L. ed. 167, 171, the court said: "Congress has also enacted, a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

We think, in the light of the rule so long adhered to in the courts of the United States, the Secretary, acting in his quasi judicial capacity, was called upon to construe the acts of Congress here in question, and his decision is not subject to review in this proceeding. Though the construction placed upon the act of Congress may be erroneous,—a question upon which we are not called to decide,—so long as the construction was a possible one, it is not subject to review in mandamus. *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356.

Complaint is made that the relators, if denied the writ prayed in the present action, are left without a remedy. The Congress has made the decisions of the Secretary of the Interior final on all matters relating to the disposition and sale of the public lands, so long as title remains in the United States. If this amounts to a legislative injustice, Congress, and not the courts, can correct it. The courts are powerless to create a remedy.

The judgment is affirmed with costs.

Affirmed.

LANE v. CAMERON.[1]

In the Court of Appeals, District of Columbia.

PUBLIC LANDS—MINING CLAIMS—OFFICERS—EQUITY—INJUNCTION.

1. A valid mining claim under the public land laws is property which may be bought and sold and which passes by descent.

[1] Reported in 45 App. D. C., 404, and printed with the permission and through the courtesy of Charles Cowles Tucker, Esquire, Reporter.

2. Even after judgment of the court in a proceeding by an adverse claimant to a mining claim, under sec. 2326, Rev. Stat. Comp. Stat. 1913, sec. 4623, on the question of the right of possession, the Land Department may pass upon the sufficiency of the proofs to ascertain the character of the land and determine whether the conditions of the law have been complied with in good faith.
3. The province of the courts is to uphold, rather than stay, the hands of officials who, in good faith, are seeking to perform duties imposed by law.
4. The Secretary of the Interior and the Commissioner of the General Land Office will not be enjoined, in a suit in equity by the locator of an unpatented mining claim who states that he is satisfied and does not and may never desire a patent, from proceeding to determine the character of the claim. (Construing secs. 2318 to 2348, Rev. Stat. Comp. Stat. 1913, secs. 4613–4660.)

No. 2971. Submitted October 4, 1916. Decided November 14, 1916.

HEARING on an appeal by the defendants, the Secretary of the Interior and Commissioner of the General Land Office, from a decree of the Supreme Court of the District of Columbia, enjoining them from proceeding to determine the character of land covered by unpatented mining claims in which the complainant claimed an interest.

Reversed.

The COURT in the opinion stated the facts as follows:

This is an appeal from a decree of the supreme court of the District restraining the Secretary of the Interior, Franklin K. Lane, the Commissioner of the General Land Office, Clay Tallman, their successors in office, and all persons claiming to act under their authority, from proceeding to determine the character of land covered by six unpatented mining claims in the Grand Canyon, in the State of Arizona, in which appellee, Ralph H. Cameron, asserts an interest.

In his bill appellee sets forth the pendency in the Land Office of six certain proceedings in which the United States is plaintiff and he one of the defendants, involving the several lode and placer mining claims enumerated in his bill; that these locations are unpatented claims held by him and his associates under the mineral laws of the United States; that each year they have done at least $100 worth of work "which tended to develop the mineral contents of said claims"; that the jurisdiction of the Department has not been invoked in any way for the purpose of claiming the fee simple title to the land embraced in the claims, or for any other purpose; that by reason of the location of such mining claims the locators obtained by operation of law a vested right and property in the claims and the lands embraced within their boundaries, giving to the holders of such claims "*the right of possession*" to all such land; "that such title is a complete and independent legal title separate from, unattached to and

independent of, any title held by the United States in or to said ground * * *; that the attempt of the defendants in this case to proceed with the said contests is an unlawful, unauthorized, and unrighteous effort to interfere with the vested, legal, complete, entire and perfect right, title, interest and property of this plaintiff and his co-owners, and tends to cloud and does cloud the title of plaintiff and his co-owners; and the actions of the defendants herein complained of constitute an attempt to deprive the plaintiff and his co-owners of their property without due process of law * * *; that the plaintiff and his co-owners are satisfied and content with the vested title, right, estate, and property which they have already acquired from the United States of America; that plaintiff and his co-owners do not wish and may never desire to acquire the said described title so remaining in the United States of America." It is further set forth that upon the institution of said proceedings in the local land office at Phoenix, Arizona, due notice having been given locators, pleas to the jurisdiction were filed and overruled.

Appellants interposed a motion to dismiss the bill; the several grounds of the motion being, first, want of equity; second, the legal title to the land in question still being in the United States, all questions as to the status of said land are cognizable in the land department, and as it appears from the bill that there now is pending before that Department a proceeding to ascertain the status of the land involved and the existence and validity of the claim of interest therein asserted by the plaintiff, the bill should be dismissed; third, that the exercise of judgment and discretion by the Department is not reviewable by any court, either of law or equity; and, fourth, that even if appellants have no jurisdiction and if said proceedings are void, as averred in the bill, the action of appellee is premature. Appellants electing to stand upon their motion to dismiss, the court entered the decree above mentioned and this appeal followed.

Mr. Alexander T. Vogelsang, *Mr. C. Edward Wright*, and *Mr. C. D. Mahaffie*, for the appellants, in their brief cited:

Alice Placer Mine, 4 Land Dec. 314; *Barden* v. *Northern P. R. Co.* 154 U. S. 288; *Belk* v. *Meagher*, 104 U. S. 279; *Bockfinger* v. *Foster*, 190 U. S. 116; *Brown* v. *Hitchcock*, 173 U. S. 473; *Burfenning* v. *Railway*, 163 U. S. 321; *Burke* v. *Southern P. R. Co.* 234 U. S. 669; *Cameron* v. *Weedin*, 226 Fed. 44; *Clark* v. *Herington*, 186 U. S. 206; *Clipper Min. Co.* v. *Eli Min. & Coal Co.* 194 U. S. 220; *Collins* v. *Babb*, 73 Fed. 735; *Cosmos Exp. Co.* v. *Grey Eagle Oil Co.* 190 U. S. 301; *Creede & C. C. Min. Co.* v. *Uinta Min. Co.* 196 U. S. 337; *Deffeback* v. *Hawke*, 115 U. S. 392; *Re Emblem*, 161 U. S. 52; *Fisher* v. *United States ex rel. G. R. T. Co.* 37 App. D. C. 436; *Hardin* v. *Jordan*, 140 U. S. 371; *Hawley* v. *Diller*, 178 U. S. 476; *Heath* v.

Wallace, 138 U. S. 573; *Johnson* v. *Towsley*, 13 Wall. 72; *Kirwan* v. *Murphy*, 189 U. S. 35; *Lane* v. *United States ex rel. Mickadiet*, 241 U. S. 201; *Last Chance Min. Co.* v. *Tyler*, 157 U. S. 683; *Le Fevre* v. *Amonson*, 81 Pac. 71; *Litchfield* v. *Reg. & Rec.* 9 Wall. 575; *Marquez* v. *Frisbie*, 101 U. S. 473; *Nevada Exp. & Min. Co.* v. *Spriggs*, 124 Pac. 770; *Ex parte Nichols-Smith*, unreported; *Noble* v. *Union River Logging Co.* 147 U. S. 165; *Nome & S. Co.* v. *Nome*, 34 Land Dec. 275; *O'Brien* v. *Lane*, 40 App. D. C. 493; *Perego* v. *Dodge*, 163 U. S. 160; *Plested* v. *Abby*, 228 U. S. 42; *Conlon* v. *Quinby*, 104 U. S. 420; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Shepley* v. *Cowan*, 91 U. S. 330; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *United States* v. *Midwest Oil Co.* 236 U. S. 459; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *Warnekros* v. *Cowan*, 108 Pac. 238; *Wright* v. *Hartville*, 81 Pac. 649; *Re Yard*, 38 Land Dec. 59.

Mr. Francis M. Phelps, for the appellee, in his brief cited:

Noble v. *Union River Logging Co.* 147 U. S. 165; *Belk* v. *Meagher*, 104 U. S. 279; *St. Louis M. & M. Co.* v. *Montana Limited*, 171 U. S. 650–655; *Clipper M. Co.* v. *Eli M. Co.* 194 U. S. 220; *Hardin* v. *Jordan*, 140 U. S. 371; *Nome & S. Co.* v. *Nome Townsite*, 34 Land Dec. 275; *Re Yard*, 38 Land Dec. 59.

Mr. Justice ROBB delivered the opinion of the Court:

The method of initiating a miner's right differs very materially from the requirements of a homestead entry. A mining claimant merely stakes out his location, files his claim in the office of the clerk of the county wherein the land is situated, and proves each year that he has done a certain amount of work on the claim. By the filing of his claim he acquires what is known as a mining location and is not required to file any paper in the Land Office unless and until he applies for a patent. See Sections 2318 to 2348, Rev. Stat. Comp. Stat. 1913, secs. 4613–4660. But Section 2320 declares that "no location of a mining claim shall be made *until the discovery of the vein or lode* within the limits of the claim located." Under Section 2322, locators, "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the limits of their locations," etc. A valid claim, therefore, is property, which may be bought and sold and which passes by descent. *Belk* v. *Meagher*, 104 U. S., 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510.

Section 2326 provides that where an adverse claim is filed during the period of publication, it shall be the duty of such claimant, within a specified time, "to commence proceedings in a court of competent

jurisdiction, to *determine the question of the right of possession*, and prosecute the same with reasonable diligence to final judgment." It is the contention of the Department that in such a proceeding the jurisdiction of the court is confined to a determination of the single question of the relative rights of the parties, and that the court is not authorized to determine the character of the land. This view was adopted by the supreme court of Wyoming in *Wright* v. *Hartville*, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 415, Mr. Justice Van Orsdel of this court writing the opinion. The court said: "The rule is universal that when the question of the character of the land is in issue it is one for the Land Department, and not for the courts." The same view was adopted by the supreme court of Idaho in *Le Fevre* v. *Amonson*, 11 Idaho, 45, 81 Pac. 71.

That this also is the view of the Supreme Court of the United States will be apparent from a brief examination of its opinions. Thus in *Barden* v. *Northern P. R. Co.* 154 U. S., 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, the court observed that it is the established doctrine, expressed in a number of its decisions, "that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack." Later on in the opinion the court said: "There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive." In *Perego* v. *Dodge*, 163 U. S., 160, 41 L. ed. 113, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364, a suit under Sec. 2326, the court pointed out that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceeding. In *Clipper Min. Co.* v. *Eli Min. & Land Co.*, 194 U. S., 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632, adverse claims had been filed and the case had gone to judgment. The court said: "We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the govern-

ment, or that the judgment necessarily gives to them the lodes in controversy." The court then quotes from 2 Lindley on Mines, Sec. 765, to the effect that even after the judgment of a court on the question of the right of possession, the Land Department may pass upon the sufficiency of the proofs to ascertain the character of the land and determine whether the conditions of the law have been complied with in good faith. The opinion of Mr. Justice Lamar, when Secretary of the Interior, in Re Alice Placer Mine, 4 Land Dec. 316, to the same effect, was then quoted with approval. The court concluded: "The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So, also, it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it."

In the light of the foregoing, we will consider the present case. These claims were filed in the Grand Canyon in territory now set aside as a national forest and national monument. No adverse claims, therefore, now can be filed against them. Appellee and his associates, as set forth in the bill, naturally are "satisfied and content" with the situation, and "do not wish and may never desire" a patent to these claims. It is apparent, therefore, that unless the Land Department of the Government, to which and to which alone has been entrusted the authority and duty of representing and protecting the public interest in these matters, is authorized to inquire into the good faith of these claims, the public interest may suffer. The jurisdiction of the Department to make such an inquiry should this appellee ask for a patent, is not denied. The question of jurisdiction, therefore, under his contention, is dependent upon his will. If he conceives it to be to his interest to obtain a patent, jurisdiction will be conferred upon the Department to determine the character of the land embraced within these entries; but, if he elects not to apply for a patent, the Department, even if convinced that the character of the land is nonmineral, must permit him to occupy it to the exclusion of the public. This is a startling contention to press in a court of equity, and its fallacy is clearly apparent when we come to consider that the administration of the public land system was entrusted exclusively to the Land Department, that the public interest might be protected at all times.

But, says the appellee, it is open to the Land Department to institute a court proceeding to have determined his rights. The Department very naturally answers this contention by pointing out that under such a proceeding the court would be without jurisdiction to pass upon the fundamental question involved; namely, that of the character of the land. That question, as we have seen, has been held to be for the exclusive determination of the Department, and should the Department institute a court proceeding without first having

determined it, there would be nothing upon which to base a judgment. We are clearly of opinion that this contention of appellee is unsound.

Hardin v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and *Noble* v. *Union River Logging R. Co.*, 147 U. S., 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, are not in conflict with our conclusion that the Department has jurisdiction to inquire into the character of the land here involved; for in these cases there had been final action by the Department, and hence attempts to resume a jurisdiction wholly lost were abortive. In the present case, the legal title to the land embraced within these entries still is in the United States, and the question as to the character of that land still is undetermined. This, therefore, is an attempt not to prevent the Department from resuming a lost jurisdiction, but from exercising an existing jurisdiction and performing a statutory duty.

This attempt of appellee to interfere with the Department in the performance of its duty as the guardian of the public interest, must fail. If the character of this land really is mineral and the locations regular, such undoubtedly will be the finding of the Department, and appellee will be injured in no way. If, on the other hand, the character of this land is nonmineral and these locations irregular, these facts should be determined and appropriate action taken by the Department to restore this land to the public domain. The province of courts is to uphold, rather than stay, the hands of officials who, in good faith, are seeking to perform duties imposed by law.

It follows that the decree must be reversed, with costs, and the cause remanded with directions to dismiss the bill.

Reversed and remanded.

JONES v. McNEIL.

Decided September 22, 1917.

COMMISSIONER OF THE GENERAL LAND OFFICE—AUTHORITY UNDER SEC. 453, U. S. REV. STAT.—SUPERVISORY AUTHORITY OF SECRETARY.

Under section 453 of the U. S. Revised Statutes, the land department of the Government has always held that in matters pertaining to the public domain, authority granted to the Secretary of the Interior may be exercised, in the first instance, by the Commissioner of the General Land Office, subject to the supervisory authority of the Secretary.

DESERT-LAND ENTRIES—AUTHORITY OF COMMISSIONER IN TIME EXTENSION—ACT OF APRIL 30, 1912.

The provision in the act of April 30, 1912 (37 Stat., 106), that "the Secretary of the Interior may in his discretion in addition to the extension authorized by existing law grant to any entryman under the desert land laws a further extension of time within which he is required to make final proof,"

does not preclude the granting of such extension of time by the Commissioner of the General Land Office, subject to the supervisory authority of the Secretary.

VOGELSANG, *First Assistant Secretary:*

March 11, 1908, William M. McNeil made desert-land entry 01215, for the SE. ¼, Sec. 9, T. 33 N., R. 75 W., 6th P. M., 160 acres, Douglas, Wyoming, land district.

August 29, 1910, first annual proof was filed, alleging expenditure of $220 for fencing and for surveying a ditch, and August 9, 1911, second annual proof was filed showing expenditure of $200 for ditch work. July 2, 1912, McNeil filed application for extension of time for three years within which to submit final proof, alleging as ground therefor the expenditure of at least $750 for fencing the land with a three-strand barbed wire fence and building a section of a ditch which, when completed, will be four and a half miles long, and further alleging that some of the ditch is rock work, taking longer to perfect.

November 14, 1912, an extension of time was granted to and including March 11, 1915, under the act of March 28, 1908 (35 Stat., 52).

July 18, 1916, the local officers transmitted application for further extension of time for one year, in which application it is alleged, among other things, that since the first application for extension was filed there has been expended in money and labor $1,000 in constructing an irrigation ditch, 5 feet wide on the bottom and 7 feet wide on the top, for a distance of one and a quarter miles, in an effort to effect reclamation of the land. This application was executed June 30, 1916, before a local officer.

August 5, 1916, upon the showing made, a further extension of time was granted to and including March 11, 1917, under the acts of March 28, 1908, *supra*, and April 30, 1912 (37 Stat., 106).

With McNeil's application for further extension of time was also transmitted a protest by Floyd Jones against the allowance of such application, which protest was dismissed by the Commissioner's decision of November 25, 1916. From this decision Jones has appealed to the Department.

In dismissing the protest of Jones, the Commissioner says:

> The affidavit of protest is largely a chronological statement of facts, all within the knowledge of this office, and contains no material allegations which would tend to disprove those put forward by McNeil in his application for extension. The fact that McNeil was in default is immaterial and was cured by the granting of the extension. Unless the affidavit of protest contains allegations sufficient, if proved to be true, to negative the right of the entryman to extension of time for proof, the application for such extension must be adjudicated in all respects as if protest had not been filed (39 L. D., 557).

The application for extension was so adjudicated and the protest is accordingly dismissed, subject to the usual right of appeal within 30 days from notice.

The only contention presented upon this appeal is that the Commissioner of the General Land Office was without authority to grant a further extension of time under the act of April 30, 1912 (37 Stat., 106), and that such extension could be granted only by the Secretary of the Interior. This contention is based upon the language of such act—

that the Secretary of the Interior may in his discretion in addition to the extension authorized by existing law grant to any entryman under the desert land laws a further extension of time within which he is required to make final proof.

It has always been the holding of the Department that in matters pertaining to the public domain, authority granted to the Secretary can be first exercised by the Commissioner of the General Land Office, subject to appeal to and revision by the Secretary of the Interior. Full authority for this mode of procedure is found in section 453, U. S. Revised Statutes. This practice is recognized under the act of April 30, 1912, by Departmental instructions of May 21, 1912 (41 L. D., 28).

The action of the Commissioner in this case is fully authorized by Departmental decision in Hoobler *v.* Treffry (39 L. D., 557).

The decision appealed from is affirmed.

WEIR v. OVERR.

Decided September 25, 1917.

DESERT ENTRY—ANNUAL PROOF—CREDIT FOR IMPROVEMENTS.

A desert-land entryman is not entitled, in making annual proof, to credit for improvements placed upon the land by a former entryman.

SEC. 5, ACT OF MARCH 4, 1915—CONTEST NOT A BAR TO RELIEF.

The benefits of the act of March 4, 1915 (38 Stat., 1138, 1161), are applicable to entries otherwise within its terms notwithstanding the intervention of a contest.

DESERT-ENTRYMAN'S EXPENDITURE—BASIS FOR RELIEF UNDER ACT OF MARCH 4, 1915.

Expenditure by a desert-land entryman in good faith in a reasonable belief that it would tend to reclaim the land from its desert state is acceptable in support of a claim for relief under paragraphs 2 and 3 of the act of March 4, 1915, notwithstanding it may not have been such as would satisfy the requirements of annual proof.

VOGELSANG, *First Assistant Secretary:*

Cora B. Overr has appealed from decision of April 9, 1917, by the Commissioner of the General Land Office, holding for cancellation her desert-land entry for the NW. ¼, Sec. 12, T. 24 S., R. 24 E.,

M. D. M., Visalia, California, land district, on the contest of D. S. Weir.

The entry was made November 9, 1912, and the first contest affidavit was filed on November 13, 1915, charging that the entrywoman had not during the first two years after the date of the entry expended the sum of $320, or an amount equal to $2 per acre, tending toward the irrigation and reclamation of the land. An amended contest affidavit was filed on March 9, 1916, alleging that the sum of $480, or an amount equal to $3 per acre, had not been expended on the land toward the irrigation and reclamation thereof during the first three years of the life of the entry. Answer was filed by the entrywoman and a hearing was had on the contest. The local officers found that the charge had been sustained and the Commissioner affirmed that action.

There is little conflict in the testimony upon the vital issues. The questions for decision are of law. It is shown that the entrywoman, on November 11, 1912, purchased the improvements placed on this land by a former entryman, Horace E. Gilhousen. The items so purchased are enumerated in the instrument of transfer as follows:

> Two miles of two barbed wire fence, including posts. Windmill, pump and fixtures, cabin and contents, except personal effects.

The amount of $400 was paid for these improvements, as shown by the testimony. On December 3, 1913, the entrywoman made first yearly proof, claiming expenditures to the amount of $680 for the ultimate reclamation of the lands, itemized as follows:

Boring one 10-inch well	$100
Purchase of gasoline engine and pump	350
Fencing	100
First clearing, breaking, leveling and checking of 20 acres of land	130

It was also shown at the hearing that after the date of filing of the first contest affidavit and the filing of the amended affidavit, work to the value of $45 or $50 had been put upon the land in the building of a reservoir.

The record shows that a gasoline engine and two pumps were purchased for $700. One of these pumps and one-half interest in the engine were intended for use on this land. The entrywoman's husband has an adjoining entry, and the plan was to use the engine jointly between the two. One-half of the cost, or $350, was charged to this land. However, the said appliances, although on the ground, had not been attached to the well so as to become effective for use in irrigating the land. In view of these accepted facts the contestant makes the following contentions:

(1) Improvements placed on the land by a former entryman can not be credited as a part of the annual improvement required by the desert-land act.

In support of this proposition the case of Herren *v.* Hicks (41 L. D., 601), was cited.

(2) A pump not installed or affixed to the realty, and a portable gasoline engine mounted on wheels and not affixed permanently to the realty can not be credited as a part of said annual improvement.

The cases of Rigdon *v.* Adams (34 L. D., 279), and Wilkinson *v.* Stillwell (35 L. D., 92), were cited in support of this contention.

The decisions referred to are clear authority for the propositions advanced by the contestant with reference to the ordinary provisions of the desert-land law concerning the required yearly expenditures. It is believed, however, that this case should receive consideration under the remedial act of March 4, 1915 (38 Stat., 1138, 1161). It has been held that the benefits of this act may be accorded, in a proper case, notwithstanding the intervention of contest. (Ward *v.* Tapp, 44 L. D., 157, 159; Gammill *v.* Thompson, 44 L. D., 476.)

Said act provides, in part, as follows:

That where it shall be made to appear to the satisfaction of the Secretary of the Interior, under rules and regulations to be prescribed by him, with reference to any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, 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, if the extension allowed by this Act or any existing law were granted, 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 five years from notice within which to perfect the entry in the manner required of a homestead entryman.

That any desert-land entryman or his assignee entitled to the benefit of the last preceding paragraph may, if he shall so elect within sixty days from the notice therein provided, pay to the receiver of the local land office the sum of 50 cents per acre for each acre embraced in the entry, and thereafter perfect such entry upon proof that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than $1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years and the payment to the receiver, at the time of final proof, of the sum of 75 cents per acre: *Provided*, That in such case final proof may be submitted at any time within five years from the date of the entryman's election to proceed as provided in this section, and in the event of failure to perfect the entry as herein provided, all moneys theretofore paid shall be forfeited and the entry canceled.

In the instructions of April 13, 1915 (44 L. D., 56), for administration of said act, section 7, with reference to the nature of expenditures required to support a claim under that part of the act above quoted, provides that—

any expenditure which the claimant can show that he has made in good faith and with a reasonable belief that it would tend to effect reclamation of the land will be acceptable, even though such expenditure may not have been such as would satisfy the requirements for annual proof.

In this connection see case of Elliott *v.* White (45 L. D., 217). Full instructions with reference to application for relief under said remedial act may be found in circular of May 18, 1916 (45 L. D., at page 367 *et seq.*).

The first paragraph of section 5 of said act of March 4, 1915, provides for extension of time for the submission of final proof, but a condition precedent for such relief is that expenditures must have been made such as would satisfy the provisions of the desert-land law respecting yearly expenditures. As above shown, expenditures which may be properly credited in this case do not meet such requirements. But as to the other two paragraphs of section 5 of the said remedial act as above quoted, the expenditures appear to furnish sufficient basis for relief, provided the necessary further showing be made. It is, therefore, deemed appropriate to afford the entrywoman opportunity to apply for the relief above suggested, and to this end the contest will be suspended for a period of thirty days from notice hereof to permit such an application to be filed, should the entrywoman desire to undertake to show herself entitled to that form of relief. Upon expiration of the period stated, such further action will be taken as may then appear appropriate.

The decision appealed from is accordingly modified.

LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF AGENTS, ATTORNEYS, AND OTHERS REPRESENTING CLAIMANTS BEFORE THE DEPARTMENT OF THE INTERIOR AND ITS BUREAUS.

LAWS.

The following statutes relate to the recognition of attorneys and agents for claimants before this Department:

That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement. [Act of July 4, 1884, sec. 5; Stat. L., vol. 23, p. 101.]

Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection

with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both. [Act. of Mar. 4, 1909, sec. 109; Stat. L., vol. 35, p. 1107.]

It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee. [Sec. 190, Revised Statutes.]

Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States. [Sec. 113, Criminal Code of the United States.]

Any person prosecuting claims, either as attorney or on his own account, before any of the departments or bureaus of the United States shall be required to take the oath of allegiance and to support the Constitution of the United States, as required of persons in the civil service. [Sec. 3478, Revised Statutes.]

The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in the State or district where the same may be administered. [Sec. 3479, Revised Statutes.]

The act of May 13, 1884 (Stat. L., vol. 23, p. 22), provides that the oath above required shall be that prescribed by section 1757, Revised Statutes, which is as follows:

I, ——— ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me, God.

REGULATIONS.

Under the authority conferred upon the Secretary of the Interior by the fifth section of the act of July 4, 1884, the following regula-

tions are promulgated for the guidance of the various bureaus and offices.

NOTE.—A special admission is required for practice before the Patent Office (see Patent Office Rules of Practice). Except as therein prescribed, the following regulations are applicable to practitioners before the Patent Office.

1. Any person who is an attorney at law in good standing and a citizen of the United States, or has declared his intention to become such a citizen, may be admitted to practice as an attorney in and may be recognized as the representative of claimants before the Department of the Interior and its several bureaus by presenting for that privilege his satisfactory application containing recitals as to the following facts:

(*a*) The applicant's full name, age, and permanent post-office address; (*b*) the date on which he was first admitted to practice before any court and the name and place of location of such court; (*c*) the name and place of location of the last court before which he was admitted or enrolled, and the name and location of the court before which he has lately most actively practiced; (*d*) the name of the executive department or bureau of the Federal Government, if any, in which he has been admitted to practice or in which he has been denied admission to practice, and the date of such admission or denial; (*e*) whether he has ever been disbarred or suspended or excluded from practice, and if so, the grounds on which he was disbarred, suspended, or excluded, and the dates of his disbarment, suspension, or exclusion and readmission to practice; (*f*) the name and location of the court, courts, or executive department by which his disbarment, suspension, or exclusion, and readmission were ordered; and (*g*) the name of the officer or employment, if any, which the applicant holds or has under the Government of the United States at the date of his application for admission, or has theretofore so held or had, if any, and the date and cause of his separation from such former office or employment.

2. Any attorney at law whose application for admission to practice is pending before the Department of the Interior or any of its bureaus may, at the discretion of the officer before whom it is pending, secure the right to enter his appearance in any proper matter pending for adjudication by such Department or bureau, and continuously thereafter and until final adjudication thereof exercise all the rights and privileges of an admitted attorney by presenting his application therefor to the Secretary of the Interior or to the head of the bureau before which such matter is pending.

3. Any competent person who is a citizen of the United States, or who has declared his intention to become such a citizen, and who is not an attorney at law, may be admitted to practice as an agent in, and may be recognized as the representative of claimants before the

Department of the Interior and all its bureaus by presenting his satisfactory application, under oath, for that privilege containing recitals as to the following facts:

(*a*) The applicant's full name, age, present occupation, permanent post office address, and his occupation during each of the preceding 10 years; (*b*) a statement as to whether he has theretofore been admitted to practice or denied admission to practice before any executive department or bureau of the Federal Government, and if so, the name of such department and the date of his admission or denial; (*c*) whether he has ever been disbarred or suspended or excluded from practice as such agent, and if so, the grounds on which he was disbarred, suspended, or excluded, the date of his disbarment, suspension, or exclusion, and the name of the department by which the same was ordered; (*d*) the name of any office or employment, if any, which the applicant holds or has under the Government of the United States at the date of his application for admission, or has theretofore so held or had, if any, and the date and cause of his separation from such former service or employment; (*e*) a brief statement of the applicant's educational qualifications and knowledge of the laws administered by said department and its bureaus; and (*f*) the names and post-office addresses of five reputable persons who have an intimate knowledge of the applicant's character and qualifications.

4. Each application for admission as attorney must be accompanied by and have attached thereto, in addition to the oath prescribed by section 1757, Revised Statutes, *supra*, a duly executed and authenticated certificate from the clerk of the court or courts named in such application, stating that the applicant is a person of good moral character and in good repute, and that he has been and is duly admitted to practice in the court of which he is the clerk, and that the applicant is at that time an attorney in good standing therein; and each applicant for admission as an agent must furnish and attach to his application as a part thereof, and in addition to the oath prescribed by section 1757, Revised Statutes, *supra*, a certificate signed by a judge of a court of record stating that the applicant is a person of good moral character and in good repute, possessed of the necessary qualifications to enable him to render claimants valuable service, and otherwise competent to advise and assist claimants in presenting their claims before the Department of the Interior and its bureaus.

5. All applications for admission to practice must be addressed to the Secretary of the Interior and be filed with the head of the bureau before which the applicants named therein expect most frequently to appear; and the officer with whom any such application is filed will, after such consideration and investigation as he may deem necessary, forward such application, together with such report and

recommendation thereon as the facts, in his judgment, warrant, to the said Secretary, for his consideration and action thereon.

6. The Secretary of the Interior, or the head of any bureau with whom any application for admission to practice is filed, may require the applicant named therein to furnish such other evidence or statement in support thereof as he may deem advisable, and may make such investigation, or cause such investigation to be made, as may in his judgment be necessary to enable him to determine the proper action to be taken on such application; and favorable action will not be taken on any such application until after the applicant named therein shall have furnished such additional evidence or statement as may be required of him.

7. Firms of agents or attorneys, as such, will not be permitted to practice before the Department or recognized as having the right to appear before it, or any bureau or office thereof, in any proceedings or matter involving the services of an agent or attorney; and, except in the Pension Bureau, in the prosecution of any matter by any such firm, every pleading, brief, motion, or other paper or communication shall be signed individually by one or more duly qualified members thereof, and such signature shall be considered as a certificate by such agent or attorney that he has read the papers so signed by him; that upon the instructions laid upon him regarding the case there is good ground for the same; that no scandalous matter is inserted therein; and that it is not interposed for delay.

8. No person holding any office or place of trust or profit under the Government of the United States will be permitted to appear as an attorney or agent for the claimant in any case against the United States; nor shall any person who has, within two years next preceding his admission to practice before the Department, been employed in any of the executive departments of the Government, be permitted to appear as attorney or agent of the claimant in any case involving the prosecution of a money demand against the United States, unless the case in which he appears shall have been presented after his retirement from such service. No attorney will be recognized or heard as counsel in any case in the consideration and disposition of which he has directly participated, in any capacity, during his connection with the Department.

9. No officer authorized to receive final proofs, or to officiate in the preparation and execution of applications and affidavits for entry of public lands, will be permitted to appear for and represent the claimant in any case pending before the Department, the General Land Office, or any district land office in which he shall have rendered such official service.

10. Authority to appear in and practice before the Department includes authority to practice in and before any and all of the bureaus

and offices of the Department, except the Patent Office. Each of the several bureaus and offices of the Department will be, from time to time, advised of the names and addresses of persons admitted to practice as attorneys or agents.

11. Attorneys or agents shall not contract for, demand, or receive, directly or indirectly, any compensation whatsoever, for advice or consultation concerning the pension laws, and such of the bounty land laws as are administered and executed by the Pension Bureau, except such compensation as may be lawfully paid by order of the Commissioner of Pensions, whether a claim has been or is thereafter filed for the person in whose behalf such advice or consultation is had.

12. Whenever the Secretary, or the head of any bureau of the Department, has knowledge, or sufficient information that any attorney or agent admitted to practice before the Department is engaged in unprofessional or dishonest practice, or has been guilty of disreputable conduct in connection with any matter before the Department, or any bureau or subordinate office thereof, or is disreputable or incompetent, or has refused to comply with any of the rules and regulations governing his admission as such, or has, with intent to defraud, in any manner deceived, misled, or threatened any claimant or prospective claimant, by word, circular, letter, or advertisement, the head of such bureau, and when the offense is committed before the Department, then the head of the bureau which the Secretary may designate for that purpose, shall give the accused agent or attorney due notice with a statement of the charge or charges against him, which statement shall be sufficiently specific to permit the accused intelligently to make answer thereto, and shall cite said attorney or agent to show cause within a given time why he should not be disbarred.

If an answer, under oath, is filed denying the charges, or so explaining them as to raise an issue thereon, a time and place shall then be set for the taking of testimony. If, however, said attorney or agent shall fail to file an answer or other pleading, such charge or charges will be taken as confessed and judgment may be rendered as upon default, and the head of the bureau from which the charge or charges emanated shall transmit the record to the Secretary together with his recommendations. The taking of testimony under this rule shall be held at as convenient a place as possible for both the Government and the defendant, and notice shall be served upon the defendant notifying him of the time and place at which testimony will be submitted by the Government, in order that he may be present and cross-examine the witnesses. Ten days' notice, in writing, shall be given the opposite party of the taking of testimony, such notice to be served either personally or by registered mail, and the 10-day period shall be considered as running from the date on which

notice was personally served upon defendant, or if service is had by mail, then from the date on which said notice was received as shown by the return registry receipt card. Testimony shall be reduced to writing and be signed by the witnesses, unless otherwise stipulated. Testimony may be taken before any officer authorized to administer oaths for general purposes or before any officer or agent of the Department designated by the Secretary for that purpose. Depositions may be taken by either party before any officer duly authorized to administer oaths for general purposes, or before any Government agent designated by the Secretary for that purpose, upon notice in writing as above provided, and such depositions may be filed as evidence before the head of the bureau from which the charge or charges emanated. After the testimony has been taken and forwarded to the head of the bureau having jurisdiction, it will be considered, and if, in the opinion of such bureau head, such attorney or agent should be disbarred, he will so recommend, transmitting the record together with his recommendations to the Secretary, who will thereafter take such action thereon as the law and facts seem to warrant.

13. Any agent or attorney will be deemed *disreputable*, in the sense in which that word is used in the foregoing paragraph, and be subject to suspension or exclusion from practice as such, who, after being admitted to practice, knowingly commits or is guilty of any of the following acts, to wit: (*a*) Represents fictitious or fraudulent applicants for title to public lands, or fictitious or fraudulent applicants for pensions or for the payment of claims of any character by the United States; (*b*) prosecutes collusive or fraudulent land contests, or presents or prosecutes fraudulent pension or other claims against the United States; (*c*) speculates in relinquishments of unassignable land entries or land claims or in unassignable claims of any kind against the United States; (*d*) represents himself as agent or attorney for land or other claimants when in fact he is only agent or attorney for the transferee or mortgagee of such claimants; (*e*) fraudulently or wrongfully attempts to prevent any qualified person from settling upon, entering, or filing for public lands; (*f*) demands or accepts any fee proscribed by paragraph 11 of these regulations; (*g*) or who is otherwise and in any manner whatever guilty of dishonest or unprofessional conduct; (*i*) or who, in the presentation or prosecution of, or in connection with, any matter or business pending before the said Department or any of its bureaus or offices, knowingly has as his associate, or employs as his agent, subagent, or correspondent, any person who has been guilty of any of the abovementioned acts, or who has been denied admission to practice, or is suspended or disbarred from practice before said Department, or

who himself knowingly acts as the associate, agent, subagent or correspondent of any such person.

14. Upon the disbarment of an attorney or agent, notice thereof will be given to the heads of the bureaus of this Department, and thereafter, until otherwise ordered, such disbarred person will not be recognized as attorney or agent in any claim or other matter before this Department or any bureau thereof.

ALEXANDER T. VOGELSANG,
Acting Secretary.

WASHINGTON, D. C., *September 27, 1917.*

RULE OF PRACTICE 95 AMENDED.

[Circular No. 567.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 2, 1917.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

September 28, 1917, Rule 95 of Practice was amended to read as follows:

RULE 95. Notice of all motions and proceedings before the Commissioner or Secretary, except as specified below, shall be served upon parties or counsel personally or by registered mail, and no motion will be entertained except on proof of service of notice thereof. As to motions for rehearing, petitions for certiorari and petitions for the exercise of supervisory authority before the Secretary, service of notice shall be made only after such proceeding has been entertained and service directed, as provided by Rule 83.

CLAY TALLMAN,
Commissioner.

SUSPENSION OF RESIDENCE REQUIREMENTS UPON RECLAMATION PROJECTS DURING WAR WITH GERMANY.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 4, 1917.

1. The following two sections are from the act of Congress approved August 10, 1917 (Public No. 40), entitled, "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products":

"Sec. 11. That the Secretary of the Interior is hereby authorized, in his discretion, to suspend during the continuance of this Act that provision of the Act

known as the "Reclamation Act" requiring residence upon lands in private ownership or within the neighborhood for securing water for the irrigation of the same, and he is authorized to permit the use of available water thereon upon such terms and conditions as he may deem proper.

"Sec. 12. That the provisions of this Act shall cease to be in effect when the national emergency resulting from the existing state of war shall have passed, the date of which shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the beginning of the next fiscal year after the termination, as ascertained by the President, of the present war between the United States and Germany."

2. This act gives the Secretary of the Interior discretionary authority to suspend, during the war, that portion of Section 5 of the Reclamation Act of June 17, 1902 (32 Stat., 388), reading as follows:

"No right to the use of water for land in private ownership shall be sold * * * to any landowner, unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, * * *"

3. The Secretary of the Interior will therefore permit, as a war measure, the acceptance, upon Federal reclamation projects during the term of the war as fixed by the act, of applications for temporary water delivery to lands in private ownership and subject to public notice, without reference to the residence of the water-right applicant. No application, however, will be received under this act from one qualified to make a formal water-right application under said section 5 of the Reclamation Act of June 17, 1902.

4. The charges for the delivery of water shall be the same in amount as the operation and maintenance charges announced by public notice, but shall be payable in advance.

5. Applications hereunder may be made by the landowner or his duly authorized representative and should follow in general the form below:

DEPARTMENT OF THE INTERIOR,

UNITED STATES RECLAMATION SERVICE,

Project.

Application for temporary water service.

(Act of August 10, 1917, Public No. 40.)

_____ ____, 191__.

1. I hereby apply for water service from the _____ Canal, for irrigation in the irrigation season, commencing _____ and ending _____ of each year, for _____ _____ Meridian, said application being made subject to the following conditions:

2. The charges for water service shall be the same in amount as the operation and maintenance charges announced by public notice. The minimum charge per acre shall be paid when water is first ordered in any irrigation season, and any additional water supply shall be paid for as ordered.

3. The water furnished under this application shall be used exclusively upon the land above described, and shall not be permitted to collect and run upon other land, or be wasted in any manner, and shall be limited to the amount beneficially used upon said lands or so much thereof as shall constitute a proportionate share per acre of the actual supply available at any time during the continuance of this application for all lands watered from _____ Canal. Said water will be delivered from said canal, or some lateral thereof, and shall there be received by me and conveyed at my expense to the lands above described.

4. The proper representatives of the United States Reclamation Service shall have full control of the distribution of water through said canal system, and shall have the right, in order to secure an economical and efficient service, to establish and enforce such rules and regulations as such representatives may deem proper, to all of which rules and regulations I hereby agree to conform.

5. Any violation of the rules and regulations so established, either by me or by the occupants of said lands, shall be sufficient cause for the cancellation of this application and the discontinuance of water service thereunder.

6. The United States shall not be responsible for failure to supply water under this application caused by insufficient supply of water, hostile diversion or drought, nor on account of any other distribution than that herein stipulated for, directed or ordered to be made by any valid and subsisting order or decree of a competent court, nor for any damage by floods, acts of hostility, or unavoidable accidents.

7. The furnishing of water hereunder to the lands aforesaid shall not be taken or construed as binding the United States, after the termination of this application, to furnish water to said lands, or any part thereof, nor shall it, under any circumstances, become the basis of a permanent water right.

8. This application shall continue in force until terminated by law or by written notice at the end of an irrigation season given either by the applicant or by the Project Manager.

_____ _____,
Applicant.

By _____ _____.

Approved _____ _____
_____ _____
Project Manager.

A. P. DAVIS,
Director and Chief Engineer, U. S. R. S.

ALEXANDER T. VOGELSANG,
Acting Secretary of the Interior.

PRESKEY v. SWANSON.

Decided October 10, 1917.

APPLICATION TO CONTEST—CORROBORATING AFFIDAVIT—REQUIREMENTS.

In applications to contest public-land entries the statements must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation; and these facts must be set forth in the witness's affidavit.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Ernest J. Swanson from the decision of the Commissioner of the General Land Office, dated April 21, 1917, hold-

ing for cancellation, on the contest of Leo Preskey, his homestead entry, made December 16, 1914, for NE. ¼, Sec. 18, T. 23 N., R. 2 W., M. M., Great Falls, Montana, land district.

Contestant charged in his affidavit, filed July 22, 1916, that entryman—

has failed to establish his residence in good faith upon said entry; has failed to comply with the homestead laws in the matter of residence and cultivation and has abandoned said entry for more than six months last past preceding the date of this contest; that said entry was not made in good faith.

The affidavit was corroborated as follows:

J. Bedord, of Great Falls, Montana, who being duly sworn deposes and says: That he resides near the within described homestead entry and that said entryman has failed to reside upon his claim; that he has not cultivated any of said land except by renting it to another party and that he has abandoned said entry for more than six months last past next preceding the date of this contest.

In his answer, filed August 21, 1916, defendant denied the charges and concluded as follows:

The filing of this answer is not intended as a waiver of questions raised by the motion filed herein.

The motion referred to filed with the answer was—

for the dismissal of the contest filed herein on the ground and for the reason that the affidavit of contest is not properly corroborated; the affidavit of the corroborating witness being insufficient in this that it fails to state how long the affiant has resided in the vicinity of the said land and furthermore fails to allege or show in any manner that the said affiant has personal knowledge of the truth of the statements or allegations set forth in his affidavit.

The motion was overruled by the local officers, notice of hearing was issued and testimony was later submitted.

The overruling of the motion was assigned as error on appeal from the decision of the local officers, and is again assigned as error in the appeal under consideration.

Rule of Practice 3, as amended September 23, 1915 (44 L. D., 365), referring to applications to contest, provides:

The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

Pursuant to said amendment of Rule 3 the printed form of application to contest was amended by providing that the corroborating witness should state—

that he is acquainted with the tract described in the above affidavit, and knows from personal knowledge and observation that the statements therein made are true—

to be followed by a statement of the facts of which the affiant has personal knowledge.

The decision appealed from held that the overruling of the motion to dismiss was correct, "as the corroborating affidavit set up facts sufficient, if proven, to cancel the entry."

With this the Department is unable to agree. The amended rule requires that the corroborating witness must have personal knowledge of the facts, and if the affidavit fails to state that the affiant has such personal knowledge, it should not be accepted, especially where, as here, the insufficiency of the corroboration is made the subject of a motion to dismiss interposed concurrently with the answer.

Prior to the amendment of September 23, 1915, Rule 3 simply provided: "The statements in the application must be corroborated by the affidavit of at least one witness." This resulted in many affidavits being corroborated on information and belief, and made it possible to impose on the land department the consideration of speculative and unwarranted contests. Experience demonstrated the necessity for the amendment of the rule, and defendants are entitled to a strict compliance therewith before being placed under the necessity of defending a contest.

Preskey's application to contest was executed on a form printed prior to the revision heretofore referred to. The blank intended for use by the corroborating witnesses contained the following:

> That they are acquainted with the tract described in the above affidavit, and know from personal knowledge and observation that the statements therein made are true.

Bedord's corroboration was typewritten on a slip of paper and pasted over the printed form, thus making doubly significant his failure to state that he had personal knowledge of the facts alleged.

The motion to dismiss should have been granted and notice of hearing should not have issued.

The decision is reversed.

PRESKEY v. SWANSON.

Motion for rehearing of the Department's decision of October 10, 1917, 46 L. D., 215, denied by First Assistant Secretary Vogelsang, December 26, 1917.

STATE OF NEW MEXICO (On Petition).

Decided October 18, 1917.

SCHOOL LANDS IN NATIONAL FORESTS—STATE'S RIGHT OF WAIVER AND LIEU SELECTION.

Under sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), and the enabling act of June 20, 1910

(36 Stat., 557, 565), the State of New Mexico may waive its right to granted school lands in place, where, after acquirement of title by the State, said lands are placed in a national forest.

LIEU LAND SELECTION BY STATE—ACT OF FEBRUARY 28, 1891.

The provision in the act of February 28, 1891, *supra*, that a State or Territory may select other sections of public land in lieu of school sections otherwise disposed of by the General Government, and that "such selection shall be a waiver of its right to said sections," does not warrant a construction that such "waiver" of the base lands is tantamount to the vesting of fee simple in the United States to the lands so waived, prior to the approval of the selection by the Department.

STATE SELECTION OF LIEU LAND—PREREQUISITES TO VESTING OF TITLE.

The Department's approval and certification of lieu lands selected by a State are necessary prerequisites to the vesting of title to such lands in the State, and, conversely, title to base lands tendered by the State in support of a lieu selection does not vest in the United States until approval of the selection, there being, in fact, no selection until the approval is executed on the part of the Department.

DOCTRINE OF RELATION—APPLIED TO STATE INDEMNITY SELECTIONS.

Only upon approval of a State selection does the doctrine of relation become operative, and under it the right of the State relates back to the date of filing of the selection and is superior to claims asserted subsequent to the filing of the selection and prior to its approval.

VOGELSANG, *First Assistant Secretary:*

The Department has considered the petition for the exercise of supervisory authority filed on behalf of the State of New Mexico in the above entitled case, wherein decisions were rendered, on appeal and motion for rehearing, October 14 and November 23, 1916, respectively, directing cancellation of the State's lieu selection 031065 as to the W. ½ and other lands in Sec. 29, T. 23 S., R. 38 E., selected in lieu of lands of equal area in Sec. 36, T. 19 S., R. 14 E., within the then boundaries of the Alamo National Forest.

Briefly stating such facts as are deemed necessary to the proper disposition of the case at bar, it appears that approved plat of survey of T. 19 S., R. 14 E., N. M. P. M., was filed in the local land office June 24, 1885. December 20, 1906, the entire township, embracing the lands offered as base in the particular case under consideration, was withdrawn for the then proposed Sacramento National Forest, and subsequently, by Executive order of April 24, 1907, was included therein, which reservation was later changed to the Alamo National Forest, by Executive proclamation of March 2, 1909.

March 9, 1915, the State filed the selection in controversy. By Executive proclamation of April 3, 1916, prior to approval of the indemnity selection, Sec. 36, T. 19 S., R. 14 E., was excluded from the forest reserve.

Prior adverse action herein was taken upon the ground that the base lands proffered, having been eliminated from the forest reserve prior to approval of the selection, the State retained title to said

base lands under its grant as lands in place, and the Department was, therefore, without authority of law to approve said selection, following the principle laid down in the case of State of California *et al.* (44 L. D., 468), wherein it was held (syllabus):

> Where land within a national forest offered as base for a school indemnity selection is prior to approval of the selection eliminated from the forest the State is not entitled to have the selection consummated but takes title to the base land under the grant.

Among the several contentions urged by counsel for the State, in exhaustive briefs filed, as well as upon oral presentation of the case to the Department, it is asserted that the ruling cited is without authority of law, contrary to equity, and unconscionable; that title to the base and selected lands involved vested in the United States and the State of New Mexico, respectively, upon proffer of the selection, "upon the foundation of the principle that a grant *in præsenti* creates a present obligation upon the part of the grantor and a present interest in the grantee and that the obligation of the grantor is discharged and that the interest intended to be granted vests in the grantee when all the conditions of the grant have been fulfilled"; that, by relation, title to the selected lands vests in the State and the base lands in the United States as of date of filing of the selection, and the duty of the Department is limited or restricted to the approval of such selection, if regular when filed, regardless of the change in the status of the lands offered as base subsequent to the filing of the selection.

It is further insisted by counsel that the case at bar involves one of exchange, or lands offered in lieu of other lands title to which was in the State at the date the selection was filed, as distinguished from one involving a question of indemnity for a loss of lands within a school section title to which did not pass to the State under its grant, and that in the former class of cases, the State having waived title to the base lands, or completely parted with title thereto, as an offer on its part to select other lands in lieu thereof, the Department is without authority of law to compel the State to reacquire title to such base lands.

The petition also asserts that the State having accepted the offer to surrender lands in place (subsequently included within a reservation) in exchange for other lands, the Department is without power, on account of conditions arising subsequent to the tender of the selection, or change in the status of the base lands, to violate the executed contract and withhold approval of the selection, without specific authority of Congress.

In the first place, under the laws applicable hereto—sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), and the enabling act of June 20, 1910 (36 Stat.,

557, 565)—there remains no doubt but that the State may waive its right to lands in place granted under the acts above cited where, subsequent to acquiring of title by the State, said lands were placed within the forest reservation. The Supreme Court of the United States, in the case of California *v.* Deseret Water, Oil and Irrigation Company [243 U. S., 415] wherein opinion was rendered March 26, 1917, cited in brief of counsel for petitioner, after quoting the first proviso to the act of February 28, 1891, *supra*, "Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections," held:

> This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the State. Unless this proviso refers to lands, the title to which has passed to the State it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservation which are withdrawn from settlement.

The ruling of the court in the case cited is limited merely to the right of the State to waive its interests in the lands offered as base, and does not, directly or indirectly, hold that the Department, in determining the State's rights under a selection such as the one under consideration, where the base lands have been eliminated from the forest reservation prior to approval of the selection, has no alternative other than to perform the ministerial act of approving such a selection.

The Department is clearly of the opinion that the phraseology of the act of February 28, 1891, *supra*, taken as a whole, and especially that portion of the act providing that "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said section," does not warrant any such construction being placed thereupon as would permit of the term "waiver" of the base lands as tantamount to the vesting of fee simple title thereto in the United States prior to the Department's approval of the selection.

The mere waiver of the base lands, or proffer thereof by the State, does not of itself pass title thereto until accepted by the Department by its approval of the selection. The Department has long held that approval and certification by the Department of the lands selected are a necessary prerequisite to the vesting of title to the selected lands in the State, and it is obviously true as well that title to the base lands tendered in support of such a selection does not vest in the United States until such a selection shall have been approved.

In the case of Hall *v.* State of Oregon (32 L. D., 565), the Department, in affirming the action taken by the Commissioner of the General Land Office in rejecting a timber and stone application filed by Hall for lands covered by the indemnity school land selection of the State, held:

It is true, as claimed in the appeal, that until approved by the Secretary of the Interior there is in reality no selection, the proffer of a list and showing in support thereof being only preliminary proceedings taken for that purpose, but in the orderly administration of the land laws this Department has uniformly accorded to an indemnity school land, railroad, or other selection made in accordance with an act of Congress, pending its final consideration and disposal by this Department, the same segregative effect as an original entry made under the homestead or other public land law.

In the case of State of California *et al.* (41 L. D., 592), it was held (syllabus):

No title is acquired under or by virtue of a school indemnity selection until the same has been approved by the Secretary of the Interior; and where the lands embraced in a selection are classified as oil lands and withdrawn under the provisions of the act of June 25, 1910, the Secretary is without authority to approve the selection in the face of such withdrawal; but it should be rejected, without prejudice to the right of the State to submit showing with a view to securing reclassification of the lands and to apply anew therefor in event of their restoration.

The Department, in determining what effect a withdrawal under the act of June 25, 1910 (36 Stat., 847), had upon lands applied for under forest lieu, railroad and State selections, after mature consideration of the question as to whether or not by the mere proffer of a State selection title to the lands sought to be selected thereby unqualifiedly passed to the State or other applicant therefor, as the case might be, laid down the administrative ruling (43 L. D., 293) that—

The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon mere presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

Again, in the case of State of Wyoming (45 L. D., 590), the Department, citing pertinent decisions by the United States Supreme Court, held (syllabus):

Title does not vest in the State under a school indemnity selection until the selection has been duly approved; and a discovery of mineral prior to such approval will defeat the selection.

It is manifest from the rulings cited that it has long and repeatedly been held by this Department that there is, in fact, no selection where approval of the Department is necessary to give the same validity, until such approval is executed by the Department. The Depart-

ment, therefore, can not concede that the State's contention upon this petition is sound—that the State takes title to the selected lands and the Government title to the base lands upon the mere proffer of selection to the Government and prior to its approval by the Department.

The contention that, by relation, titles to the base lands and selected lands pass upon the presentation of a perfected selection, is equally without merit. With respect to this feature of the case it may with propriety be stated that the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, such as the one under consideration, has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications, so that after the selection *shall have been approved* the State's rights relate back to the date of filing, and are superior to those asserted subsequent to the filing of the selection and prior to its approval. This only is the extent to which the doctrine of relation has application. (See 27 L. D., 475; 32 L. D., 565; 33 L. D., 161; 34 L. D., 12; 39 L. D., 377.)

The Department is fully convinced that title to the selected lands does not vest in the State by the mere proffer of a perfected selection, and the question remaining to be answered is, if title to the selected lands does not pass to the State, upon the proffer of a selection, until the selection is approved and certified by the Department, does title to the base lands tendered in support of that selection, upon presentation of such a selection, pass from the State to the Government prior to the acceptance and approval of the selection by the Department?

In the case of Edwin Collins (40 L. D., 444) the Department, in rejecting a homestead application filed by Collins for lands previously tendered by the State of Idaho as base for school indemnity selection, held (syllabus):

> Land within a school section assigned by the State as base for indemnity selection is not subject to entry, selection or other appropriation under the public land laws until the selection is approved and title to the base land revests in the United States.

In the case of Smith *v.* State of Idaho (40 L. D., 554), the Department adhered to the rule as laid down in the case last cited, holding (syllabus):

> Land within a school section assigned by the State as base for indemnity selection is not subject to appropriation, entry, or selection under the public land laws until the selection is approved and title to the base land becomes vested in the United States.

Again, in the case of John W. Schofield (42 L. D., 538), the Department held (syllabus):

The legal title to a tract of school land relinquished as base for indemnity selection does not revest in the United States until the selection is approved, and prior to such approval the relinquished land is not subject to entry, selection, or other appropriation under the public land laws; but where settlement was made upon land so relinquished prior to approval of the selection based thereon, on the faith of statements by the State Land Commissioner that the State did not claim the land and application to enter filed by the settler, such application should not be rejected outright but held and considered in connection with the selection, and if the selection be approved, the settlement right should be recognized and protected.

In the more recent case of State of California *et al.* (45 L. D., 644), analogous to the case at bar, the Department, after distinguishing the case cited from that of Robinson *v.* Lundrigan (227 U. S., 173), reaffirmed the ruling as laid down in the case of State of California *et al.* (44 L. D., 468), the legality of which is questioned upon this proceeding, and held that elimination of the base from the forest reserve prior to approval of selection, notwithstanding that the reserve was created subsequent to the date title to the base lands passed to the State under its grant as lands in place, defeated the selection, but that the State would be permitted, if it so elected, to substitute new base in support of the selection.

In passing upon the question as to whether or not title to the base land vests in the Government upon the mere waiver thereof on the part of the State, or upon the tender thereof in support of a selection, it is deemed appropriate here to make mention of the fact that the various States have for years tendered relinquishments of selections pending before the Department for approval, and the Department has invariably accepted the relinquishments of the selections. Had the proffer of the selection by the State and its waiver of title as to the base lands vested title in the Government, it would require the issuance of a patent to revest the State with title. (See 27 L. D., 474).

The Department therefore concludes that the State took title to the base lands tendered in support of the selection under its grant, that title thereto was at all times thereafter, prior and subsequent to restoration of said lands from the forest reservation, and is now, in the State of New Mexico, and the very condition upon which the right of the State to offer said lands in exchange for others is predicated having been removed by elimination of the base lands from the forest reserve, the Department is without authority of law to approve the selection.

The decision rendered by the Department in the case of State of California *et al.* (44 L. D., 468), is accordingly adhered to, without prejudice to the State's right to substitute new base in support of the

selection in accordance with the principle laid down in the case of State of California *et al.* (45 L. D., 644).

The petition must be and is hereby denied.

HOMESTEAD ENTRYMEN PLACED UNDER JUDICIAL RESTRAINT.

[Circular No. 570.]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 20, 1917.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

I have received and considered your memorandum of September 11, 1917, and accompanying papers, in the matter of homestead entrymen who, subsequent to date of entry, are placed under judicial restraint; that is, who, because of conviction for a crime or crimes, are incarcerated in jails or other institutions and thereby prevented from continuing residence upon and improvement of their claims.

I am of the opinion that such restraint should not, under the law or as a matter of policy, be held to excuse compliance with the requirements of the homestead law, but that such conviction and restraint do not warrant the cancellation or forfeiture of the entry.

I have therefore to direct that in all such cases the entries shall, upon the filing of evidence of such judicial restraint, be placed in a state of suspension and so held until the termination of the judicial restraint, whereupon the entryman shall be required to comply with the requirements of the applicable homestead laws as a prerequisite to final proof and patent.

The papers transmitted with your memorandum are herewith returned.

ALEXANDER T. VOGELSANG,
Acting Secretary.

OSMUND STEENSLAND.

Decided October 20, 1917.

SECOND ENTRY—ACT OF SEPTEMBER 5, 1914.

Where an entry is relinquished without consideration following discovery that, because of the character or small area of the land, a living can not be made thereon, and it further appears that no vacant contiguous land can be added, the entryman will be deemed to have abandoned the entry "because of matters beyond his control."

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Osmund Steensland from the decision of the Commissioner of the General Land Office dated May 7, 1917, reject-

ing his application to make a second homestead entry under the act of September 5, 1914 (38 Stat., 712), for the SW. ¼ SE. ¼, Sec. 14, and E. ½ NE. ¼ and NW. ¼ NE. ¼, Sec. 23, T. 20 N., R. 12 E., B. H. M., Lemmon, South Dakota, land district.

Applicant's former entry was for 80 acres in Sec. 21 of said township, was made March 19, 1915, and relinquished on June 9 following. He alleged that he neither established residence nor placed any improvements on the land; that the land was not on a section line on any side, and as he was entitled under the Homestead law to a full 160-acre tract, he concluded to relinquish.

With the appeal is an affidavit to the effect that the character of the land in his former entry was such that he could not make a living thereon and that there was no vacant land adjoining. He relinquished because of such conditions.

The act of September 5, 1914, *supra*, requires that an applicant for a second homestead or desert-land entry must show, among other things, that the prior entry or entries "were lost, forfeited or abandoned because of matters beyond his control."

The Department is of the opinion that if an entryman finds that, because of the character or small area of the land entered, he is unable to make a living thereon, and that no vacant contiguous land can be added to his entry, and he thereupon relinquishes without consideration, he can be considered to have abandoned such entry "because of matters beyond his control."

While the decision appealed from was correct on the showing then on file, the additional affidavit makes the application allowable.

The decision is reversed.

ISOLATED TRACTS—PARAGRAPHS 2 AND 5, CIRCULAR OF JANUARY 11, 1915 (43 L. D., 485), AMENDED.

[Circular No. 569.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 31, 1917.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

October 18, 1917, the Department instructed this office as follows:

The limitation contained in paragraphs 2 and 5 of the general regulations, circular of January 11, 1915 (43 L. D., 485), to the effect that no sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 160 acres, may be waived in cases where it is shown to your office upon satisfactory evidence that isolated tracts, not exceeding 120 acres each in area, are entirely surrounded by land owned by the applicant and have been isolated for five or

more years. In such cases, in addition to showing the above facts and complying with the other requirements of the said circular of January 11, 1915, applicant should be required to show that the lands are not valuable for farming, but are chiefly valuable for grazing or for special use in connection with the adjoining lands.

Applicants under this amendment must furnish proof of ownership of the land surrounding that applied for; also detailed evidence as to the character of the land applied for, particularly with respect to its comparative values for farming, grazing, and special use in connection with the adjoining lands, which evidence must consist of an affidavit by the applicant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

You will be governed in other respects by the general regulations.

C. M. BRUCE,
Acting Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

ALLOTMENTS TO INDIANS AND ESKIMOS IN ALASKA—AMENDMENT TO CIRCULAR 491.

[Circular No. 572.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, November 6, 1917.

REGISTERS AND RECEIVERS, CHIEF OF FIELD DIVISION, AND SUPERINTENDENT OF U. S. PUBLIC SCHOOLS, DISTRICT OF ALASKA:

You are advised that Circular of Instructions No. 491, relating to the acquisition of title to public lands in the District of Alaska, approved July 19, 1916, is hereby amended as follows:

Paragraphs 8 and 9, page 20, of said circular 491 (45 L. D., 227, 246), are hereby eliminated and the following substituted in lieu thereof:

8. The application for allotment and all papers filed in connection therewith, will, when in due form, be referred by the local office to the Chief of the Alaskan Field Division, who will dispose of them as hereinafter set forth.

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

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

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

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

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

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

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

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

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

9. Upon the receipt of the report of the District Superintendent, the Chief of Field Division will, if in his judgment the report is sufficient, transmit it to the General Land Office with his approval or disapproval of the recommendation therein made, with such suggestions as to the application as may seem to him appropriate. If the report does not fully cover all the facts, the Chief of Field Division will either return it to the District Superintendent for further information or direct an investigation by a special agent of his office, as in his judgment may be deemed best.

CLAY TALLMAN,
Commissioner.

Approved, November 14, 1917.
FRANKLIN K. LANE,
Secretary.

INSTRUCTIONS.

November 7, 1917.

HOMESTEADS WITHIN RECLAMATION PROJECTS—ASSIGNMENT OF ENTRY.

The owner of a homestead entry under the Reclamation Act is not qualified to take by assignment another such entry.

VOGELSANG, *First Assistant Secretary:*

I am in receipt of your [Commissioner of the General Land Office] letter of October 15, 1917 (Williston 05637 "F" AD.), requesting instructions as to the proposed assignment of a portion of the homestead entry of Raymond McLaughlin to Noah A. Snook.

The lands involved were withdrawn under the second form of the Reclamation act of June 17, 1902, (32 Stat., 388), in connection with the Lower Yellowstone Irrigation Project, August 24, 1903. May 2, 1905, Noah A. Snook made homestead entry 32909 at Minot (now Williston), North Dakota, for the E.½ NW¼, Sec. 8, T. 151 N., R. 104 W., 5th P. M., subject to the provisions of the Reclamation laws. October 6, 1906, he made homestead entry 724, Williston series, as an additional entry for the SE.¼ SW.¼, Sec. 5, NW.¼ NE.¼, Sec. 8, of the above township, the combined area being 160 acres. Snook made final proof August 13, 1910, which was accepted under the provisions of the General Homestead laws by you October 27, 1910, the final certificate and patent to issue upon proof of the

reclamation of one-half of the irrigable area and payment of the charges, etc.

Upon May 2, 1906, Raymond McLaughlin made homestead entry 41274, Minot, North Dakota, for the NW.¼ SE.¼, NE.¼ SW.¼, and lots 6 and 8, Sec. 5, of the above township. December 12, 1906, he made additional entry 1435, Williston, for the SW.¼ SE.¼, said Sec. 5. He made final proof February 10, 1913, which was accepted by you under the General Homestead law March 20, 1914, final certificate and patent to issue upon proof of the reclamation of one-half of the irrigable area under the provisions of the act of August 9, 1912 (37 Stat., 265).

A preliminary farm unit plat covering these lands was approved June 13, 1911, but the plat was revoked May 18, 1914. The farm units have not yet been established nor has any public notice been issued. McLaughlin desires to assign to Snook the SW.¼ SE.¼ and lot 8 of said Sec. 5, containing 63.90 acres. You express the following view:

> It is my opinion that under the circumstances the entryman Snook would be permitted to take the assignment, but in the event a farm unit plat was approved and public notice issued he would be required to dispose of his holdings in excess of one farm unit, or else make payment in full of all the construction charges fixed for the excess.

The act of June 23, 1910 (36 Stat., 592), provides:

> That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

The act of August 9, 1912, *supra*, provides, in part:

> That any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation submit proof of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent.

Inasmuch as the farm units have not been established, the entryman has been unable to submit proof of the required reclamation, and accordingly patent can not now be issued under the above act.

The act of August 13, 1914 (38 Stat., 686), in section 13, provides:

> That no person shall hold by assignment more than one farm unit prior to final payment of all charges for all the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

Under the act of June 23, 1910, *supra*, the Department held that to entitle one to take by assignment he must show that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act (see Sarah S. Long, 39 L. D., 297). This requirement was also made in the circular of December 17, 1910 (39 L. D., 421). The circular of May 18, 1916 (45 L. D., 385), provides, in paragraph 41:

> Assignments under this act are expressly made "subject to the limitations, charges, terms, and conditions of the reclamation act," and inasmuch as the law limits the right of entry to one farm unit and forbids the holding of more than one farm unit prior to payment of all construction or building and betterment charges each assignor must present a showing in the form of an affidavit to the effect that the assignment is an absolute sale, divesting him of all interest in the premises assigned, and *each assignee must present a showing in the form of an affidavit that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law upon which all installments of construction or building and betterment charges have not been paid in full* and has no existing water-right applications covering an area of land which, added to that taken by assignment, will exceed 160 acres, or the maximum limit of area fixed by the Secretary of the Interior. [Italics the Department's.]

The foregoing regulation was based upon the provisions of section 3 of the act of August 9, 1912, *supra*, which provides:

> That 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 act * * * before final payment in full of all instalments 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,

with the exception that excess land acquired in good faith by descent, will, or foreclosure of a lien, may be held for two years, and no longer.

It appears therefore that under the acts of August 9, 1912, and August 13, 1914, *supra*, as well as under the regulations cited, the Department can not permit the assignment from McLaughlin to Snook to be made, as the proposed assignee now owns and holds another entry under the Reclamation law. You will advise counsel for Mr. Snook, who has made inquiry, accordingly.

CHARLES T. FARTHING.

Decided November 8, 1917.

REPAYMENT—DESERT ENTRY ERRONEOUSLY CANCELED—ENTRYMAN OFFERED OPPORTUNITY TO COMPLETE.

Where a desert entry is canceled in the erroneous belief that first year proof had not been submitted, and upon discovery of the error two years later

the entryman is called upon to submit second and third year proof as a condition to reinstatement of the entry, but takes no action, repayment of the purchase money will be allowed.

VOGELSANG, *First Assistant Secretary:*

Charles T. Farthing has appealed from the decision of the Commissioner of the General Land Office rendered April 19, 1917, in the above entitled case, denying repayment of the initial purchase money paid in connection with desert land entry 04523, made June 18, 1909, for the SE. ¼ NE. ¼, W. ½ SE. ¼ and NE. ¼ SE. ¼, Sec. 22, T. 18 N., R. 70 W., 6th P. M., Cheyenne, Wyoming, land district.

The record discloses that the entry was canceled by the Commissioner, December 3, 1910, on the ground that claimant had not submitted the required first yearly proof, the local officers having reported to that effect by letter of October 6, 1910. September 6, 1911, the SE. ¼ NE. ¼, said Sec. 22, was selected by the State under indemnity school list 07791.

The cancellation of this entry for the reasons stated was clearly erroneous, as admitted, it appearing that the first yearly proof had been actually filed by Farthing, August 23, 1910, showing an expenditure of $170.

November 29, 1912, the Commissioner directed the local officers to call upon claimant for a showing as to whether or not he had made the necessary expenditures due for the second and third years, covering a period subsequent to the date the entry was canceled, with a view to reinstating the entry if it were shown that such expenditures had been made. Claimant took no action in connection with this requirement, and by order of the Commissioner dated June 2, 1913, it was directed that the entry remained canceled.

Adverse action herein was taken on the ground that if Farthing had complied with the requirements of the desert land law subsequent to date of submisson of first yearly proof and the erroneous cancellation of his entry, and as a result thereof had taken advantage of the opportunity afforded him to have the canceled entry reinstated, said entry was susceptible of confirmation. The Department cannot concur in this view.

The entry under consideration was not voluntarily surrendered by claimant, but, on the other hand, erroneously canceled by the Government through no fault of the entryman and at a time when appellant had shown, in the manner prescribed by the Desert Land law, that he had fully met the requirements thereof. Moreover, it cannot be inferred that he was guilty of any fraud or attempted fraud in connection with his attempt to acquire title. His right to repayment is determinable upon his acts up to and including the date of cancellation of his entry and not by acts performed, or not performed, subsequent to cancellation thereof.

Under the circumstances, the act of March 26, 1908 (35 Stat., 48), affords ample authority for repayment herein and the decision appealed from is accordingly reversed.

FRANZ v. NORTHERN PACIFIC RAILWAY COMPANY.

Decided November 13, 1917.

INTERMARRIAGE OF HOMESTEADERS—ACT OF APRIL 6, 1914—WHO ENTITLED TO BENEFITS.

A homestead settler who has not made entry of the land settled upon is not entitled to the benefits of the act of April 6, 1914 (38 Stat., 312), which, by its terms, has application only where there has been "the marriage of a homestead entryman to a homestead entrywoman."

VOGELSANG, *First Assistant Secretary:*

Ethyl Franz has appealed to the Department from the decision of the Commissioner of the General Land Office of May 18, 1917, sustaining the action of the local officers and rejecting her homestead application 06836, filed October 16, 1916, for lot 4 (SW. ¼ SW. ¼), SE. ¼ SW. ¼, Sec. 19, lot 1 (NW. ¼ NW. ¼), and lot 2 (SW. ¼ NW. ¼), Sec. 30, T. 8 N., R. 13 W., M. M., 144.08 acres, Missoula, Montana, land district.

It appears from the records of the land department that the above described land in Sec. 19 is within the primary limits of the grant to the Northern Pacific Railroad (now Railway) Company by the act of July 2, 1864 (13 Stat., 365), whose line of road opposite thereto was definitely located July 6, 1882. Survey of said tract in the field was completed October 15, 1914, and the plat of survey filed in the local land office October 14, 1916. November 16, 1916, the railroad company listed this land in list No. 146, Missoula 06830.

October 16, 1916, Ethyl Franz filed homestead application for said last described tract, together with the land first described, in Sec. 30, same township and range, and November 16, 1916, she filed election to hold the land in Sec. 19 under the special provisions of the act of July 1, 1898 (30 Stat., 597, 620).

In such election she sets forth that, with her former husband, John Lacy, she settled on this land September 9, 1914, and resided thereon continuously until July 25, 1916, upon which date she was married to Edward Franz, a homesteader; that after her marriage to Franz they elected to reside on his homestead. She further states that she has improvements on the land to the value of $500. Affiant further sets forth by affidavit, as her qualifications to make entry, that about the first of September, 1914, she, with her former husband, John Lacy, established residence on the land in question; that Lacy had never made a homestead entry and was qualified to make entry of said lands; that about April 1, 1915, said Lacy deserted her and

left said lands, never returning with the purpose of residing thereon; that from the time Lacy deserted her she resided on and claimed the lands in question until July 25, 1916, when, having obtained a divorce from Lacy, she was married to Edward Franz; that said Edward Franz had a homestead entry, and they elected to live on his homestead.

It thus appears that applicant had no homestead entry of her own, and that she was absent from the land involved from July 25, 1916, to October 16 of that year, when she filed application to make entry thereof.

In disposing of the case the Commissioner says:

> It is the opinion of this office that the remedies provided by the act of April 6, 1914 (38 Stat., 312), which confers the privileges of such election on an entryman and entrywoman, do not apply unless both of the parties have an entry in existence.

In this conclusion the Department concurs, as only persons having existing homestead entries are entitled to the benefit of the provisions of said act of April 6, 1914. It follows that applicant has no right to make election to retain the land embraced in the railroad grant and her homestead application has been properly rejected.

The decision appealed from is affirmed.

EXECUTION OF AFFIDAVITS BEFORE COMMANDING OFFICER—ACT OF OCTOBER 6, 1917.

[Circular No. 573.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 19, 1917.

REGISTERS AND RECEIVERS, U. S. LAND OFFICES:

Your attention is directed to the act of October 6, 1917 (Public, No. 71, 65th Cong.), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during the continuance of the present war with Germany, and until his discharge from service, any man serving in the armed forces of the United States who, prior to the beginning of his services, was a settler, an applicant, or entryman under the land laws of the United States, or who has, prior to enlistment, filed a contest with the view of exercising preference right of entry therefor, may make any affidavit required by law or regulation of the department, affecting such application, entry, or contest, or necessary to the making of entry in the case of the successful termination of such contest awarding him preference right of entry, before his commanding officer as provided in section twenty-two hundred and ninety-three of the Revised Statutes of the United States, which affidavits shall be as binding in law

and with like penalties as if taken before the Register of the United States Land Office.

2. Since the enactment of section 2293, United States Revised Statutes, an applicant for homestead entry has been permitted to execute his application before his commanding officer where it is shown that his wife or minor child *is residing* on the land in question. The law is not changed by the present legislation and an application may, under those circumstances, be thus executed, even though the homestead claim was not initiated, by settlement or otherwise, before the applicant's entrance into the military service. In such cases the nonmineral affidavit may be executed by the wife or by a minor child if he is of such age as to intelligently make the required oath. However, if the claim was not initiated prior to the man's enlistment no credit may be given on account of the period of his service.

3. The present act extends the privilege of executing an affidavit in connection with a claim under *any* of the public-land laws before the party's commanding officer only to such persons as had initiated their claims *prior to enlistment.* If this had not been done by the filing of an application for the land or of a contest against a pending entry therefor, and the claim is based only on an alleged settlement under the homestead laws or on possession held pursuant to the desert-land laws, he must, in the first affidavit executed by him under the provisions of this act, set forth the facts showing its initiation prior to his entrance into the service.

4. In the case of voluntary entrance of privates into the Army, Navy, or Marine Corps, or appointment of officers (including those appointed from the Officers' Training Corps), the enlistment mentioned in the act dates from that time; in the case of a person enlisted in the Naval Reserve, from the time he is called into active service; in the case of a drafted man, from the time he is mustered into service; in the case of members of the Federalized National Guard, from the time they are mustered into the United States service, and the act has no application to other State troops; in the case of members of the Red Cross, only from the time they actually become identified with, and a part of, the military or naval forces of the United States, and the act does not apply to other members of the Red Cross.

5. The provisions of the act cover all affidavits required to be executed by a claimant under the public land laws in connection with final proof on his claim, but the testimony of any witnesses required by law must be given in the manner and at the place indicated by general statutory provisions. The published and posted notice of intention to submit proof must name the time and place where the witnesses will testify, and must contain a statement that the claimant

himself will testify before his commanding officer pursuant to the provisions of this act, but no attempt need be made to indicate the time or place where claimant's testimony will be submitted. In such cases you will wait a reasonable time for the arrival of the claimant's testimony, and if this does not come to hand you will forward to this office for consideration all papers received by you.

6. The term "commanding officer," used in the act, signifies the officer who commands the smallest unit in which the party serves. Often the matter of determining the proper officer will depend upon the circumstances of the case, but it may be mentioned, by way of illustration, that the captain of a company would primarily be regarded as such officer, where the party is serving in the fighting forces of the Army.

CLAY TALLMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

BOLTON v. INMAN.

Decided November 19, 1917.

THREE-YEAR HOMESTEAD LAW (ACT OF JUNE 6, 1912)—CONTEST CHARGING ENTRY SPECULATIVE.

A charge in an application to contest a homestead entry that the entryman "has been at all times and now is holding said land for speculation only" is not the equivalent of a charge that the entry was *made* for speculative purposes, and is not of itself sufficient ground for contest.

CONTEST FOR ABANDONMENT—SECTION 2297, REVISED STATUTES, AS AMENDED BY ACT OF JUNE 6, 1912.

Since the amendment of section 2297, Revised Statutes, by the passage of the act of June 6, 1912 (37 Stat., 123), a homestead entry is not subject to contest upon a charge of abandonment until after the lapse of six months and one day from the date of alleged abandonment.

CONTEST FOR ABANDONMENT—APPLICATION—CORROBORATING AFFIDIVIT.

It is not enough, in an application to contest a homestead entry, that the corroborating affidavit contain the allegation that affiants know from personal knowledge that the statements made by the contestant are true, but in such affidavit must be set forth as facts matters which, if proven, would render the entry subject to cancellation.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Guy E. Bolton from a decision of the Commissioner of the General Land Office, dated July 7, 1917, revoking the cancellation on June 12, 1917, of the original and additional homestead entries of William N. Inman, and dismissing his contest.

The original entry was made at the Bozeman, Montana, office on August 22, 1914, for the NW. ¼, Sec. 22, T. 2 N., R. 18 E., M. M.,

and the additional, under section 3 of the Enlarged Homestead act, on October 15, 1914, for the NE. ¼, said Sec. 22.

The contest of Bolton was initiated February 12, 1917, the charge being—

> That said Inman has offered relinquishment for sale and has been at all times and now is holding said land for speculation only; that said William N. Inman is a fugitive from justice and has wholly abandoned said land with intention never to return thereto, and has left the State of Montana; that said absence and abandonment by said entryman is not caused by reason of his employment in any military or other service of the United States or in any National Guard of any of the several States.

The affidavit was corroborated by Thomas I. Bolton and Charles H. Russell, who alleged—

> That they are acquainted with the tract described in the above affidavit and know from personal knowledge and observation that the statements therein made are true; that each of them know from personal knowledge that the said William N. Inman has disposed of all of his personal effects and that he can not be found in the State of Montana; that a bench warrant has been issued for his arrest, and that the same has been returned by the sheriff of Stillwater County unserved.

Notice was served by publication. No appearance was made by the defendant, and under date of June 12, 1917, the Commissioner canceled the entries. Thereafter, attention was directed to the case, resulting in its reconsideration and the decision appealed from.

It is contended on appeal that the Commissioner erred in holding the charges insufficient, in taking action upon his own motion or upon that of a stranger to the record, and in dismissing the contest without consideration of the right of contestant to amend.

Contestant attempted to charge three causes of action, as follows:

First: Has offered relinquishment for sale.

Second: Has been at all times and now is holding said land for speculation only.

Third: Is a fugitive from justice and has wholly abandoned said land with intention never to return thereto, and has left the State of Montana.

It has repeatedly been held that an offer to sell a relinquishment of an entry is not of itself a sufficient ground for contest. (Rossman *et al. v.* Dickey, 38 L. D., 187; Stubendordt *v.* Carpenter, 32 L. D., 139).

The decision in Schulte *v.* Forstman (40 L. D., 221), cited by appellant to sustain his contention that the second charge was sufficient to warrant the ordering of a hearing, disposed of a charge that the entry there involved was illegal *in its inception*, not that it was, *after being made*, held for speculation. This was true of the charge involved in Paxton *v.* Owen (18 L. D., 540). This is an entirely

different charge from that made by this contestant, who did not allege that the entry was *made* for speculative purposes.

The fact of the execution of a relinquishment or the offering for sale of improvements is not an evidence of fraudulent intent in making an entry. (Chatten *v.* Walker, 16 L. D., 6; Lewis *v.* Barnard, 22 L. D., 150).

The third charge is not an allegation of abandonment under section 2297, R. S., as amended by the act of June 6, 1912 (37 Stat., 123). Prior to said amendment said section provided:

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land-office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government.

In amending said section Congress omitted therefrom the clause "has actually changed his residence," the section now reading:

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government.

Prior to said amendment if a homesteader changed his residence from the land the entry was immediately subject to contest; but since June 6, 1912, an entry is not subject to a charge of abandonment until after the lapse of six months and one day from the date of abandonment.

Rule of Practice 3, as amended September 23, 1915 (44 L. D., 365), provides:

The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit.

The corroboration of the affidavit heretofore quoted, while it contains the allegation that affiants know from personal knowledge that the statements made are true, does not set forth facts which, if proven, would render the entry subject to cancellation. An entryman does not forfeit his entry by the sale of any part or all of his personal property.

It appearing that on February 13, 1917, an application to contest the entries of Inman had been filed by one Irene Garvin, Bolton can not be allowed to amend his contest affidavit so as to set forth a cause of action. (Farmer *v.* Moreland, 8 L. D., 446; Hawkins *v.*

Lamm, 9 L. D., 18; Hay *v.* Yager *et al.*, 10 L. D., 105). See also Shugren *et al. v.* Dillman (19 L. D., 453).

The contest affidavit did not allege a cause of action, hence the cancellation of the entries was erroneous; and the matter coming again to the attention of the Commissioner it was his duty to rescind his former action. The circumstances under which the defects in the proceedings were called to the notice of the Commissioner can not be questioned by the contestant.

The decision is affirmed. The contest of Garvin, which was closed on the cancellation of the entries on June 12, 1917, will be reinstated and appropriate action taken thereon.

ALBERT FELLENBAUM.

Decided November 19, 1917.

SOLDIERS' ADDITIONAL HOMESTEAD RIGHT—ASSIGNMENT.

The land department is not charged with the duty of supervising the transfer of soldiers' additional homestead rights, and until the filing of an application to locate such a right, it will not undertake the determination of questions connected with the assignment thereof.

SAME—ADJUDICATION OF RIGHT BY LAND DEPARTMENT.

Upon due presentation of an application to locate a soldier's additional homestead right, *prima facie* valid, and in the absence of knowledge of irregularity of any kind, the land department will allow such application.

T., shown by the records of the land department to be the owner of a soldiers' additional homestead right, assigned such right for value to another, who assigned it to G., neither of said assignees having knowledge of a previous sale of the right to M.; G. thereupon surrendered the right to the land department, in payment for public land, at a time when neither she nor the land department had knowledge of the sale to M. *Held*, that an application to exercise such right by the assignee M. was properly rejected.

VOGELSANG, *First Assistant Secretary:*

Albert Fellenbaum has appealed from the decision of the Commissioner of the General Land Office rendered May 25, 1917, holding for rejection his application under sections 2306 and 2307, Revised Statutes, to enter the SW. ¼ NE. ¼, Sec. 8, T. 6 N., R. 35 E., M. D. M. (40 acres), Carson City, Nevada, land district.

It appears that the application in question was filed in the local office on December 18, 1916, based upon several assignments of soldiers' additional rights, totaling 20.26 acres, among them 0.98 acre of the right of Charles L. Boyd.

It further appears that Boyd died entitled to a soldiers' additional right of 80 acres, which was assigned by his widow to Robert C. Turrittin, of Reno, Nevada, and located by Turrittin upon a tract of 79.02 acres, and that thereafter, on August 14, 1916, Turrittin as-

signed the remainder of said right, amounting to 0.98 acre, to the W. E. Moses Land Scrip and Realty Company, which, on August 17, 1916, assigned same to the applicant herein.

It further appears that Turrittin, on December 4, 1916, made a second assignment of said 0.98 acre of the right of Charles L. Boyd to Louis R. Glavis, who, on December 11, 1916, assigned same to Phebe Giroux. Prior to this time, however, on June 29, 1916, it appears that said Phebe Giroux made application to enter a tract of 80 acres, based upon assignment of three small rights, and before the case was reached for adjudication in the General Land Office it was found that she had tendered insufficient rights to take the acreage applied for. Thereupon, on December 11, 1916, she filed direct in the General Land Office two additional assignments, one of which was the 0.98 acre of the right of Boyd, said two assignments, with the rights already filed, being found sufficient to bring her application within the rule. As the assignments filed by said applicant appeared regular in all respects, were properly executed, and as the records of the General Land Office showed that only 79.02 acres of the 80-acre right of Boyd had been used, her application was duly allowed on December 15, 1916. Final certificate was issued December 20, 1916, the entry approved for patent February 7, 1917, and patent No. 571558 was issued, covering the tract applied for, on March 10, 1917, thus satisfying said 80-acre right of Boyd.

In the meantime, as stated, appellant Fellenbaum, on December 18, 1916, made application for the above described tract, filing several assignments, including said 0.98 acre, and it is insisted in his behalf that at the time the local officers issued the final certificate upon the application of said Phebe Giroux, on December 20, 1916, the application of Fellenbaum had been filed two days prior thereto, and that, therefore, the local officers and the Commissioner of the General Land Office were charged with notice of the prior assignment of said 0.98 acre; that it was therefore error on the part of the local officers to issue the final certificate in favor of Giroux when the records of their office showed the adverse and prior assignment in favor of appellant; that the action of the Commissioner allowing the application of Giroux was merely a preliminary step and could have no force and effect until the local officers notified the applicant of the amount of the fee and commissions and the required sum had been paid into the local land office, at which date the final certificate issues.

The Department is not in agreement with this contention. It is not a question of taking property without due process of law for failure to file notice of assignment, as is insisted, but the facts show a pending application to make entry of a certain described tract of land based on assignments of three several rights. The matter was in the General Land Office for disposition but had not been ad-

judicated. Giroux, upon discovery that she had tendered insufficient rights to take the acreage applied for, purchased two other small rights and filed them with her application. It was then found that with those already filed she had tendered sufficient rights to justify, under the rules of the Department, the allowance of her application.

It has long been the settled practice of the Department that the transfer of a soldiers' additional right is of no concern to the Department (D. H. Talbot, 30 L. D., 39), and that notice of such transfer may consist of an application to make entry under the right, or of some action by the land department which involves the assertion or validity of such assignment (Nellie J. Hennig, 38 L. D., 442). The prior assignment by Turrittin of the 0.98 acre of the right of Boyd to the W. E. Moses Company is not a matter for consideration by the Department, and has no bearing upon the merits of the controversy. At the time Giroux purchased the right in question from Turrittin the latter was shown by the records of this Department to be the owner thereof, and having, in good faith and prior to the assertion of any adverse claim, tendered the same in payment for the land described, it is held that she was entitled thereto. It is proper, in this connection, to state that the assignment to Giroux was in the form recognized by the practice and regulations of the Department.

The only issue really presented upon this appeal is whether or not Giroux, under the assignment to her, properly asserted her claim. The Department is of the opinion that the tender by her to the Commissioner of such additional assignments of soldiers' rights as were found to be necessary in order to bring her application within the rule, was due and proper notice of such assignments, and that it is immaterial whether they were filed in the local land office or in the General Land Office.

There is no error in the decision of the Commissioner, and it is accordingly affirmed.

PERSONS IN MILITARY SERVICE—INSTALLMENT PAYMENTS ON ENTRIES OF CEDED INDIAN LANDS.

[Circular No. 574.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 20, 1917.

REGISTERS AND RECEIVERS, U. S. LAND OFFICES:

Where a person has entered or shall enter land formerly embraced in an Indian reservation, for which he is required to pay a certain price per acre for the benefit of the Indians, and thereafter has en-

tered, or shall enter, the military or naval service of the United States, the entry will not be canceled on account of the failure of the soldier or sailor to make the payments of any amounts falling due during the term of his enlistment, but it will be held suspended, pending consideration by Congress of legislation designed to extend the time for such payments beyond the period of military service or the existing war.

2. The question whether such entrymen shall be required to pay interest, except as required by existing laws, will depend on the terms of the legislatiion which Congress may enact.

3. In cases where the entryman has filed notice of his entrance into the military or naval service as permitted in paragraph 8 of the circular of instructions of August 22, 1917, issued under the act of July 28, 1917, you will nevertheless call upon him for the payment when due, but will in your notice inform him that if he is unable to pay on account of his employment in the military service he should advise you to that effect. In all cases where there is response by him, or on his behalf, that he has entered the military or naval service, you will forward the papers to this office with your report.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

PINE MOUNTAIN WATER COMPANY.

Instructions, November 20, 1917.

RIGHTS OF WAY IN NATIONAL FORESTS—SEC. 4, ACT OF FEBRUARY 1, 1905.

A grant of rights of way under section 4 of the act of February 1, 1905 (33 Stat., 628), for the construction and maintenance, in national forests, of dams, reservoirs, water conduits, water plants, etc., for municipal purposes, is not confined to municipal corporations, but may be obtained by citizens or private corporations for the purpose of furnishing water for municipal purposes, or the operation of mining or milling works not their own.

VOGELSANG, *First Assistant Secretary:*

By letter of October 31, 1912, [Commissioner of the General Land Office] your office in connection with the application of the Pine Mountain Water Company for a right of way (San Francisco 04568), asked as to whether (1) an "applicant, under the act of February 1, 1905 (33 Stat., 628), must be required . . . to show that it intends to use the water in connection with the operation of its own

mining or milling works, and (2) whether none other than a municipality can be granted right of way, when said right of way is for the purpose of furnishing water for municipal purposes."

Section 4 of that act authorizes the granting of rights of way for the construction of dams, reservoirs, water conduits, water plants, etc., within forest reserves, "to citizens and corporations of the United States for municipal or mining purposes, and for the purpose of milling and reduction of ores." There is nothing in the wording of this statute which expressly confines the privileges it grants to the exclusive individual and personal use of the particular citizen or corporation by which they are acquired for the purposes of mining or the milling and reduction of ores; and that statute, in so far as it relates to the first question submitted, is closely kindred to other acts granting similar rights of way under which the right has not been confined by construction to the individual and personal use of the grantees or beneficiaries thereunder. The acts of March 3, 1891 (26 Stat., 1095, 1101), and May 11, 1898 (30 Stat., 404), grant rights of way to "any canal or ditch company formed for the purposes of irrigation;" and the act of February 15, 1901 (31 Stat., 790), permits rights of way to "any citizen or corporation of the United States for beneficial uses." These statutes, like the act under consideration, are silent as to whether the rights they give are merely personal inalienable rights, or rights under which leases or sales of water or power to others could be made; yet it is well recognized that persons by whom they are acquired may either devote them to their own personal use, or they may, in whole or in part, dispose of them to be used by others for the purposes for which they were granted.

Again, there is nothing connected with the history of the enactment of this statute which indicates that Congress intended to limit the right conferred under it to the personal use of the individual by whom it should be acquired from the Government.

In reporting section 4 of the act (the law under consideration) to the Senate, the committee by which that section was drafted as an amendment to the original bill as it passed the House of Representatives, said: "The amendment proposed by the Committee protects mining interests, if any, within forest reserve;" and Mr. Lacy, who was then chairman of the House Committee on Public Lands, in reporting the result of the consideration by a conference committee, said:

> The Senate made provision that rights of way for mining purposes should be in the nature of an easement instead of, as at present, a mere license,

referring, evidently, to the act of February 15, 1901 (31 Stat., 790), which authorized mere revocable permits for rights of way. In so

far as the Congressional Record shows, the only purpose of the amendment submitted by the Senate Committee was the protection of mining rights by authorizing easements which would abide during "the period of their beneficial use"—a more permanent right than could theretofore be acquired within national forests. As the privileges acquired under the act of 1901 are not limited to mere personal use, it does not seem likely that Congress intended such a limitation in the act of 1905. That act was intended to enlarge the rights theretofore existing, and can not, for that reason, be considered as in any sense limiting their enjoyment to the persons to whom they were granted. These considerations lead to the conclusion that an applicant, under the act of 1905, should not be required to show that he intends to use the rights applied for in connection with his or its own mining or milling works, and you are, accordingly, so instructed.

In connection with the second question asked by your office it may also be here said that there is nothing in the language of the statute which expressly limits the privileges of that act to municipal corporations when the right of way is desired to furnish water for municipal uses.

The statute authorizes the granting of rights of way "for municipal purposes" to "citizens or corporations." The words "municipal purposes" as used in this act must be held to include the supplying of water and electricity generated by water power to the individual inhabitants of cities and towns for all the purposes for which they are usually so used, and can not be limited to only the purposes for which a municipality would use them in its governmental capacity. This act must be construed as far as possible in harmony with kindred laws existing at the time of its passage. As we have already seen, it was said that it was only intended by this act to make more permanent the tenure under which rights of way could be held than were the temporary rights of way granted by the act of 1901, *supra*. That act authorized temporary rights of way for the purpose, among others, of "supplying water for domestic, public or any other beneficial use," and, in the absence of expressions to the contrary, it is reasonable to hold that the words "municipal purposes" were used in the act of 1905 to signify these uses.

Mr. Lacy, in reporting the result of the conference mentioned above, further said:

> The Conference Committee recommended that section [Sec. 4 here under consideration] be amended by granting the same privilege to municipalities as is given to mining companies, because there are some towns which get their water power for electric lighting from ditches from forest reserves.

If this general use was intended, is there any good reason for saying that the water or electricity should be supplied by the municipal government only and not by individual or other corporate effort?

The law authorizes the granting of rights of way to "citizens and corporations." There is nothing in that language which excludes citizens or private corporations from the benefits of the act, and confines the right to municipal corporations; and there seems to be no sound reason why they should be so excluded.

You are, therefore, informed that, in the judgment of this Department, citizens, or private corporations, others than a municipality, can be granted a right of way under the act of 1905 for the purpose of furnishing water for municipal purposes.

The conclusions here reached find further support in the fact that a contrary construction of the act of 1905 would most likely defeat, at least in part, the very purposes of its enactment. It is reasonable to assume that there are many small mines within, and small municipalities near, national forests, which could not receive the benefits of that act if left dependent on their own efforts, because the owners of the mines, or the municipalities, would not of themselves be able to provide the money needed in the construction of water-works necessary to that end, while under the application of the statute as here construed they could, by becoming joint owners with others, or by renting or purchasing, easily secure water or electricity to amply and more economically supply their needs.

Again, to hold that citizens or private corporations may not obtain a right of way for municipal purposes, and that that right can be acquired by municipalities only, would be to impute to Congress the intent to establish and enforce municipal ownership and prohibit private ownership of public utilities in a State where the local laws make no such provision, and have, on the contrary, authorized private ownership of such utilities and made provision for controlling the service they give to the public. In the absence of language clearly manifesting such an intent, it should not, in the judgment of this Department, be so imputed.

It is not here intended to express any opinion as to the sufficiency of the pending application mentioned above.

If in your judgment it is necessary to amend existing regulations or to issue new regulations for the purpose of effectuating the conclusions here announced, you will direct their amendment or preparation and submit them for Departmental approval.

ERNEST MULLER.

Decided November 27, 1917.

ADDITIONAL ENTRY, ENLARGED HOMESTEAD ACT—RULE OF APPROXIMATION.

In applying the rule of approximation to additional homestead entries, an excess area contained in a perfected original entry should be eliminated from consideration, except in computing the total acreage applied for.

EXCESS AREA ON ORIGINAL AND ADDITIONAL ENTRY—PAYMENT REQUIRED.

Although payment was made for an excess area in the original entry, upon making an additional entry the applicant must pay for any excess over the approximate area he was qualified to enter.

PRIOR DECISION DISTINGUISHED.

Louis G. Triebel (41 L. D., 391), distinguished.

VOGELSANG, *First Assistant Secretary:*

An appeal has been filed on behalf of Ernest Muller from a decision of the Commissioner of the General Land Office, dated June 23, 1917, holding for cancellation, as to lot 2 of section 30, his additional entry, made August 10, 1916, under section 3 of the Enlarged Homestead act, for the SE. ¼ SW. ¼, Sec. 19; lot 2 (38.56 acres) and the E. ½ NW. ¼, Sec. 30, T. 58 N., R. 82 W., 6th P. M., Buffalo, Wyoming, land district.

Muller's original entry embraced lot 1 (29.58 acres), lot 2 (30.12 acres), the SW. ¼ NE. ¼, SE. ¼ NW. ¼, and the NE. ¼ SW. ¼, said Sec. 19 (a total of 179.70 acres), and was perfected in November, 1906.

The decision appealed from held that the additional entry violated the rule of approximation, the total area of the two entries being 338.26 acres, because, if the smallest legal subdivision (lot 1) embraced in the original entry were eliminated, the deficiency would be but 11.32 acres, while the excess is 18.26 acres. Further, that as the original entry had been patented, said lot 1 could not be considered for elimination purposes, and since lot 2 of Sec. 30 is the only subdivision which can be eliminated without breaking the contiguity of the tract, the additional entry was held for cancellation to that extent, citing the case of Louis G. Triebel (41 L. D., 391), wherein it was held (syllabus):

> One who made homestead entry for less than 160 acres can not by making additional entry and invoking the rule of approximation be permitted to secure a greater area of land in the aggregate than he might have embraced in his original entry.

In the case cited, Triebel made an entry in May, 1910, for 138.85 acres, and in April, 1911, made an additional entry for 40 acres, under the act of April 28, 1904 (33 Stat., 527). The original entry had not been perfected, and the Department required him to consent to the elimination of the smallest legal subdivision thereof or suffer the cancellation of the additional entry. The Department is of opinion that the rule there announced is not applicable to a case like the present, where the original entry has been perfected and the entryman is unable to relinquish any portion thereof. The correct rule under such a state of facts is that the additional entry must approximate the area which the applicant is qualified to enter.

When Congress, by the act of March 3, 1915 (38 Stat., 956), amended sections 3 and 4 of the Enlarged Homestead act, Muller

became qualified to enter 140.30 acres of land contiguous to his original entry of 179.70 acres. He applied for and was allowed to enter 158.56 acres—18.26 acres in excess of the area he was qualified to enter. But if the smallest legal subdivision (38.56 acres) should be eliminated, the deficiency would be 20.30 acres.

The entry involved does not violate the rule of approximation, and will be allowed to stand as made, provided the entryman shall pay the purchase price of the excess area (18.26 acres). The fact that he paid for an excess of 19.70 acres when he made the original entry does not excuse him from paying for the excess area later entered. The decision is modified to agree with the foregoing.

PERMITS AUTHORIZING EXPLORATION OF PUBLIC LANDS FOR POTASSIUM.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., December 1, 1917.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The Act of Congress approved October 2, 1917, entitled "An Act to authorize exploration for and disposition of potassium" (Public No. 49), authorizes the Secretary of the Interior under such rules and regulations as he may prescribe, to issue prospecting permits for a period not to exceed two years, for the exploration of the land described therein for potash in any of the forms named in said act, and under authority thereof the following rules and regulations will govern the issuance of such permits:

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

2. The permit thus issued may include not more than 2560 acres of public lands of the United States in reasonably compact form, or a similar area of lands that may have been disposed of under laws reserving to the United States the potassium deposits therein. In the latter case full compliance shall be made with the laws making such reservation.

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

4. If the permittee, within the two years specified, shall discover valuable deposits of one or more of the forms of potassium, as de-

scribed in said act, within the area covered by his permit, such discovery shall entitle him to a patent of not to exceed one-fourth of the land embraced in the permit, to be taken in compact form. The discovery of a valuable deposit of potash under this permit shall be construed as the discovery of a deposit which yields commercial potash in commercial quantities.

The remainder of the land embraced in such permit, if containing deposits of potash, will thereafter become subject to lease, under such regulations as may be found requisite in dealing with the land containing said deposit.

5. In addition to land embraced in the permit the Secretary may, in his discretion, issue to the permittee, during the life of the permit, the exclusive right to use a tract of unoccupied, non-mineral, public land not exceeding 40 acres in area, for purposes connected with and necessary to the development of the deposits covered by the permit.

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

(a) Applicant's name and address;

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

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

(d) Reasons why the land is believed to offer a favorable field for prospecting;

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

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

7. On the receipt of the application, if found in compliance with the terms of the act, a permit will issue and the district land officers be promptly notified thereof; thereafter no filings will be accepted for the lands embraced therein during the lifetime of said permit.

A copy of the act you will find herewith, together with a form of permit, which may be modified to meet the conditions of any particular case.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

FORM OF PERMIT.

The form of permit issued under this act will be, in substance, as follows:

THE UNITED STATES OF AMERICA.

Know All Men by These Presents, That I, Franklin K. Lane, Secretary of the Interior, under and by virtue of the Act of Congress entitled "An Act to authorize exploration for and disposition of potassium," approved October 2, 1917, have granted and do hereby grant a permit to _____ of the exclusive right for a period of two years from date hereof to prospect the following described lands _____ for chlorides, sulphates, carbonates, borates, silicates, nitrates or salts of potassium, but for no other purpose, upon the express conditions as follows, to wit:

1. To begin the prospecting for said minerals within ninety days from date hereof and to diligently prosecute the exploration and experimental work during the period of such permit, in the manner and extent as follows, to wit:

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

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

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

5. To observe such conditions as to use and occupancy of the surface as may be provided by law in case any lands embraced herein have been granted with a reservation to the United States of the potassium deposits therein; *Expressly reserving* to the Secretary of the Interior the right to permit for joint or several use such easements or right of way upon, through or in the lands covered hereby, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act; *and Further reserving* the right and authority to cancel this instrument for failure of the permittee or licensee to exercise due diligence in the execution of the prospecting work in accordance with the terms hereof.

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

In Witness Whereof, I have affixed my signature hereto and the seal of the Department this _____ day of _____ _____.

[SEAL]

_____
Secretary of the Interior.

[PUBLIC NO. 49—65TH CONGRESS.]

[S. 2156.]

An Act To authorize exploration for and disposition of potassium.

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 issue to any applicant who is a citizen of the United States, an association of such citizens, or a corporation organized under the laws of any State or Territory thereof, a prospecting permit which shall give the exclusive right, for a period of not exceeding two years, to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium on public lands of the United States, except lands in and adjacent to Searles Lake, which would be described if surveyed as townships twenty-four, twenty-five, twenty-six, and twenty-seven south of ranges forty-two, forty-three, and forty-four east, Mount Diablo meridian, California: *Provided*, That the area to be included in such permit shall not exceed two thousand five hundred and sixty acres of land in reasonably compact form.

SEC. 2. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one or more of the substances enumerated in section one hereof *have been discovered by the permittee* within the area covered by his permit, the permittee shall be entitled to a patent for not to exceed one-fourth of the land embraced in the prospecting permit, to be taken in compact form and described by legal subdivisions of the public-land surveys, or if the land be not surveyed, then in tracts which shall not exceed two miles in length, by survey executed at the cost of the permittee, in accordance with rules and regulations prescribed by the Secretary of the Interior. All other lands described and embraced in such a prospecting permit from and after the exercise of the right to patent accorded to the discoverer, and not covered by leases, *may be* leased by the Secretary of the Interior, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres, all leases to be conditioned upon the payment by the lessee of such royalty as may be specified in the lease and which shall be fixed by the Secretary of the Interior in advance of offering the same, and which shall not be less than two per centum on the gross value of the output at the point of shipment, which royalty, on demand of the Secretary of the Interior, shall be paid in the product of such lease, and the payment in advance of a rental, which shall be not less than 25 cents per acre for the first year thereafter; not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively; and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods, upon condition that at the end of each twenty-year period succeeding the date of any lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such

periods, and a patentee under this section may also be a lessee: *Provided*, That the potash deposits in the public lands in and adjacent to Searles Lake in what would be if surveyed townships twenty-four, twenty-five, twenty-six, and twenty-seven south of ranges forty-two, forty-three, and forty-four, east, Mount Diablo meridian, California, may be operated by the United States or may be leased by the Secretary of the Interior under the terms and provisions of this Act: *Provided further*, That the Secretary of the Interior may issue leases under the provisions of this Act for deposits of potash in public lands in Sweetwater County, Wyoming, also containing deposits of coal, on condition that the coal be reserved to the United States.

SEC. 3. That in addition to areas of such mineral land to be included in prospecting permits or leases the Secreary of the Interior, in his discretion, may issue to a permittee or lessee under this Act the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land not exceeding forty acres in area for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

SEC. 4. That the Secretary of the Interior shall reserve the authority and shall insert in any preliminary permit issued under section one hereof appropriate provisions for its cancellation by him upon failure by the permittee or licensee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit.

SEC. 5. That no person shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof which, together with the area embraced in any direct holding of a lease under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, or otherwise, exceeds in the aggregate in any area fifty miles square an amount equivalent to the maximum number of acres allowed to any one lessee under this Act; that no person, association, or corporation holding a lease under the provisions of this Act shall hold more than a tenth interest, direct or indirect, in any other agency, corporate or otherwise, engaged in the sale or resale of the products obtained from such lease; and any violation of the provisions of this section shall be ground for the forfeiture of the lease or interest so held; and the interests held in violation of this provision shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located, except that any such ownership or interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition.

SEC. 6. That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit for joint or several use such easements or rights of way

upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act may reserve to the United States the right to dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease; that the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 7. That each lease shall contain provisions deemed necessary for the protection of the interests of the United States, and for the prevention of monopoly, and for the safeguarding of the public welfare.

SEC. 8. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property or some part thereof is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, *or of the general regulations promulgated* under this Act and in force *at the date of the lease*, and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 9. That the provisions of this Act shall also apply to all deposits of potassium salts in the lands of the United States which may have been or may be disposed of under laws reserving to the United States the potassium deposits with the right to prospect for, drill, mine, and remove the same, subject to such conditions as to the use and occupancy of the surface as are or may hereafter be provided by law.

SEC. 10. That all moneys received from royalties and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation Act, but after use thereof in the construction of reclamation works and upon return to the reclamation fund of any such moneys in the manner provided by the reclamation Act and Acts amendatory thereof and supplemental thereto, fifty per centum of the amounts derived from such royalties and rentals, so utilized in and returned to the reclamation fund shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools.

SEC. 11. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and

all things necessary to carry out and accomplish the purposes of this Act.

SEC. 12. That the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, outputs of mines, or other rights, property, or assets of any lessee.

SEC. 13. That the Secretary of the Interior is hereby authorized and directed to incorporate in every lease issued under the provisions of this Act a provision reserving to the President the right to regulate the price of all mineral extracted and sold from the leased premises, which stipulation shall specifically provide that the price or prices fixed shall be such as to yield a fair and reasonable return to the lessee upon his investment and to secure to the consumer any of such products at the lowest price reasonable and consistent with the foregoing: *Provided*, That such lease issued under this Act shall also stipulate that the President shall have authority to so regulate the disposal of the potassium products produced under such lease as to secure its distribution and use wholly within the limits of the United States or its possessions.

Approved, October 2, 1917.

THOMAS A. SHEPPARD.

Decided February 10, 1917.

REPAYMENT—VOLUNTARY ABANDONMENT AND RELINQUISHMENT—RESTRICTED PATENT.

Abandonment of land entered and relinquishment of the entry rather than accept a lesser estate (a surface patent) therein than entryman undertook to acquire, is not a voluntary abandonment, and the purchase money paid may be recovered under the repayment laws.

Case of Dorathy Ditmar (43 L. D., 104), cited and distinguished.

VOGELSANG, *First Assistant Secretary:*

November 2, 1910, Thomas A. Sheppard made desert land entry 02777 for the S. ½, Sec. 4, T. 29 S., R. 22 E., M. D. M., Visalia, California, land district. He submitted first yearly proof November 25, 1911, and second yearly proof November 29, 1912, supplemented by further showing January 13, 1913.

January 28, 1915, one Lightner filed contest against said entry charging, in substance, that more than four years had expired since date of entry, that no application for extension of time had been made, and entryman had failed to reclaim the land as required by statute. No answer was filed to such contest, and such further pro-

ceedings were had that the entry was canceled, upon default, by the Commissioner's letter of May 12, 1915. January 3, 1916, Sheppard filed application for repayment of the purchase money paid by him in connection with said entry, accompanied by relinquishment of the entry and entryman's sworn statement in which, after reciting the fact of making entry, he says:

> That since making said entry, the land embraced therein has been included in Petroleum Reserves No. —, issued by the President of the United States, under date of September 14th, 1911, and April 11th, 1914; on account of said Reserve and the uncertainty of acquiring title, due to the fact that the tract embraced in said entry has been classed as being chiefly valuable for mineral, which classification has, in former cases, proven a bar to securing of patent in most cases, and in others where patent has been secured the process has been very slow and expensive; for these reasons affiant has concluded to relinquish said Desert Land Entry to the United States and asks for repayment of the money paid thereon.

The land embraced in said desert land entry was included in Petroleum Reserve No. 23, by Executive order of September 14, 1911, as to the SW. ¼, and in Petroleum Reserve No. 31, April 24, 1914, as to the SE. ¼, of said section.

By decision of the Commissioner of the General Land Office of October 6, 1916, Sheppard's application for repayment was denied, and he has appealed to the Department.

While section 3 of the act of July 17, 1914 (38 Stat., 509), provided a method whereby Sheppard might have acquired title to the surface of the land, it did not impose upon him any obligation to do so. See George W. Ozbun (45 L. D., 77). His abandonment of the land and relinquishment of the entry, rather than accept a lesser estate than he desired and undertook to acquire, were in no sense "voluntary" as that term is used in the case of Dorathy Ditmar (43 L. D., 104), which states the rule applicable in cases of this character. The underlying principle was long ago announced by the Department in the case of Hiram H. Stone (5 L. D., 527), where the facts differed from those under consideration only to the extent that there the whole area could not be acquired, while here a less interest than that sought was open to Sheppard.

The decision appealed from is, accordingly, reversed.

STOCK-RAISING HOMESTEADS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 14, 1917.

THE DIRECTOR OF THE GEOLOGICAL SURVEY:

The Stock-raising Homestead act of December 29, 1916 (Public, No. 290), places upon the Secretary of the Interior the responsibility

for its administration and authorizes him to make such rules and regulations in harmony with its provisions and purposes as are necessary to carry it into effect.

The administration of the law requires three types of work, the designation of "stock-raising lands," the reservation of lands containing water holes or other bodies of water needed or used by the public for watering places, and the withdrawal and administration of stock driveways. Instructions were issued to the Commissioner of the General Land Office on February 5, 1917, to take the steps necessary to the withdrawal of stock driveways. It is my desire that you undertake as soon as practicable the field and office work required for the designation of "stock-raising lands" and that you continue to recommend the reservation of watering places as heretofore. The following instructions supplemental to the regulations of January 27, 1917, are issued for your guidance in making these classifications.

CLASSIFICATION OF STOCK-RAISING LANDS.

Stock-raising lands are defined in the act as lands (*a*) the surface of which is chiefly valuable for grazing and raising forage crops; (*b*) which do not contain merchantable timber; (*c*) which are not susceptible of irrigation from any known source of water supply; (*d*) which are of such character that six hundred and forty acres are reasonably required for the support of a family.

The first of these criteria makes it necessary to separate "stock-raising lands" from lands of greater value, especially those of such agricultural value that only 160 or 320 acres are reasonably required for the support of a family. Hence lands which are suited to diversified farming and can be expected to produce ordinary agricultural crops by the usual methods of cultivation applied to humid lands are properly subject to disposition under the General Homestead act. Lands which by the application of dry-farming methods, such as summer-fallowing, fall-plowing, and other means of conserving moisture, will produce, either annually or in alternate years, food cereals, flax, potatoes, and other crops of like character, are in general subject to disposition under the Enlarged Homestead act. Neither of those types of land should be designated for entry under the Stock-raising Homestead law.

The Stock-raising Homestead act recognizes a new class of agricultural lands, less valuable than either of those just mentioned, upon which it is contemplated that a family can be supported by raising live stock through a combination of grazing and the production of forage crops.

In many areas, lands which are suited to dry-farming will doubtless be found to grade almost imperceptibly into lands which may be regarded as "stock-raising lands." Similarly in other areas lands

properly classified as stock-raising homestead lands will be found to merge imperceptibly into lands that are too arid for the purpose of this act. It will nevertheless be necessary to distinguish between lands of these classes even though in some instances such a distinction may be somewhat arbitrary. In making this classification the various factors which influence the productiveness of the lands, the amount and distribution of rainfall, the length of the grazing and the growing seasons, the nature of the soil, and the topography of the lands, should be studied and given proper weight. These studies may be accompanied by field investigations to determine if possible the results which have actually been attained by the prevailing agricultural practice in such localities and to determine also what results may be expected from the application of scientific methods of crop production.

In regions where the rainfall and other climatic conditions are suitable for dry farming and possibly even for ordinary agriculture, some lands will perhaps be found which, because of steepness, roughness, or other topographic conditions, or because of the alkaline or otherwise unproductive character of the soil, are not adapted to such higher agricultural uses. Such lands may be chiefly valuable for grazing and raising forage crops and hence to that extent subject to designation under this act. It will doubtless also occur that such generally unproductive tracts include small areas of better lands. The presence of such small bodies of dry-farming or ordinary agricultural lands will not, however, be an obstacle to designation under this act.

It is the intent of this act to provide a homestead of such character that 640 acres are reasonably required for and may, under ordinary conditions, be expected to support, a family by stockraising. It is inconsistent with this intent to permit the entry of lands which, because of aridity, roughness or altitude are worthless for grazing or which, while of some grazing value, will produce no forage crops.

Lands which are irrigable are not subject to designation under this act. Following the rule established in the administration of the Enlarged Homestead act, any legal subdivision, one-eighth or more of which is irrigable, irrigated, or subirrigated, will be classed as irrigable land and not designated under this act.

The act requires the exclusion from designation of lands which contain merchantable timber. Merchantable timber is that which is "fit to be sold;" that is, timber of such a character that it might become an article of commerce were a market available. The determination of the question of whether or not timber is merchantable rests, therefore, on the actual character of the growth, and not on its present salability or the existing facilities for transportation or manufacture. The presence of a small amount of timber on the land classified will not exclude it from designation, and a

40-acre tract which contains less than 25,000 feet of saw-timber or its equivalent in poles, posts, or cordwood may, therefore, be designated.

In proceeding with the work of designation and classification under the Stock-raising Homestead act, you will use every endeavor to complete the work as soon as possible, will classify the unentered public lands subject to this act in large blocks or areas wherever possible, and in case of reasonable doubt resolve the doubt in favor of the designation of the lands.

Orders of designation of stock-raising lands, covering such areas and quantities of land as are consistent with the proper administration of this act, should be prepared by you for my signature and submitted for consideration as rapidly as is practicable.

They should, however, generally be made after the stock driveways in the same general section have been withdrawn.

WITHDRAWAL OF WATERING PLACES.

You are further instructed to continue the work heretofore undertaken in connection with the creation of public water reserves. In continuation of that work you will receive and consider any applications or petitions for the withdrawal of water holes or other bodies of water needed or used by the public for watering places, will make such field investigations as may be necessary to determine their suitablility for use by the public for such purpose, and in the event that lands are found to contain watering places of this character, you will submit recommendations of withdrawal prepared for the signature of the President.

In connection with the work of classifying stock-raising lands and of withdrawing watering places, you will avail yourself of any information in other bureaus of this Department, and they will be expected to cooperate by furnishing you such information and assistance as may be helpful. You are authorized, so far as may be useful and practicable, to invite cooperation with bureaus and offices of the Department of Agriculture.

FRANKLIN K. LANE.

APPLICATION FOR ADDITIONAL ENTRY BY WIDOW, HEIR OR DEVISEE OF HOMESTEADER.

[Circular No. 560.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, August 4, 1917.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

By decision rendered May 8, 1917, in the case of Timothy Sullivan, guardian of Juanita Elsenpeter, the Secretary of the Interior over-

ruled the Department's decisions in the cases of Lillie E. Stirling, 39 L. D., 346; Susan A. Davis, 40 L. D., 573; and Bertha M. Birkland, 45 L. D., 104, in which it had been held that under certain circumstances the widow or heirs of a homestead entryman might make entry, under the Enlarged Homestead act, additional to that made by him. This overruled also the decision in Samuel T. B. Himes, 43 L. D., 388, wherein it had been held that the widow or heirs might make additional entry under section 2 of the act of April 28, 1904 (33 Stat., 527). Following the said construction of the law, you are instructed:

(1) You will reject, subject to the usual right of appeal, all applications filed by the widow, heirs, or devisee of a homesteader to make entry additional to his claim. This order will govern your action not only on applications hereafter filed but on those which are now pending in your office, and it applies to applications under the Stock-Raising Homestead law as well as to those under the acts above referred to. The circular of January 27, 1917, issued under said law, as amended by the circular of March 23, 1917, is modified accordingly.

(2) Additional entries heretofore *allowed* in accordance with the prior rulings will be submitted to the Board of Equitable Adjudication for consideration, if they shall first have been perfected by the submission of final proof. Therefore, you will not reject proofs upon such additional entries on the sole ground that they were improperly allowed.

CLAY TALLMAN,
Commissioner.

Approved, August 4, 1917.
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EBERT V. WATTS.

Decided October 18, 1917.

DESERT-LAND ENTRY—RELINQUISHMENT—CONTINUITY OF CLAIM—NOTICE.

A desert-land entryman, believing himself unable to submit acceptable final proof, relinquished his entry, without intention of severing his connection with the land, having previously made arrangements with a railway company to scrip it for his benefit. The scrip location could not be consummated, and a third person, having notice that the land was improved and adversely claimed, made homestead entry thereof. *Held*, That such entry is subject to cancellation because of the paramount right of the desert-land claimant, whose relinquished entry, upon cancellation of the homestead entry, may be reinstated.

VOGELSANG, *First Assistant Secretary:*

Joshua H. Watts has appealed from a decision of the Commissioner of the General Land Office, dated March 17, 1917, holding

for cancellation, upon the contest of Jonathan S. Ebert, his homestead entry 018631, Phoenix, Arizona, land district, made October 23, 1915, for lots 4, 5, 6, 9, and 10, Sec. 1, T. 13 S., R. 12 E., G. & S. R. M.

The facts are as follows: April 6, 1909, Louis S. Rodriguez made desert land entry 05523, for lots 2, 3, 4, 5, 6, 7, 8, 9, and 10, said Sec. 1, T. 13 S., R. 12 E., and on November 9, 1909, relinquished lots 2, 3, 7, and 8. On November 28, 1909, Rodriguez died, and on December 22, 1909, his widow and heir assigned the remaining portion of the entry, containing 164.75 acres, to Jonathan S. Ebert. This assignment was recognized by the Commissioner of the General Land Office, February 27, 1911. In March, 1911, Ebert submitted first, second and third annual proofs, showing expenditures of $740 on the land as follows:

Clearing 40 acres	$100.00
Fencing and plowing 20 acres	60.00
Purchase of pump, engine, boiler and fittings	480.00
Constructing 6,000 feet of ditch	100.00
Total	740.00

March 22, 1912, Ebert relinquished his entry, and on the same day the lands were selected by the Santa Fe Pacific Railroad Company, as lieu lands, under the act of April 21, 1904 (33 Stat., 211.)

July 10, 1912, Joshua H. Watts filed homestead application 018631, for the same lands, which application was suspended pending final action on the lieu selection. September 27, 1915, the local officers were notified by the Commissioner of the General Land Office of the rejection of said lieu selection, and on October 23, 1915, the homestead application of Watts was allowed.

January 10, 1916, Ebert filed application to contest said homestead entry, alleging, in substance and effect, that he procured the selection of the lands by the Santa Fe Pacific Railroad Company and that the selection was made in his interest and behalf; that his occupancy of said lands had been continuous and had never been abandoned since he became the assignee of the original entryman; that his possession of said lands was open and notorious; that the improvements on the land which he had either purchased or placed there himself, were worth approximately $2,000; that the homestead claimant knew that the land was adversely claimed and that his entry was not made in good faith for the purpose of acquiring a home and using the land for agricultural purposes, but for purposes of speculation and sale. March 7, 1916, Ebert filed application for reinstatement of his entry.

Notice of the contest was duly served, and Watts filed answer alleging that the land was not desert but agricultural in character; that it was subject to overflow by flood waters of the Santa Cruz River, and is known as bottom land. He further alleged that Ebert

had not improved or cultivated the land to the extent claimed by him, and denied that his entry was not made in good faith.

Hearing was had before a designated officer on April 28, 1916, both parties appearing with counsel and witnesses and submitting testimony. Upon reviewing the testimony, the local officers found that when the entry was assigned to Ebert, in 1909, there was upon the land a pumping plant consisting of a big steam boiler, centrifugal pump and engine, which he purchased for $485; that there was also on the land a large well, a house over the pumping plant, and an old ditch running entirely across the tract, which ditch Ebert paid $100 to have repaired and made over. Further improvements consisted of the clearing of 40 acres, and the fencing of 25 acres, at a cost of $160, and on some of the land crops had been grown.

The local officers further found that the contestee had not shown that the lands were nondesert in character. They accordingly recommended that Watts's homestead entry be canceled and Ebert's desert land entry reinstated. Upon appeal by Watts, the Commissioner of the General Land Office, by decision dated March 17, 1917, affirmed the decision of the local officers, and further appeal brings the case before the Department.

The record has been examined, and the Department is convinced that the concurring decisions below were correct. The record clearly establishes as a fact that the expenditures for improvements upon the land for which Ebert claimed credit in his annual proofs were made by him in good faith with a view to reclaiming the land. Furthermore, Watts certainly was aware of the improvements on the land and of Ebert's claim thereto, or at least that it was covered by a scrip location. Henry A. Smith, Watts's son-in-law, and a witness for him at the hearing, is general manager of the Three Rivers Irrigation Company, and owns all the land on the opposite side of the river for a mile above and two miles below the land involved. He testified that he pointed this land out to Watts and suggested that he homestead it; that 15 or 20 acres of the land had been cleared and that there were evidences of "early occupation," but that the so-called pumping plant was not much more than a junk heap at that time and that nothing had been raised on the land since he had been familiar with it; that is, since the fall of 1910.

Respecting the question of Watts's good faith in making the entry in question, letters were introduced written by Watts negotiating for the sale of his relinquishment, first for $2,000, subsequently, however, agreeing to take $750. One such letter, under date of November 28, 1915, states:

> I located this land after a very careful look over all the territory close to Tucson and as an engineer and surveyor I picked this out because I think it controls the water for 200,000 acres below, and is, therefore, chiefly valuable for its water, an inexhaustible supply at 14 feet.

It is established beyond question that Ebert had complied with all of the requirements of the desert land law up to the time of the filing of his relinquishment, and it is manifest that he never intended to abandon his possession or part with his claim to the land. The lieu selection failed because of a judgment here that the selected lands in this, as well as in a large number of like cases coming up from the Phoenix office, had a value exceeding that of the bases offered. In many of these cases reinstatement of the canceled entries has been granted. In fact, in reporting, under date of February 10, 1916, to the Chairman of the Committee on Public Lands, House of Representatives, on a measure (H. R. 10117) designed for the relief in proper cases of entrymen in the State of Arizona who had relinquished their homestead or desert land entries for the purpose of procuring selections under the act of April 21, 1904 (33 Stat., 211), the Department stated that such legislation was unnecessary, inasmuch as the Department could grant all that the bill was intended to secure without its aid or authorization.

Viewing all the facts and circumstances in connection with this case, the Department is convinced that the homestead entry of Watts should be canceled and Ebert's desert land entry reinstated.

The decision appealed from is accordingly affirmed.

MORGENROTH v. NORTHERN PACIFIC RAILWAY COMPANY.

Decided November 16, 1917.

HOMESTEAD SETTLERS—NOTICE OF EXTENT OF CLAIM.

Persons settling upon public lands with a view to initiating homesteads must give ample notice of the direction and extent of their claims, in order that other intending claimants may avoid initiating claims in conflict therewith.

HOMESTEAD SETTLEMENT AND IMPROVEMENTS—WHAT NOTICE THEREOF REQUIRED.

Homestead improvements and settlement upon any part of a technical quarter section of public land are notice as to all of the land therein comprised, but as to subdivisions outside the technical quarter section settled upon or improved it is necessary to post notices conspicuously upon each smallest legal subdivision, or otherwise mark the same in such manner as to clearly indicate the extent of the claim.

VOGELSANG, *First Assistant Secretary:*

The Northern Pacific Railway Company, and Ralph D. Brown and Ernest H. Meiklejohn, its beneficiaries, under selection filed by the company under the act of March 2, 1899 (30 Stat., 993), have appealed from the decision of March 26, 1917, by the Commissioner of the General Land Office, holding its selection for rejection for the assigned reason that it conflicts with the prior settlement claim of Edward Morgenroth.

It appears that the selection in question was filed November 7, 1910, for the W. ½ NE. ¼, Sec. 20, T. 34 N., R. 10 E., W. M., Seattle, Washington, land district, which land was then unsurveyed. The plat of survey was filed January 10, 1916, and the company, on January 29, 1916, applied to adjust to the survey by the description above given.

It also appears that on January 10, 1916, the local officers allowed Morgenroth to make homestead entry for the NE. ¼ of Sec. 20, upon allegation of settlement on February 18, 1909, and subsequently maintained. Upon allowance of the homestead entry the selection of the company was rejected because of conflict as to the W. ½ NE. ¼ of said quarter section. Upon appeal by the company, the Commissioner held that the local officers should have ordered a hearing upon the allegation of settlement, and he accordingly directed that hearing be had. Hearing was held on June 23, 1916, and both sides submitted testimony.

It appears that Morgenroth, in February, 1909, made settlement on a tract which upon survey was found to be the NE. ¼ SE. ¼ of said Sec. 20. He built a house and cleared about an acre or a little less of the land, and raised garden truck thereon. His improvements upon that forty-acre tract were claimed to be worth $700. He lived there until after the survey in the field in 1912, and, when it was discovered that his house and improvements were located in the SE. ¼ of the section, he constructed a house on the NE. ¼ and established his residence there, and subsequently cleared something like an acre of ground and has cultivated a portion of it to vegetables. He claims to have posted a notice on his first house and also north of it, and on the NE. ¼, to the effect that he was claiming the NE. ¼ for homestead entry. He claims that the total value of his improvements is about $1,500. The land is very heavily timbered, containing about nine and a half million feet. It is shown that a considerable part of the land would be susceptible of cultivation if the timber were removed.

It is the duty of anyone intending to initiate a homestead by settling upon public land to give ample notice of the extent of the settlement claim. A rule of long standing in the Department is that homestead improvements and settlement upon any part of a technical quarter section constitute notice as to all of the land therein. But as to subdivisions outside the technical quarter section settled upon or improved it is necessary to post notices conspicuously upon each smallest legal subdivision, or otherwise mark the same in such manner as to clearly indicate the extent of the claim. It is admitted by Morgenroth that his settlement was made upon the SE. ¼, then unsurveyed. He had no improvements upon the NE. ¼ prior to the date of this selection. He does not claim to have put any notices upon the W. ½ of the NE. ¼. The meager testimony regarding his

notices is not at all satisfying. He claims to have put a notice on his house, which was on the SE. ¼, to the effect that he claimed the NE. ¼, and he also claims to have placed a notice upon the NE. ¼. The testimony regarding notice on the NE. ¼ is too indefinite to be given any weight in the case, but certainly it is not shown that any notice was placed upon the W. ½ NE. ¼, the tract in conflict. His alleged notices were not found by the selecting agents, either upon his house or on the NE. ¼. The selector had neither actual nor constructive notice of any settlement claim to the tract in conflict. To hold that the improvements placed upon the NE. ¼ SE. ¼ constituted notice of claim to the NE. ¼, and the whole thereof, would be a perversion of the doctrine of notice by settlement and improvement.

Inasmuch as a settler, by giving proper notice, is not restricted to the technical quarter section settled upon, he may choose from an area of one thousand acres (25 quarter-quarter sections) to make up his 160-acre claim. In the absence of notice, there is no way for other intending claimants to know the direction and extent of the settlement claim. It is altogether unreasonable that such undefined settlement should be permitted to cast a cloud upon such a large area. It is believed that the correct rule as applied to this case is the one followed in the cases of Brown *v.* Central Pacific Railroad Company (6 L. D., 151), and Union Pacific Railroad Company *v.* Simmons (6 L. D., 172).

The Supreme Court, in the case of St. Paul, Minneapolis and Manitoba Railway Company *v.* Donohue (210 U. S., 21), reviewed at length the legislation regarding settlement rights and the decisions of the Department respecting notice required of settlers as to the tracts claimed, and, *inter alia*, it was said:

> In the administration of the land laws, in the endeavor to protect the rights of third parties acting in good faith, and at the same time to give effect to the rights arising from a settlement and the relation back of the claim when filed to its initiation by settlement, the decisions of the Land Office, while consistent in the interpretation of the statutes, perhaps present from the nature of the subject, some lack of precision in the appreciation of the facts involved in particular cases. It is certain, however, that, viewing comprehensively the rulings of the land department, the subject has been considered in two aspects—first, the sufficiency of acts done by a settler upon or after initiating a claim to give notice of the extent of his claim to another settler; and, second, the sufficiency of like acts to entitle to a patent for the land as against the Government. In both of the classes it is undoubted that the administrative rule has been, as to surveyed and unsurveyed lands, that the notice effected solely by improvements upon the land is confined to land within the particular quarter-section on which the improvements are situated (5 L. D., 141). And this ruling was predicated upon the assumed import of the decision in Quinby *v.* Conlan (104 U. S., 420).
>
> In the first class of cases, however, that is, in contests between settlers, where the claim of the first settler embraced not only land within the legal

subdivision on which the improvements had been placed, but contiguous land lying in another quarter-section, the ruling has ever been that any conduct of the first settler adequate to convey actual or constructive notice to a subsequent settler that the claim had been initiated not only to the land upon which the improvements were situated but as to contiguous land, even though in another quarter-section, sufficed to preserve the rights of the first settler. The scope of the rulings on this subject is illustrated by a decision of the Secretary of the Interior made in 1893, in Sweet *v.* Doyle (17 L. D., 197). In that case the Secretary maintained the homestead right of Sweet to land lying in different sections. In doing so, reviewing previous decisions, attention was called to the fact that it had been ruled that the original settler might defeat an attempted settlement by another before the time when record notice was required, in any of the following modes: (1) As to a technical quarter-section by the settlement upon and placing of improvements thereon; (2) as to all of a tract, although lying in different quarter-sections, by improvements on each subdivision of the land outside of the quarter-section on which he had settled; (3) by actual notice to an intruder of the extent of the settlement claim. Two cases decided in 1887 (Brown *v.* Central Pacific R. R. Co., 6 L. D., 151, and Union Pacific R. R. Co. *v.* Simmons, 6 L. D., 172) illustrate the recognition by the land department of a right in a qualified preemptor to settle upon unsurveyed land, although lying in more than one quarter-section. * * *

As a result of this review of the legislation concerning preemptions and homesteads and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter-sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract and that he does such acts as put the public upon notice of the extent of his claim.

The above rule was reaffirmed and applied in the case of Great Northern Railway Company *v.* Hower (236 U. S., 702). Tested by this rule, the evidences of the settlement claim in this case were clearly insufficient to defeat the lieu selection as to the land in conflict.

The decision appealed from is reversed.

MORGENROTH v. NORTHERN PACIFIC RAILWAY COMPANY.

Motion for rehearing of the Department's decision of November 16, 1917 (46 L. D., 259), denied by First Assistant Secretary Vogelsang, March 4, 1918.

ALASKA COAL LANDS—AMENDMENT OF LEASING REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., December 3, 1917.

Paragraph 7 of Regulations Governing Coal Land Leases in Alaska, approved May 18, 1916 (45 L. D., 113), is hereby amended to read as follows:

(7) When the time fixed for filing such applications shall have expired all applications then on file will be promptly listed and the proposed terms thereunder will be noted. Thereafter due publication at the expense of the Government for not less than once a week for a period of thirty days will follow in at least two newspapers of general circulation, one of which shall be published in the Territory of Alaska and one in the United States proper, of the applications filed, each to be designated by a number and not by the name of the applicant, the block or blocks applied for, with the announcement that at the expiration of the period of publication the said applications will be taken up and the proposals therein considered, subject to any better terms that may be offered by any other qualified applicant during the period of publication, or by the first applicant.

FRANKLIN K. LANE.

GANUS v. STATE OF ALABAMA.

Decided December 11, 1917.

SETTLEMENT UPON ENTERED LAND—PRIOR ENTRY CANCELED—WHEN SETTLEMENT RIGHT ATTACHES.

A *bona fide* settlement maintained upon lands embraced in the intact entry of another attaches *eo instante* upon cancellation of the entry.

SETTLER'S RIGHT—SEC. 3, ACT OF MAY 14, 1880—CONFLICTING CLAIMS OF STATE AND SETTLER.

The provision in section 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must assert his claim to three months from the date of settlement when on surveyed land, was intended solely for the protection of the rights of settlers *as among themselves*, and is without application to conflicting claims of a settler and a State under its school grant.

VOGELSANG, *First Assistant Secretary:*

Alvah F. Ganus has appealed from the decision of the Commissioner of the General Land Office rendered July 11, 1917, in the above entitled case, dismissing his protest against indemnity school land selection 09403, filed February 26, 1915, for the E. ½ NE. ¼ and NE. ¼ SE. ¼, Sec. 20, and SW. ¼ NW ¼, Sec. 21, T. 18 S., R. 7 W., H. M., Montgomery, Alabama, land district.

The described land was formerly embraced in homestead entry 07483, made by James B. Smith, July 8, 1912, subject to the provisions of the act of June 22, 1910 (36 Stat., 583), which entry was canceled, upon relinquishment, February 24, 1915, two days prior to the filing of the State's selection hereinbefore referred to.

November 6, 1915, Ganus filed protest against the allowance of the selection, claiming that he had been residing on the land since January 31, 1915, had since fenced a portion thereof and otherwise improved the same, and had, in addition thereto, cultivated approximately 15 acres.

The Commissioner of the General Land Office, on July 14, 1916, directed that the case proceed to hearing upon Ganus's protest. Hearing was held August 2, 1916, before the clerk of the Circuit Court in and for Jefferson County, Alabama, at which testimony was submitted in the form of oral depositions by and in behalf of Ganus, but no evidence was offered by the State, although its agent cross-examined Ganus and his witnesses.

The testimony submitted was vague and meager and the facts disclosed thereby are totally insufficient for the purpose of determining whether or not Ganus was a *bona fide* settler on the land prior to the date the State's selection was filed, and, if such were the case, whether protestant had followed up his settlement by subsequently maintaining residence on the land to the exclusion of a home elsewhere.

Upon this record the Department entertains no doubt but that Ganus diligently prosecuted his claim and endeavored to clear the records of the entry, which was intact at the date he commenced settlement. In this respect the record discloses that during the month of January, 1915, he wrote the local officers on two occasions requesting to be advised as to how to proceed to acquire title to the land settled upon by him, then included in the entry of Smith, who had abandoned the land. February 8, 1915, Ganus again made inquiry of the local officers as to what should be done by him in order to contest the entry of Smith, as a result of which Ganus, on May 25, 1915, filed contest against the Smith entry. The local officers, on May 27, 1915, acting upon Ganus's contest, advised him that the Smith entry had been relinquished February 24, 1915, and the lands applied for by the State, February 26, 1915.

Ganus states that he was not aware of the fact that the Smith entry had been relinquished previous to the date he filed his contest. No good and sufficient reason is apparent, at least from the present record, to doubt this statement, as it appears that the State's agent procured the relinquishment of the outstanding entry, and, after filing the same in the local land office, tendered the State's school land selection. The only course left for Ganus to pursue was that of filing protest against the acceptance of the State's selection, which he did. The Department, in view of these facts, is not inclined to hold that Ganus slept on his rights, but, on the contrary, did all within his power to have the records cleared of the Smith entry, and, subsequently, the State's selection, in order that he might make entry of the land, upon which he claims to have been a settler at the date the Smith entry was canceled upon relinquishment and prior to the date of the filing of the State's selection under consideration.

Regarding rights that may be acquired by settlement upon lands while embraced in an intact entry of another, the Department has in-

variably held, following the principle laid down by the Supreme Court in the case of Moss *v.* Dowman (176 U. S., 413, 421), that a *bona fide* settlement, if being maintained upon lands embraced in the intact entry of another, takes effect *eo instante* upon cancellation of the entry. The Department in passing upon this question, and in conformity with the views expressed by the court in the case cited, has held:

Settlement on land covered by an entry must be accompanied by residence or other evidence of occupation in order to take effect on cancellation of the entry. (2 L. D., 26, 123.)

Settlement on land covered by an entry confers no right as against the record entryman, but as between subsequent claimants settlement first in time is entitled to the highest consideration on cancellation of the existing entry. (11 L. D., 284; 20 L. D., 452; 25 L. D., 37, 448.)

No rights can be acquired by acts of settlement as against an entryman claiming under a prior record entry, but as between subsequent claimants the prior actual settler is entitled to precedence upon the cancellation of the entry for extinguishment of the record title. (34 L. D., 257.)

It follows that if Ganus was actually in possession of the premises at the date of cancellation of the outstanding entry of Smith, February 24, 1915, as he claims to have been, his rights acquired by such settlement were superior to those of the State under its selection filed February 26, 1915, provided his settlement was followed up by *bona fide* residence on the land to the exclusion of a home elsewhere; otherwise, during the pendency of the selection and prior to its final rejection, the State's rights would attach in accordance with the principle laid down by the Department in the case of Alvin R. Jones *et al.* (45 L. D., 184), syllabus, cited in the decision below, holding that:

A mere settlement upon public land is not such an appropriation as will prevent school indemnity selection thereof; and where the settler subsequently abandons his claim, the pending school indemnity selection attaches.

The Commissioner, under authority of the ruling in the Jones case cited, dismissed Ganus's protest on the following ground:

Ganus admits that he was away from the homestead from in May, 1915, until September 14, 1915, and no testimony was offered as to where he was residing after that time and up to the date of the hearing in August, 1916. * * * As there is no showing upon Ganus's part that he has resided on the land at all since in May, 1915, to in August, 1916, a period of over 14 months, Ganus lost his preference right as a prior settler.

The Department can not concur in the view that claimant (having admitted he was absent from May, 1915, until September, 1915), merely because no evidence appears of record showing that he resided on the land from September, 1915, up to and including the date of hearing, August 2, 1916, is to be presumed to have been absent dur-

ing that period. In the absence of positive proof to that effect it is to be presumed to the contrary, or, that claimant was residing on the land during such periods as he did not specifically state he was absent. The Department concludes that claimant's prayer upon this proceeding, that further hearing be ordered, at which the State may be represented, should be, and it accordingly is, hereby granted.

Furthermore, in this connection claimant states under oath that during the time he was absent, from May, 1915, to September, 1915, it was in order to make a living for himself and family and at the same time make it possible to cultivate and improve the land, and that his wife and children were living on the land, as he had no home elsewhere.

Counsel for the State insistently contends that whatever legal rights or equities Ganus might have had in the premises were lost through his own laches, in view of the fact that he did not protect his right by filing his homestead application, or protest, within the three months immediately subsequent to the date the land became subject to entry, or after cancellation of the Smith entry, as provided by Sec. 3 of the act of May 14, 1880 (21 Stat., 140), and, therefore, the State's selection, for this reason, if no other, should be accepted. If this contention were legally sound there would be no necessity for further hearing. It is, however, without merit. The Supreme Court, in the case of Northern Pacific Railway Company *v.* Trodick (221 U. S., 208), syllabus, held:

> Under the act of May 14, 1880, c. 89, 21 Stat., 140, delay on the part of a homesteader in making application after survey can not be taken advantage of by one who had acquired no rights prior to the filing; and so *held*, that where the Northern Pacific land grant had not attached on account of actual occupation, delay on the part of the settler in filing after survey did not inure to the benefit of the company.

Again, in the case of Svor *v.* Morris (227 U. S., 524), syllabus, the Supreme Court held:

> Under the act of May 14, 1880, 21 Stat., 141, and Sec. 2265, Rev. Stat., the rights of a settler who fails to assert his claim within three months of settlement are not inexorably extinguished but only awarded to the next settler in order of time who does assert his claim and complies with the law, and advantage of this statute can not be taken by a railroad company selecting land which is withdrawn from selection by having already been settled on. Hastings & Dakota Ry. Co. *v.* Arnold, 26 L. D., 538, approved.

The Department, following the principle as laid down by the cases last cited, in considering the case of Moore *v.* Northern Pacific Railway Company *et al.* (43 L. D., 173), syllabus, held:

> A settler upon public land who fails to make entry within three months from the date of settlement, or within three months from the date of the filing of the township plat of survey where the settlement is upon unsurveyed land, forfeits his right in favor of a subsequent settler who asserts his claim in

time; but in the absence of an adverse settlement, the settler loses no rights by failure to assert his claim within three months.

Any question concerning the formality of the assertion and completion of title under settlement claims is a matter between the United States and the settler; and the land department is not deprived of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration.

The Department in the more recent case of Wilson *v.* State of New Mexico (45 L. D., 582), syllabus, held:

The provision in Sec. 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must assert his claim to three months from the date of settlement when on surveyed land, or three months from the date of filing of the township plat when on unsurveyed land, was intended solely for the protection of the rights of settlers *as among themselves*, and is without application to conflicting claims of a settler and a State or railroad company under its grant.

In the administration of the public land system, it is a fundamental principle that the settler shall be preferred over claimants who seek to assert scrip or other rights to the public domain, and in pursuance of this principle the Department will give equitable consideration to asserted settlement claims, in the presence of a scrip application for the land by one without claim to equitable consideration.

The Department therefore concludes that it is immaterial, in so far as the rights asserted by the State under the indemnity selection involved are concerned, whether Ganus did or did not file an application for the land, or protest against acceptance of the State's selection, within three months from date of cancellation of the Smith entry, on which date he alleges he was a *bona fide* settler on the land.

After carefully considering this case from every angle, and especially in view of the showing presented by Ganus in the corroborated affidavits submitted in support of his protest, the Department is of the opinion that further hearing is necessary, and it is so ordered, the issues to be confined to the date Ganus commenced settlement on the land; whether or not he was a settler at the date the Smith entry was canceled; the duration of his absence from the date he commenced his settlement up to and including the date of the hearing hereby ordered; and whether or not, as Ganus asserts upon his protest, his wife and family resided on the land during his absences. The hearing should also bring out facts concerning the amount of cultivation, extent and value of the improvements placed on the land by protestant, and such other facts as the parties litigant deem relevant and material.

After submission of the further testimony the case will be considered *de novo* upon its merits.

The decision appealed from is accordingly vacated and the case remanded for appropriate action in accordance with the foregoing.

DEER CREEK MINING AND MILLING CO. v. PARIS.

Decided December 18, 1917.

MINING LOCATION—PRIOR SETTLEMENT CLAIM IN CONFLICT—PARAMOUNTCY OF RIGHT.

Where a homestead entry conflicts with a lode mining claim, the homestead entryman having settled upon the tract prior to survey and to the lode location, the point of discovery of which is outside the limits of the homestead tract, the right of the entryman is superior to that of the locator if the evidence does not show that the vein extends into the homestead tract or that the area in conflict is mineral.

VOGELSANG, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office, February 25, 1916, sustaining the protest of the Deer Creek Mining and Milling Company against homestead entry 04738 by Joseph D. Paris for the NW. ¼ SE. ¼ and E. ½ SW. ¼, Section 4, T. 31 N., R. 3 E., B. M., in the Lewiston, Idaho, land district, to the extent of its conflict with the Paris lode mining claim, and holding the homestead entry for cancellation to that extent.

The plat of survey was filed in the local office February 10, 1913, and on that day Paris filed his application for homestead entry of the land described, alleging settlement November 15, 1899. The entry was allowed August 23, 1913, and final proof was submitted January 21, 1914, but on January 14 the protestant filed its protest against the entry so far as it conflicts with the "Paris" lode claim, located January 8, 1910, and lying partly north of and partly within said tracts. Issue being joined upon the protest, a hearing was had, beginning January 11, 1915, and upon the evidence adduced the local officers rendered their decision, September 4, 1915, recommending dismissal of the protest. The Commissioner, on appeal, reversed this decision, holding the homestead entry for cancellation to the extent of the conflict, and allowing the protestant to apply for a segregation survey. From that decision Paris appealed, April 10, 1916, to the Department.

The Paris lode claim was located with its north end line, bearing east and west, 609 feet north of the north line of the Paris homestead tracts, its center line 1412 feet long and bearing north and south, its width 600 feet, and its south end line bearing north 75 degrees 11 minutes east; so that its conflict with the homestead tracts has a center length of 803 feet and embraces nearly four-sevenths of its total area. Paris's residence on the homestead tracts has been continuous since his settlement in 1899, his house, barn and other improvements being on the NW. ¼ SE. ¼, said section 4, near its north line and east of the east line of the Paris lode location.

The protestant was incorporated in November, 1908, under the laws of Idaho, Paris being one of its incorporators and named in the articles as an original stock subscriber and director; and he was still a stockholder at the time of the hearing, but has since sold his stock, pursuant to a previously granted option, to Orr, the company's leading promoter and manager. The Paris lode claim, located by one Gray, January 8, 1910, was conveyed by him to the company in June of that year. Previous to its location the company had acquired several other claims, and including the Paris it held seventeen at the time of the hearing, the group running southeasterly and joining the Paris claim on its north end, and on or near one of the claims it had a reduction mill in course of erection; and it had taken rich ore from some of the other claims, developing them by tunnels aggregating nearly 1000 feet in length. Its only discovery or development on the Paris claim is on that part north of the north boundary of the Paris homestead tracts, and consists of three prospect holes, the most southerly 76 feet north of said north homestead line, each of which shows small veins or perhaps lenses of gold-bearing quartz, the assays of ore samples from which showed mineral values ranging from very low to about $400 per ton; but the deposits in place show varying strikes, and indications of pinching out entirely in or near the most southerly prospect hole, and according to the testimony of the protestant's expert witness, Prof. Thyng, the main ledge, found in the drift tunnel in the company's main workings north of the Paris location, has a strike of north 56 degrees west and could not enter any part of the Paris claim without "a tremendous twisting on its course," which he says would be "very improbable." No prospecting has been done, or discovery made, and there are no mineral indications, on the part of the claim within the conflict area,—that is, within the homestead boundaries.

The official township survey, although it is noted on the plat that "there is some indication of mineral in this township," does not classify these particular tracts as mineral in character, and therefore they stand as *prima facie* nonmineral—a presumption easily rebuttable, however.

Paris was the locator of several of the protestant's group of claims, lying northeast and east of the homestead tracts, and conveyed them to the company nearly three years before the Paris claim was located. On January 13, 1911, he located for himself the "Nellie" lode claim, near the center of the homestead tracts and next south of the Paris location, with its length running east and west, and his location notice referred to the Paris claim as adjoining it on the north; but this location he afterwards abandoned.

These are the salient points of the evidence in the record, and they present several questions of law for consideration.

First, the equitable estoppel claimed against Paris. This claim is based on the facts, first, that Paris was a stockholder of the mining company, and that its management (with which he was originally but not then identified as a director) has sold its stock on the faith of all its apparent assets, including the Paris claim as located; secondly, that he has himself located sundry mining claims in the vicinity, including particularly the "Nellie" claim within his homestead, which location he bounded on the north by the Paris location.

None of these facts are enough, standing by themselves, to raise an estoppel. Paris's acquisition of some of the mining company's original stock issue, and even his entering its directorate, could not bar him from disputing its after-acquired claim to property claimed by himself; and it is not shown that he ever personally assisted in floating its stock. His location of other mining claims in the vicinity is not an admission on his part that the land embraced in this particular claim, or rather the part of it conflicting with his long prior homestead settlement, is mineral land. It is true that his location in 1911 of the Nellie claim in the midst of the homestead tracts and next south of the Paris location, and his referring in his location notice to the Paris claim as adjoining on the north, make it useless for him to pretend ignorance that the Paris location extended into his homestead tracts; but even that does not amount to an admission by him that the conflict area is mineral in character—which, as will presently be seen, is the vital question. What is more, the proof lacks any showing of the other essential element of an estoppel against Paris—that his action, speech, or silence when he should have spoken, was acted on by a party or privy, with such change of position as would entail loss or prejudice if Paris were permitted now to take an attitude inconsistent with his former action, speech, or silence. This is of the essence of estoppel *in pais*, or "equitable estoppel," as it is often termed. Bigelow on Estoppel (2nd ed.), pp. 492–502, and cases cited. But Paris had ceased to be a director of the mining company when it acquired the Paris claim; the "Nellie" location was made at a still later date; he himself took no part in floating the company's stock; and if he had, the stockholders are not in privity with their corporation, the party here, as regards this litigation involving a specific item of its claimed assets. They must seek their judicial remedy independently against any individual who may have led them into loss. Nor does it appear that they even knew that Paris was a stockholder, or that in his Nellie location he had so referred to the Paris location as to admit that it extended within his homestead boundaries. The factors of knowledge of and reliance upon the act, speech or silence of another to one's own prejudice are wholly lacking, so far as the record discloses. 16 Cyc., pp. 744–6, n. 38.

Secondly, the character of the land in controversy. This question must now be considered quite apart from the claim of an estoppel. Without reviewing the evidence in detail, it is enough to say that the samples of high-grade ore from that part of this claim north of the homestead boundary, coupled with the fact that the mining company is pursuing extensive development and installing costly milling machinery on another part of its group of mining claims, stamp that part of the Paris claim as mineral land at the time of the application for the homestead entry. But this ground is not in controversy; its character, as mineral or nonmineral, bears on the case only as a link in the chain of protestant's claim to the southerly part of its location, lying within the homestead boundaries; and treating that part of the mining claim—the contest area—as a separate unit of land, it must be held with equal positiveness that it is not shown to be mineral at all. It was presumptively nonmineral notwithstanding the public surveyor's notation that "there is some indication of mineral in this township," and the burden clearly lies on the protestant to prove it mineral. This has not been done. Not only the "discovery" but all the prospecting was on the other portion of the claim, northerly of and outside the homestead. The ground within the conflict area has never been investigated for mineral; it shows no mineral outcrop; its surface has not even been disturbed save by the homesteader's plow; and the evidence of the pinching out of the small veins (or more probably lenses) of mineral in the northerly portion of the claim, and of noncontinuity of those veins, is such that it cannot reasonably be inferred that they extend within the conflict area and would there show valuable mineral deposits. Nor can it be inferred that the more well-defined main ledge disclosed by the protestant's workings in some of its other claims extends into this contested ground, first because its strike points toward quite another quarter and the protestant's expert witness admits that it is very improbable it would show such a "tremendous twisting on its course," and secondly because mineral character of neighboring ground is never accepted by the Department or the courts as establishing mineral character of ground in dispute as such. The contest area must therefore be held nonmineral.

It must be regarded as settled law—

As to the homestead claim:

(1) That a *settlement* on unsurveyed public land, maintained as required by law, protects the settler against adverse claim until three months after filing of the township plat of survey in the district land office, precisely as he would be so protected if he had a homestead entry. Bryant *v.* Begley (23 L. D., 188); James McCourt (33 Id., 386); Sturr *v.* Beck (133 U. S., 541).

(2) That an *entry* of land under the homestead law creates a vested interest and prevents adverse appropriation under the mining laws unless the land so entered is shown to be of known mineral character before the issuance of final certificate. Spratt *v.* Edwards (15 L. D., 290). And see South Dakota *v.* Delicate (34 Id., 717).

And as to the mining claim:

(1) That a valid mining location may be made only on lands some part of which are shown, by a "discovery," to be valuable for mineral; but

(2) That a lode location based on discovery of a vein may be laid on a strip of open, unappropriated, unsegregated public land 600 feet wide and 1,500 feet long in any direction along the supposed strike of the vein, if such strip embraces the point of discovery equidistant from the side lines; and the point of discovery may be anywhere within the strip without reference to the end lines, and the boundaries of the claim may include open nonmineral land as well as mineral land.

(3) That a valid mineral location gives the locator possessory title to and control of the superficial area of the land within its boundaries, so long as he complies with applicable laws.

But it has been seen that the homestead *settlement* protects the settler, from its date; that is, it segregates the area of settlement, as of that date, from adverse entry, provided it is followed within due time by the homesteader's *entry* and provided none of that area is found, before issuance of his final certificate, to be mineral in character.

Since, therefore, this conflict area has not been shown to be mineral, it was not locatable as part of the Paris lode claim in the face of its prior inclusion in the homestead settlement, notwithstanding the mining claim might extend to a length of 1,500 feet and might include, with mineral ground on which discovery was made, contiguous nonmineral ground *if unsegregated by prior homestead settlement.* See Montgomery *v.* Gilbert (26 L. D., 216).

The Commissioner's decision is accordingly reversed, the mineral protest is rejected, and the homestead entry of Paris will be allowed intact.

LAND ENTRIES OF ALIEN ENEMIES WHO HAVE DECLARED INTENTION TO BECOME CITIZENS.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C.,
December 20, 1917.

I have your [Commissioner of the General Land Office] letter of December 12, 1917, requesting instructions as to the rights of alien enemies who have declared their intention to become citizens, with

reference to land entries under the laws of this country which authorize persons who have declared their intention to become citizens to make such entries.

Section 2289, Revised Statutes, provides:

> Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled * * *

to make homestead entry.

Section 2291, Revised Statutes, provides for the submission of final proof on homestead entries and for issuance of patents to the beneficiaries specified therein "if at that time citizens of the United States."

The act of March 3, 1877 (19 Stat., 377), amended by the act of March 3, 1891 (26 Stat., 1096), allows desert land entry to be made by "any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such.'" Such entryman can not, however, obtain patent until he has become a citizen of the United States.

The act of June 3, 1878 (20 Stat., 89), commonly known as the Timber and Stone Law, provides that lands chiefly valuable for timber or stone may be sold to "citizens of the United States, or persons who have declared their intentions to become such."

Section 2319, Revised Statutes, provides for the occupation and purchase of mineral land "by citizens of the United States and those who have declared their intention to become such."

The instructions of January 11, 1915 (43 L. D., 485), governing the sale of isolated tracts under Section 2455, Revised Statutes, and amendatory laws, provide that persons who have declared their intention to become citizens may make such purchase.

Section 2171, Revised Statutes, provides in part that—

> No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States.

It would appear that under existing laws an alien enemy who has declared his intention to become a citizen and who is otherwise qualified may be allowed to make a homestead entry, timber or stone entry, mineral entry, or to purchase under the isolated tract law. No final homestead entry by such a person may be allowed until completion of citizenship. Therefore, where final proof is offered on such entry, it should be suspended until such time as citizenship of the entryman shall have been obtained unless in the meantime the objection shall have been removed by remedial legislation.

As to desert land entry, it appears that an alien enemy, although he has declared his intention to become a citizen, may not be permitted to make such entry, because under present conditions he is not eligible to citizenship. This appears to be an anomaly, differing from all other land laws, but nevertheless existing law must be administered as found so long as it remains unchanged. Existing desert land entries properly allowed should be permitted to stand, and when final proofs are submitted they should be suspended as in the case of homestead final proofs by alien enemies who have declared their intention to become citizens, but who have not completed citizenship.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SOLDIERS' AND SAILORS' ADDITIONAL RIGHTS UNDER SECTIONS 2306 AND 2307, REVISED STATUTES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 26, 1917.

Hon. FRANCIS J. HENEY,
Attorney at Law,
San Francisco, California.

MY DEAR MR. HENEY:

I have considered the argument set forth in your brief filed adversely to my administrative ruling of February 15, 1917,[1] touching "soldiers' additional rights," which instructs the Commissioner of the General Land Office that no soldier's additional right assigned, after the date of said ruling, by the heirs or the administrator of a deceased soldier's estate, or of the estate of his widow, or of his minor orphan children, or directly by such minor orphan children after they shall have reached majority, shall be recognized as a valid basis of entry of public land.

Your argument apparently rests on your proposition (p. 15 of your brief) that Congress, by its amendment of March 3, 1873 (amending Section 2 of the Act of June 8, 1872—afterwards Sec. 2306 R. S.), "lifted Section 2 out of any relation to Section 3" (afterwards Sec. 2307 R. S.) "just as completely and effectively as if it had so repealed it and enacted new, separate and distinct legislation in place thereof."

I can not assent to the soundness of this proposition. The amendment referred to simply (1) enlarged the privilege of entry under the provisions of said act to the unqualified privilege of entry, and

[1] See page 32.

(2) omitted the restriction to entry of contiguous lands, which had been introduced into the amended form, approved June 8, 1872, of the "soldiers' and sailors' homestead act," but had not been in the original form of that act, approved April 4, 1872 (17 Stat., 49). Thus the amendment of March 3, 1873, in one respect simply restored the section to its original form, and in another respect broadened the field of the additional entry permitted; but it left the section still in the same relation to the other sections of the original act as when that act was passed.

And even if it is correct to say that the amendment "stripped Section 2 of every vestige of its character as a *homestead* privilege or right," still it left its provisions among the "benefits enumerated in this act," which are extended, by Section 2307, to the widow and the minor orphan children of a deceased soldier who if living would be entitled thereto. Therefore I find no justification for denying to such widows and minors the devolution upon them, successively, of the additional right of a soldier previously unavailed of by him, upon his decease; and the judicial and departmental construction of Section 2306 has always been such as to accord to them that devolution.

Now, this devolution of the benefit of Section 2306 upon designated beneficiaries does not admit of inheritability of that benefit by the heirs of an earlier designated beneficiary, but excludes the notion of such inheritability. The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property, and convertible into specific land by entry under it. The first designated beneficiary may avail himself of the offer during his lifetime, either by entry of land under it or by assignment of the right, either of which imports his acceptance of it; if he does not so accept, upon his death the offer stands extended to his widow, who may likewise avail herself of, and so accept, the offer, during her widowhood; if she does not so accept, upon her death or remarriage the offer stands extended in turn to the soldier's minor orphan children, who may likewise avail themselves of, and so accept, the offer, during their minority. But until some offeree, while qualified to become a beneficiary by acceptance, has accepted the statutory offer, there is no property right, hence there is nothing to inherit; and when there is no longer in being any offeree still qualified to become, by acceptance, a beneficiary, the offer lapses for lack of possibility of such acceptance.

It is believed that the foregoing is both sound in principle and consistent with what the Supreme Court has held in Webster *v.* Luther (163 U. S., 331); and it is precisely the view of the nature

of the "soldier's additional right" embodied in the administrative ruling of February 15, 1917, to which I feel constrained to adhere.

But you will observe that by its express terms the ruling is inapplicable to assignments of "rights" made prior to its date, as those may have been acquired on the faith of other views from time to time heretofore announced by this Department.

Cordially yours,

FRANKLIN K. LANE.

LEAVES OF ABSENCE FROM HOMESTEADS FOR THE PURPOSE OF PERFORMING FARM LABOR ELSEWHERE.

INSTRUCTIONS.

[Circular No. 581.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 10, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress of December 20, 1917 (Public No. 94), granting leaves of absence, during the pendency of the existing war, to homesteaders, to enable them to engage in farm labor on lands other than those embraced in their homestead claims, which labor may be in connection with lands owned by themselves. It provides—

That during the pendency of the existing war any homestead settler or entryman shall be entitled to a leave of absence from his land for the purpose of performing farm labor, and such absence, while actually engaged in farm labor, shall, upon compliance with the terms of this Act, be counted as constructive residence: *Provided*, That each settler or entryman within fifteen days after leaving his claim for the purpose herein provided shall file notice thereof in the United States Land Office, and at the expiration of the calendar year file in said land office of the district wherein his claim is situated a written statement, under oath and corroborated by two witnesses, giving the date or dates when he left his claim, date or dates of return thereto, and where and for whom he was engaged in farm labor during such period or periods of absence: *Provided further*, That nothing herein shall excuse any homestead settler or entryman from making improvements or performing the cultivation required by applicable law upon his claim or entry: *Provided further*, That the provisions of this Act shall apply only to homestead settlers and entrymen who may have filed their application prior to the passage of this Act. The Secretary of the Interior is authorized to provide rules and regulations for carrying this Act into effect.

2. The privilege of such absence may be exercised by any person who had made a valid settlement on public land before December 20, 1917, or who has made, or shall make, entry pursuant to appli-

cation filed before that date. If no entry has been made prior to the filing of the notice stipulated in the act and herein below mentioned, you will give it the current serial number and make record thereof on your serial number register, noting that no entry has been made; also on the tract book, if the land is described by subdivisions, section, township and range.

3. There is no limit either to the number or the length of the absences a homesteader may have under this act. They do not in anywise interfere with the five-month absence privilege accorded by law to the homesteader during each residence year, pursuant to notice and without reason stated, but the periods thereof are to be regarded as forming part of the seven months' residence ordinarily required.

4. Each person intending to avail himself of the privileges of this act must, within fifteen days after leaving his homestead, file at the local United States land office a notice that he has left the land, pursuant to the provisions of said act, for the purpose of performing farm labor elsewhere. On or before February 1 of each year he must file at said office a written statement, under oath, corroborated by two witnesses, with regard to such absence or absences during the last preceding calendar year. Said statement must contain the date or dates when he left the claim and the date or dates of his return thereto; also the name or names of the places where he was engaged in farm labor during the period or periods of his absence and the name or names of the persons for whom said labor was performed. Unless he complies with these conditions, he will not be entitled to the benefits of the act.

5. The act does not excuse a homesteader from full compliance with the law with respect to cultivation of his land and the erection of a habitable house thereon.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

[PUBLIC No. 94—65TH CONGRESS.]

[S. 2334.]

An Act To authorize absence by homestead settlers and entrymen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during the pendency of the existing war any homestead settler or entryman shall be entitled to a leave of absence from his land for the purpose

of performing farm labor, and such absence, while actually engaged in farm labor, shall, upon compliance with the terms of this Act, be counted as constructive residence: *Provided*, That each settler or entryman within fifteen days after leaving his claim for the purpose herein provided shall file notice thereof in the United States Land Office, and at the expiration of the calendar year file in said land office of the district wherein his claim is situated a written statement, under oath and corroborated by two witnesses, giving the date or dates when he left his claim, date or dates of return thereto, and where and for whom he was engaged in farm labor during such period or periods of absence: *Provided further*, That nothing herein shall excuse any homestead settler or entryman from making improvements or performing the cultivation required by applicable law upon his claim or entry: *Provided further*, That the provisions of this Act shall apply only to homestead settlers and entrymen who may have filed their application prior to the passage of this Act. The Secretary of the Interior is authorized to provide rules and regulations for carrying this Act into effect.

Approved, December 20, 1917.

APPLICATIONS FILED MORE THAN 10 DAYS AFTER THEIR EXECUTION—CIRCULAR 352 AMENDED.

[Circular No. 583.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 15, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is invited to an order of the Secretary of the Interior dated January 9, 1918, modifying the regulations which require applications for entry to be filed within 10 days after their execution:

> The Department is advised that various local officers have been obliged to reject applications to enter which were promptly mailed but were not received within the time fixed by the regulations of September 8, 1914 (43 L. D., 378), resulting in annoyance and expense to the applicants.
>
> In view thereof you will direct local officers to accept as filed within the time named in said circular all applications to enter which were deposited in the mails within 10 days from the date of execution, the regulations being amended to agree herewith.

C. M. BRUCE,
Acting Commissioner.

PAYMENTS ON ENTRIES OF LANDS IN ABANDONED MILITARY RESERVATIONS, MADE BY PERSONS IN MILITARY OR NAVAL SERVICE.

[Circular No. 585.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 19, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Where a person has entered or shall enter land embraced in an abandoned military reservation, for which he is required to pay a certain price per acre, and thereafter has entered or shall enter the military or naval service of the United States, the entry will not be canceled on account of the failure of the soldier or sailor to make the payments of any amounts falling due during the term of his enlistment, but it will be held suspended pending consideration by Congress of legislation designed to extend the time for such payments beyond the period of military service or the existing war.

The question whether such entrymen shall be required to pay interest, except as required by existing laws, will depend on the terms of the legislation which Congress may enact.

In cases where the entryman has filed notice of his entrance into the military or naval service, as permitted by paragraph 8 of the circular of instructions of August 22, 1917, issued under the act of July 28, 1917 [46 L. D., 174], you will, nevertheless, call upon him for the payment, when due, but will in your notice inform him that if he is unable to pay, on account of his employment in the military or naval service, he should advise you to that effect. In all cases where there is response by him or on his behalf that he has entered the military or naval service, you will forward the papers to this office with your report.

C. M. BRUCE,
Acting Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SOUTHERN PACIFIC RAILWAY COMPANY.

Decided January 19, 1918.

RAILROAD INDEMNITY SELECTIONS—APPROXIMATION RULE.

The rule of approximation is applicable to railroad indemnity selections.

SAME—REGULATIONS—AUTHORITY OF SECRETARY TO WAIVE.

Regulations adopted by the Secretary of the Interior covering matters resting in his discretion under the general supervisory authority vested in him, may be waived by him in the exercise of such discretion.

RAILROAD INDEMNITY SELECTION LISTS—RULE REGARDING ITEMS.

Good administration requires that, under ordinary circumstances, each item of a railroad indemnity selection list shall be considered and disposed of as an independent selection, unaffected by facts shown in other items; but an exception will be made where, in a tendered list made up of several items, the aggregate area of the tracts severally designated as bases forms a sufficient base for the total acreage asked in exchange, even though individual items of the base so tendered may contain a larger or smaller acreage than the corresponding items of the tendered selection list.

VOGELSANG, *First Assistant Secretary:*

On February 1, 1913, the Southern Pacific Railway Company filed its main line indemnity selection list No. 130 (Los Angeles 017622), which embraced the selected tracts in separate and distinct items numbered 1 to 12, respectively, of which items 5, 7 and 10, here involved, embraced the W. ½ SE. ¼ SE. ¼, Sec. 13, T. 5 N., R. 11 W., S. B. M., 20 acres, the E. ½ SE. ¼, Sec. 1, T. 5 N., R. 12 W., S. B. M., 80 acres, and the W. ½ NE. ¼ SW. ¼, Sec. 29, T. 7 N., R. 13 W., S. B. M., containing 5 acres.

On January 16, 1915, the General Land Office held the bases assigned in items 5 and 7 to be invalid and that the base assigned in item 10, which contained only 2 acres, was not sufficient to bring it within the rule of approximation, the selected tract embracing 5 acres.

In some of the items in the list the area of the base lands exceeded that of the selected tracts, as, for instance, in item 6, 80 acres was selected, while the base assigned contained 83.09 acres. These excesses were far more than sufficient to cover the deficit in item 10. In view of this fact the company assigned new bases in items 5 and 7, and then asked that the excess mentioned above be added to the base already assigned in item 10.

On January 24, 1916, the General Land Office declined to accept the new bases assigned in items 5 and 7, for reasons to be hereafter mentioned, and further held that the excess of the base lands over the selected lands mentioned above could not be credited to item 10 under the rule followed by this Department in its unreported decision rendered March 10, 1913, in the case of the Northern Pacific Railway Company's Washington clear list No. 206, and Northern Pacific Railway Company (43 L. D., 534), where it was held, in effect, that each item in a selected list, such as the one now under consideration, should be treated as a separate and distinct selection within and of itself, and must stand or fall, accordingly, as its own sufficiency or insufficiency appeared at the time of its consideration, and could not be strengthened and sustained by facts shown in other items in the same list.

In item 5, the E. ½ SE. ¼ NW. ¼, Sec. 5, T. 21 S., R. 22 E., was assigned as a base, and in item 7 the other half of that forty-acre tract subdivision, the W. ½ SE. ¼ NW. ¼, of said section, was, with other lands, named as the base.

The General Land Office based its rejection of items 5 and 7 on the ground that the base lands embrace less than and only a part of a technical legal subdivision, and the rejection of item 7 was based on the further ground that one of the other tracts offered as base lands, the Swamp Lot, in the NE. ¼ NE. ¼, Sec. 31, T. 61 S., R. 23 E., 8.75 acres, could not form the base of a selection, because it was a part of the bed of a meandered stream. The selector, in its appeal from that decision, contends that it was erroneous in holding that parts of the same legal subdivision could not be assigned as bases in different items in the same list, and also in refusing to consider the excess mentioned in connection with the base assigned in item 10, but it conceded the correctness of the holding as to the "swamp lot," and later, as is now shown by the records of the General Land Office, substituted therefor another tract, lot 10, Sec. 29, T. 22 S., R. 19 E., containing 9.07 acres, or .32 acres more than was contained in such lot.

While it is an established rule that parts of minor legal subdivisions of surveyed public lands can not be entered, selected, relinquished, or surrendered, under the public land laws, except in entries of particular kinds, that rule should not be invoked to defeat a selection, like the one under consideration, in which the base lands are all surrendered in the same selection list, notwithstanding the fact that they may be embraced in separate and distinct items in that list. That rule could not be applied in this case on any other theory than that each item in the selection list must, for all purposes, be considered, treated and disposed of as an individual selection standing alone. While this rule was adopted in aid of the convenient and expeditious consideration of such lists and for the further purpose of avoiding loss to the Government through the possibility of the assignment of the same lands as the base for more than one selection, it is not believed that it should be invariably invoked, or be applied at all in cases where its requirement would work an unnecessary hardship, or impose an unreasonable burden, and much less so in cases where its application would result in substantial loss to the selector. Where, as in this case, there are a limited number of items in a selection list, and the lands assigned as bases in different items could be made to form a sufficient base if assigned as such in a single item embracing all the selected tracts, there is no good reason why such items should not be considered together and treated collectively when necessary, instead of individually. In William Hickey's case (26 L. D., 621), it was said (*syllabus*):

> Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such a course advisable.

It is believed that the facts now before this Department amply justify the approval of this selection, in so far as items 5, 7 and 10 are concerned. The decision appealed from is therefore reversed and the case is remanded with directions that it receive further consideration and adjudication, in accordance with the views herein expressed.

VIRNAND C. WALTERS.

Decided January 28, 1918.

REPAYMENT—FORT PECK INDIAN LANDS—APPLICATION OF MONEY PAID.

Upon reduction of the area of a homestead entry of Fort Peck Indian lands, by relinquishment of a part thereof, there is no authority of law under which an installment of the purchase money paid for such lands may be returned, but such installment may be credited to the unpaid portion of the purchase price.

VOGELSANG, *First Assistant Secretary:*

On May 19, 1916, Virnand C. Walters made homestead entry, at the Glasgow, Montana, land office, under the act of May 30, 1908 (35 Stat., 558), for S. ½ Sec. 17, T. 31 N., R. 46 E., M. M. The land was appraised at $6 per acre, and entryman paid one-fifth of the purchase price (or $384) at date of entry. On April 24, 1917, entryman filed a relinquishment as to the SE. ¼ of said Section 17, and applied for repayment of one-half of the purchase money paid, setting forth in his affidavit that the reason he relinquished a portion of the entry was his inability to comply with the law as to the entire area.

The application for repayment was denied by the Commissioner of the General Land Office in a decision dated July 23, 1917, and entryman has filed an informal appeal.

The Commissioner correctly held that there was no law under which the $192 could be repaid, but the Department knows of no reason why the entire $384 can not be credited on the entry as it now stands. To do so would not conflict with the holding announced in the case of Fredericka Fritz (44 L. D., 570).

One-fifth of the remainder of the purchase price of the land became due and payable on May 19, 1917, and on October 30, 1917, apparently under a misapprehension as to the provisions of the act of March 2, 1917 (39 Stat., 994), regulations under which were issued April 13, 1917 (46 L. D., 75), entryman paid to the receiver of public moneys at Glasgow $7.68, as interest on the second installment.

The entry having been reduced to 160 acres, the first payment became $192 in excess of what was required. Deducting the amount which should have been paid on an entry of that area, a balance of $768 remained. One-fifth of this amount (or $153.60) became pay-

able May 19, 1917, but entryman had already paid $38.40 in excess of this amount, leaving but $115.20 to be paid on May 19, 1918, prior to which date an extension of the time for payment of $76.80 (being one-half of the installment then due) can be obtained under the act of March 2, 1917, *supra*, by the payment of $38.40 (making, with the $38.40 already credited on said payment, one-half of the installment then due), and 5 per cent interest on the amount ($76.80) not paid.

The $7.68 paid on October 30, 1917, was in excess of legal requirements, and the Commissioner of the General Land Office will instruct entryman how to apply for repayment of the same.

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

BILILIK IZHI v. PHELPS.

Decided February 2, 1918.

ALLOTMENTS TO INDIANS IN NATIONAL FORESTS—WHEN RIGHT MAY BE EXERCISED.

Section 31 of the act of June 25, 1910, is not limited in its application to Indians occupying, living on or having improvements on lands within national forests at the date of the passage of said act.

LISTING AND OPENING TO ENTRY UNDER FOREST HOMESTEAD LAW—NO BAR TO INDIAN ALLOTMENTS.

The listing and opening to entry of lands under the provisions of the forest homestead act of June 11, 1906, do not preclude their being taken as Indian allotments under section 31 of the act of June 25, 1910.

INDIAN SETTLERS IN NATIONAL FORESTS—HOMESTEAD ALLOTMENTS.

The effect of section 31 of the act of June 25, 1910, is to extend "to any Indian occupying, living on, or having improvements on land included within" national forests, the provisions and benefits of prior laws giving to Indians a right to public lands.

INDIAN SETTLERS ON PUBLIC LANDS—LEGISLATIVE INTENT—SURFACE PATENTS.

An Indian, otherwise qualified, may have his allotment right satisfied from coal lands in national forests subject to surface entry under the act of June 22, 1910.

VOGELSANG, *First Assistant Secretary:*

James W. Phelps has appealed from decision of December 20, 1916, by the Commissioner of the General Land Office, holding for cancellation his homestead entry made under the act of June 11, 1906 (34 Stat., 233), for the SE. ¼ Sec. 4, T. 12 N., R. 18 W., New Mexico Meridian, Santa Fe, New Mexico, land district.

Said entry was made September 11, 1914, under the act mentioned, and also subject to the provisions of the act of June 22, 1910 (36 Stat., 583), as the land is embraced in a coal land withdrawal. It is also included in the Manzano National Forest, but was listed on March 7, 1913, and opened to homestead entry on September 9, 1913, under the Forest Homestead act.

July 20, 1915, Bililik izhi, an Indian, also known as Pinto, filed contest against the entry of Phelps, alleging that—

> Affiant is now and was prior to September 11, 1914, the date of said entry, a settler upon the said SE. ¼, Sec. 4, T. 12 N., R. 18 W.; that affiant had improved said land by erecting thereon a substantial fence beginning July, 1914; that affiant cultivated said land in the year 1914; that affiant further alleges that James W. Phelps well knew at the time he filed his application to enter that the land was then appropriated.

The application to contest further stated that if allowed to do so the contestant desired to acquire title to the land under the provisions of the Indian allotment law. A hearing was had before a designated officer, whereat the contestant submitted evidence in support of the contest. The evidence showed that the cultivation of the land and the improvements placed thereon were in the interest of the contestant's minor son and not for the benefit of the contestant himself. For this reason the contestee filed motion to dismiss the contest, contending that the evidence submitted did not support the allegations of the contest affidavit. The local officers dismissed the motion with the right of appeal, but held that the contestee would be afforded opportunity to submit evidence.

Upon appeal, the Commissioner, in the decision here complained of, held that the local officers properly denied the motion to dismiss, and further held that the contestee was not entitled to further opportunity for hearing, inasmuch as Rule 40 of the Rules of Practice required him to submit his testimony at the time the case was set for hearing. The Department agrees with this ruling as to the procedure.

The Commissioner found from the testimony submitted in the case that the land was in the actual use and occupancy (though without residence) of the Indian contestant, acting in his son's behalf, prior to the filing of the homestead application by Phelps. He further found, however, that the occupancy was not commenced prior to the spring of 1914, or at least not prior to some time in 1913, and that for said reason, allotment could not be permitted under section 31 of the act of June 25, 1910 (36 Stat., 855, 863). Said law, in part, provides:

> That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section ——— of this Act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof.

It was further held that allotment could not be allowed for the tract in question under the General Allotment act for the reason that

the tract had been designated as subject to entry under the Forest Homestead law and could not be entered in any other way. However, the Commissioner held that inasmuch as the land contained Indian improvements at and prior to the time the homestead entry was made, the said entry was illegal and should be canceled. In support of this ruling reference was made to circular of May 31, 1884 (3 L. D., 371), reissued December 30, 1903 (32 L. D., 382), to the effect that entry should not be allowed upon lands in the possession of Indians who have made improvements of any value whatever thereon.

It further appears by the record that on January 23, 1915, Indian allotment application by Bililik izhi on behalf of his minor child, Nadadsi, was allowed for the SE. ¼, Sec. 4, T. 11 N., R. 18 W., New Mexico Meridian. Said application was executed October 15, 1914, filed with the forest service on November 7, 1914, and filed in the local office December 26, 1914, with a certificate from the Acting Secretary of Agriculture that said land is more valuable for grazing than for timber. There was also submitted a certificate by the Assistant Commissioner of Indian Affairs that Nadadsi is a member of the Navajo Tribe and as such entitled to an allotment under section 31 of the said act of June 25, 1910, under which said application was made. The testimony submitted at the hearing shows that said allotment application was intended to cover the identical land entered by Phelps, and that the description was a clerical error in that T. 11 N. was written in the application instead of T. 12 N., as intended.

The Department fully concurs in that portion of the Commissioner's decision holding that the entry of Phelps is invalid and must be canceled because the land at time of entry was not free from Indian improvements and occupation. But the further holding that allotment may not be allowed because the improvements were not placed on the land prior to the date of the act of June 26, 1910, *supra*, can not be affirmed. This question has been the subject of discussion and careful consideration by this Department in conjunction with the Department of Agriculture. An opinion was rendered thereon by the Solicitor for this Department under date of February 23, 1917, which was concurred in by both Departments. It was, accordingly, agreed:

That section 31 of the act of June 25, 1910, *supra*, is not limited to Indians occupying, living on or having improvements on lands within a national forest at the date of the passage of the act but applies also to Indians whose settlement, occupation or improvement occurred subsequent to the passage of the act.

This leaves the further question whether the fact that the land here involved had been listed and opened to entry under the act of June 11, 1906, bars the right to take it by allotment under the act of June 25, 1910, *supra*. The two acts are not inconsistent one with the

other. Rather, the Forest Allotment act is the concomitant of the Forest Homestead act, the object being the same, namely to permit agricultural use of lands suitable for that purpose in national forests.

Lands within a national forest which have been listed and opened to homestead entry under the Forest Homestead law are not thereby excluded from the forest. They are merely made subject to a particular kind of entry, notwithstanding the forest reservation. The act of August 10, 1912 (37 Stat., 287), specifically provides that "no land listed under the act of June 11, 1906, shall pass from the forest until patent issues."

It is true that the Department has held in a number of cases that land so listed and opened may be entered only in the manner provided by the Forest Homestead act of June 11, 1906. But this was said with reference to classes of claims inapplicable to forest lands, and not, as in this case, where the claim if otherwise proper may be allowed for forest lands and independently of the listing.

The only remaining question is as to whether, since this land was withdrawn by Executive order of July 9, 1910, as coal land, and remains so withdrawn, an allotment of said land is allowable under section 31 of the act of June 25, 1910 (36 Stat., 855, 863), in view of the act of June 22, 1910 (36 Stat., 583), which authorizes agricultural entries and surface patents for coal lands. The latter act, in section 1, provides:

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

By the acts of March 3, 1875 (18 Stat., 402, 420), and July 4, 1884 (23 Stat., 76, 96), the benefits of the General Homestead law were extended to Indians. These acts were followed by the General Allotment act of February 8, 1887 (24 Stat., 388), which provides in section 4—

> That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

The act of 1887 was amended by that of February 28, 1891 (26 Stat., 794), but not in such manner as to materially affect the fourth section. The act of 1891 was amended by section 17 of the act of June 25, 1910, referred to in section 31 thereof and hereinbefore quoted, the change in section 4 involving the quantity of land that may be allotted thereunder to Indians on the public domain, having in view the character of the land allotted as irrigable or grazing.

It is thus seen that section 31 of the act of June 25, 1910, but extends "to any Indian occupying, living on, or having improvements on land included within" the National forests, the provisions and benefits of prior laws, especially section 4 of the General Allotment act of 1887. It was held in the case of Jim Crow (32 L. D., 657, 659):

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

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund has been provided for assisting Indian homesteaders and carried upon the books of the Treasury Department under the title "Homesteads for Indians," and by the act of March 3, 1891 (26 Stat., 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of alloting agents "to assist Indians desiring to take homesteads under section 4" of the act of February 8, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

* * * * * * *

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

It has been held that section 4 of the General Allotment act of February 8, 1887, is in its essential elements a settlement law and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement." Indian Lands—Allotments, 8 L. D., 647, 650. It was held in the case of Lacey *v.* Grondorf *et al.* (38 L. D., 553, 555), in reference to section 4 of the General Allotment act:

This act was designed to afford Indian settlers upon public lands the same privilege of entering such lands as white settlers. While allotments made under said section are necessarily on the theory that the allottees are Indians, yet they are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property in which each member of the tribe has an inherent individual interest. Indian settlers under the above section are on practically the same footing as white settlers on the public lands. * * * So that the practice, rules, and decisions governing white settlers on the public lands are, with certain reasonable modifications due to the habits, character and disposition of the race, equally applicable to Indian settlers.

In transmitting to Congress a draft of the bill which was subsequently incorporated as section 31 in the act of June 25, 1910, the Department, among other things, said:

> It is found that there are many Indians now living within the forest reserves who have had no reservation provided for their tribe, or who have been unable to procure allotments on the reservation set aside for the benefit of their tribe because there was not sufficient land there.
>
> The act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), provides for allotting Indians of this class on the *unappropriated* public domain, but no provision has been made for allotting Indians located within national forest reserves. By the act of June 11, 1906 (34 Stat., 233), white persons may settle on and acquire title to, under the homestead laws, lands within forest reserves valuable chiefly for agricultural purposes. The latter act, however, does not enable the rights of Indians living in forest reserves to be protected. * * *
>
> The Department is of the opinion that common justice demands that the rights of Indians living in national forests, on lands chiefly valuable for agricultural or grazing purposes, be protected by allotting and patenting to them, under the general allotment laws, such tracts as may be occupied by them.

From the foregoing the Department concludes that an Indian settler within national forests under the provisions of section 31 of the act of June 25, 1910, is entitled, equally and under the same conditions, with the homestead settler under the act of June 11, 1906; that Indian allotments within such reserves are of the class of claims that may be allowed under the act of June 22, 1910; and that if the Indian applicant herein is otherwise qualified under the provisions of section 31 of the act of June 25, 1910, he is entitled to an allotment thereunder of the land applied for by him, subject to the provisions of the act of June 22, 1910, as to surface patent.

The decision appealed from is accordingly affirmed as modified herein.

R. J. GILMORE AND H. J. HILL.

Decided February 7, 1918.

SURVEY OF PUBLIC LANDS—RESURVEYS AND RETRACEMENTS—SCOPE OF ACT OF JUNE 25, 1910.

The act of March 3, 1909 (35 Stat., 845), as amended by the act of June 25, 1910 (36 Stat., 884), does not authorize surveys to define the boundaries of claims other than according to the lines of the original surveys where in so doing conflicts between claimants would be involved.

SURVEY LINES ESTABLISHED ON RESURVEY—RIGHTS OF CLAIMANTS WHERE BOUNDARIES CONFLICT.

The fact that a senior entryman may have innocently located the lines of his claim at variance with the Government survey as determined on resurvey does not entitle him to a metes and bounds survey to the detriment of a junior entryman claiming according to the true lines.

VOGELSANG, *First Assistant Secretary:*

Richard J. Gilmore and Harvey J. Hill appealed from the decision of June 25, 1917, by the Commissioner of the General Land Office, rejecting their protest against the resurvey of townships 1 and 2 S., R. 46 W., Colorado, respectively. Gilmore has since filed a withdrawal of his appeal and therefore consideration of his case is not required.

Hill made homestead entry for the SE. ¼ Sec. 1, T. 2 S., R. 46 W., on December 9, 1907. He states that there were no evidences of the original survey touching his land and that he had the county surveyor run out the lines for him; that he located with reference to the survey made for him by the county surveyor, and enclosed the tract by fence; that at that time the land on the west of his claim was embraced in an entry made by a man by the name of Young, who afterward relinquished, and it was then entered by one Lawver; that when Lawver took said tract he did so with knowledge of the west line of Hill's claim; that the resurvey shows that there might be error, but that Hill had the prior claim, and under such circumstances is entitled to a metes and bounds survey to define the lines of the land he thought he was getting when he filed.

The conflict in question appears to be of the extent of about thirty acres. The resurvey or retracement of this township was made under authority of the act of March 3, 1909 (35 Stat., 845), as amended by the act of June 25, 1910 (36 Stat., 884), which provides:

> That the Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands, as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: *Provided further*, That not to exceed twenty per centum of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby.

The object of this legislation is to provide merely for the restoration of the old survey. It does not authorize new or irregular surveys to mark out and define the boundaries of claims other than according to the lines of the original surveys, where in so doing conflicts between claimants would be involved. The fact that a senior entryman may have innocently located the lines of his claim at variance with the Government survey, as determined on resurvey, does not entitle him to a metes and bounds survey of his claim to the detriment of a junior entryman claiming according to the true lines.

It is not alleged that the resurvey incorrectly relocated the lines of the original survey, and no error is seen in the acceptance of the resurvey.

The decision appealed from is accordingly affirmed.

ALFRED R. THOMAS.

Decided February 11, 1918.

LAND PROPRIETORSHIP—"PROPRIETOR," IN SEC. 2289, REV. STAT., CONSTRUED.

The word "proprietor," as employed in section 2289 of the Revised Statutes as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), means owner, and an essential to ownership is present possession or enjoyment, or the present right to acquire possession.

SAME—ESTATE IN EXPECTANCY—DISQUALIFICATION TO MAKE HOMESTEAD ENTRY.

One having only a vested estate in remainder in lands is not "proprietor" thereof within the meaning of section 5 of the act of March 3, 1891, and such interest in lands does not disqualify him from making homestead entry.

VOGELSANG, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office, September 1, 1917, in affirmance of the decision of the register and receiver, holding for cancellation Alfred R. Thomas's homestead entry 025251 for Lots 3, 4, and 5, and SE. ¼ NW. ¼, Sec. 6, T. 8 S., R. 1 E., B. H. M., 154.39 acres, in the Rapid City, South Dakota, land district.

The entry, made February 20, 1911, was contested by the United States on submission of final proof in 1915, upon the charge that at the time of the entry the entryman was disqualified as such in that he was then the proprietor of more than 160 acres of land. Upon a hearing, February 19, 1917, the evidence showed that the entryman's father, William Thomas, of Anamosa, Iowa, died July 24, 1910, owning about 440 acres of land in Iowa and other land in South Dakota and Kansas, and leaving a will which, with four appended codicils, was in due course admitted to probate. The will, executed April 7, 1910, after providing in Items I to IV for payment of the testator's debts and funeral expenses and making certain specific legacies, continued as follows:

> Item V. If my demise should occur prior to the time my son, Alfred Russell Thomas, should arrive at the age of 25 years, then all the rest and residue of my property shall be held in trust until my said son shall reach the age of 25 years. That during said time * * * my trustee hereinafter named shall pay to my said son so much of the proceeds of my property as shall in his judgment be necessary for the support of my son and further education should he desire to attend school or college.

Item VI. It is my will and I hereby will and devise to my son, Alfred Russell Thomas, when he shall have arrived at the age of twenty-five years all my property, both real and personal, to have and to hold the same absolutely, and my said trustee shall at the time he arrives at the age of 25 years turn all said property over to him.

Item VII. I hereby appoint my brother, George A. Thomas, trustee of my said property until my son shall arrive at the age of 25 years; he shall invest and reinvest the same, in good and sufficient security, and have full and complete control of the same. My said trustee shall not sell any land, but shall rent the same and collect the rents.

Item VIII. I hereby nominate my brother, George A. Thomas, executor of this my last will without bonds.

The first codicil, executed April 15, 1910, reads:

I hereby devise, will and bequeath in trust for the purpose of educating two native Chinese * * * the sum of seventy dollars a year until my son shall reach the age of 25 years, and at that time there shall be set aside an amount additional which will equal $700, which sum shall be held and paid by my trustee named herein.

The second codicil, executed June 3, 1910, reads:

I * * * do hereby revoke Items VI and VII of my will * * * desiring to increase the age limit of my son, Alfred Russell Thomas, and do make the following codicil thereto:

First: I hereby devise, will and bequeath to my son, Alfred Russell Thomas, in trust all the residue of my property both real, personal and mixed until he shall have arrived at the age of thirty years of age, at which time he shall become the absolute owner and entitled to the possession and control thereof. That during the time said property is held in trust my trustee shall pay to my son, Alfred Russell Thomas, from the income thereof such sums from time to time as his judgment dictates for his support and education.

The third codicil, also executed June 3, 1910, reads:

I hereby authorize my executor and direct him to sell the following described real estate [describing the testator's land in South Dakota], and from the proceeds thereof I direct him to pay to my brothers and sisters $6000, * * * and I hereby revoke codicil two to this extent, that the foregoing described real estate does not pass to my trustee in trust or to my son Alfred Russell Thomas.

The fourth codicil, executed June 23, 1910, reads:

I do hereby authorize my executor to sell the following described real estate [describing the testator's land in Kansas]. And my said executor shall execute the necessary conveyance therefor, but should my said executor not be able to dispose of said real estate to advantage during the settlement of my estate, then my trustee named herein shall have like authority to sell and convey the same. I do hereby revoke Items V, VI, VII, and Codicil No. 2 to the extent that the real estate herein may be sold and the proceeds thereof shall be disposed of as provided in my said will, Items V, VI, VII, and Codicil No. 2. I further revoke Item VII of my will to the extent that my said trustee therein named shall continue until my son, Alfred Russell Thomas, shall arrive at the age of 30 years.

The entryman testified at the hearing that he was born September 6, 1889, and was then twenty-seven years of age; that he had never

been proprietor or had ownership or control of any land other than that described in his homestead entry, and since his father's death he had rented none of the land devised by his father's will, or had any voice in the renting thereof, or received any distributive share of his father's estate, but that his uncle, the executor and trustee under the will, had sent him money from time to time as he saw fit, averaging about fifty dollars per month. It further appeared by the evidence that his father's South Dakota land had been sold and the proceeds divided among the testator's brothers and sisters as provided by the third codicil; that the executor had as yet been unable to sell the Kansas land; and that some of the testator's debts still remained unpaid, and apparently the executor was not yet discharged as such.

The local officers, and the Commissioner in affirming them, held that the entry should be canceled because at its date the entryman was the "proprietor" of more than 160 acres of land within the meaning of section 5 of the act of March 3, 1891 (26 Stat., 1095), amendatory of Sec. 2289 R. S. Thomas, the entryman, has appealed from the Commissioner's decision to the Department.

The sole question presented by the record is, Did the provision of his father's will for the entryman constitute him the "proprietor" of the testator's Iowa lands? The devise to him absolutely upon his attaining the age of thirty years created an estate in remainder, which was vested, not contingent, since it was in favor of a person *in esse* and dependent only upon his living to the designated age; and this remainder would be assets of his estate in case of his death before that time. (Jarman on Wills, 6th Am. ed., p. 762; Schouler on Wills and Administration, 1910 ed., sec. 560.) But, while the estate in remainder vested upon the testator's death, its enjoyment was necessarily postponed until the specified age was attained, for until then a particular estate intervened. In other words, a remainder, even though vested *ex vi termini*, is an estate in expectancy, not in possession, and carries with it, while the intervening estate in possession subsists, nothing of that dominion or enjoyment which is essential to the standing of a proprietor. The estate in remainder need not engage our attention further. The Department has in no case applied Sec. 2289 as amended to the ownership, whether legal or equitable, of estates in expectancy, even though vested.

The estate in possession, to terminate upon the son's attaining thirty years of age, was devised to the testator's brother, in trust. But the trust was not a "dry" or inactive one, nor did its entire benefits go to the son. The trustee was vested in possession, upon the completion of his executorship, with the entire residuary estate, real and personal, remaining after payment of debts and legacies, in trust, first to set aside a principal fund of $700 under the first codicil, next to convert the Kansas land into personality by a sale

(if not previously effected by him as executor), next to pay to the son from time to time such sums for his support and education as the trustee's judgment might dictate, and finally, upon the particular estate in trust terminating when the son should attain the age of thirty years, to vest in his possession the remainder estate in the entire residue, real and personal. Meanwhile the trustee was to have "full and complete control" of the property, and only at thirty years of age was the son to "become the absolute owner and entitled to the possession and control thereof."

In spite of the inartificial devise *to* the son *in trust* in the second codicil, his uncle, named in Item VII of the will itself, remained the trustee and the recipient of the particular estate in trust as above; this being made evident by the last sentences of the second and fourth codicils respectively, and being the construction of the will and codicils required by settled principles. (Schouler, *supra*, secs. 473, 478.)

The devise to the trustee can not be held a mere executory devise, vesting the property itself at once in the son but the use thereof in the trustee, for the property is charged with the trust first above mentioned, paramount to that in favor of the son. It is rather—subject to both of the trusts charged upon the property—an accumulative trust. The trustee, upon termination of his estate, will no doubt be accountable to the *cestui que trust* for the accumulated net rents. But so far as current payments to the son are concerned, those bear no relation to the current rents, but rest solely in the trustee's discretion; so that the *cestui que trust* has no control over the land or other property, no enjoyment of its *corpus* or of any definite part of its issues—and it is even conceivable that, though attaining the age when he is to acquire full ownership, he may never come into the possession and enjoyment of any part of the land, since it may all have to be sold by the executor or the trustee and its proceeds devoted to the payment of debts and legacies and the creation of the principal fund called for by the first codicil. It was incumbent to prove, in support of the charge, that the personal estate is ample for these purposes; but there was no proof on this point; nor did it appear that the administration of the estate was completed and the executor discharged.

The Department has repeatedly held that one is a "proprietor" within the meaning of Sec. 2289 as amended, if he has complete valid right to acquire legal title, or if, without that complete right, he has a valid and enforcible right to acquire legal title subject to defeat only by his own act or default (Leitch *v.* Moen, 18 L. D., 397; Gourley *v.* Countryman, 27 Id., 702; Smith *v.* Longpre, 32 Id., 226; Jacob J. Rehart, 35 Id., 615); but he is not a proprietor who holds the legal title merely as a dry trustee for another, with no beneficial interest

in himself (Bickford *v.* McCloskey, 31 L. D., 166; Reiber *v.* Stauffacher, 38 Id., 201); nor is one "seized in fee simple" of land, within section 20 of the enabling act for Oklahoma (26 Stat., 81), though he holds the full legal title, if he has no beneficial interest or right in the land greater than a mere security for payment of the purchase price (Patterson *v.* Millwee, 30 L. D., 370).

To be the proprietor of land within the meaning of Sec. 2289, *supra*, one must have the exclusive right to the appropriation of the same for his own beneficial use. While the title in fee to the land embraced in the public road was in the defendant, he had no right to the appropriation of the same to his own use, and could not in any way exercise control or supervision over the same. [Jones *v.* Briggs, 39 L. D., 189.]

The word proprietor, as employed in this statute, means neither more nor less than owner, one who has a fee simple title to the land or may acquire such title by carrying out his own obligations or enforcing a vested right. [Siestreem *v.* Korn, 43 L. D., 200.]

The passage last quoted formulates accurately the limits of proprietorship—which is ownership, whether legal or equitable, carrying with it the present possession or enjoyment, or the present right to acquire the same. But this entryman had neither, as regards the particular estate. Its legal title, its rightful possession and control, were vested in his uncle under a trust, charged upon the issues and profits, first for the creation of a capital fund for a charitable use, then for accumulation to the use of the remainderman (entryman) upon termination of the particular estate; while the entryman, during the existence of the particular estate, was entitled to no possession or control, and only to such payments as the discretion or caprice of the trustee might dole out to him, irrespective of the amount of the income. The case differs radically from one of equitable ownership where the legal title stands in another solely to support the equitable right.

The decision of the Commissioner is reversed, and the contest is dismissed.

MILITARY SERVICE OF DESERT-LAND ENTRYMEN DURING THE WAR WITH GERMANY—ACT OF AUGUST 7, 1917.

[Circular No. 590.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 18, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Subjoined is a copy of the act of August 7, 1917 (40 Stat., 250), entitled "An act for the protection of desert-land entrymen who

enter the military or naval service of the United States in time of war," the provisions of which operate to protect desert-land claims held by persons serving in the military or naval service of the United States during the present war with Germany from contest and cancellation for failure to make the required yearly expenditures or to effect reclamation within the regular statutory period.

PERSONS ENTITLED TO CREDIT FOR MILITARY SERVICE.

1. The present war with Germany began, as to the United States, April 6, 1917, and to entitle a claimant to the benefits of the act it must be established that he was, at the outbreak of the war, serving as an officer or enlisted man in the Army, Navy, or Marine Corps, or Organized Militia of the United States, or has since entered such service.

The benefits of the act are conferred only upon any officer or enlisted man who, *before entering the service*, had actually made a desert-land entry, or had acquired such an entry by assignment, or had filed an allowable application to make a desert-land entry, or has acquired a preference right to unsurveyed land under the act of March 28, 1908 (35 Stat., 52). Under the provisions of the act, the claimant's rights are protected as against contest and cancellation upon the ground of failure to make the required yearly expenditures or to effect reclamation during the period of his service and for six months after its termination, and in effect operates to extend the regular statutory time provided for submitting yearly and final proofs for a period equal to the claimant's service. There is, of course, no waiver of ultimate compliance with the law's requirements of expenditure and reclamation, but, on the contrary, such compliance must be effected and proofs thereof duly submitted within the extended period of time granted by this statute, as above stated.

The act does not protect an entry on account of defaults occurring before the claimant entered the service.

NOTICE OF MUSTER INTO THE SERVICE.

2. In order to avail himself of the benefits of this act, the claimant must have filed in the local land office of the district wherein the claim is situated, within six months after its passage, a notice of his muster into the service and of his desire to hold the claim under its provisions; or if his muster into the service does not antedate the passage of the act, then the notice must be filed within six months after such muster. For purposes of identification and verification, the notice should set forth the date of muster into the service and the military or naval organization to which the claimant is attached, together with his service in full.

You will make a record of all notices claiming the benefits of the act and transmit them with your monthly returns.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

[PUBLIC NO. 36—65TH CONGRESS.]

[H. R. 3331.]

AN ACT For the protection of desert-land entrymen who enter the military or naval service of the United States in time of war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no desert-land entry made or held under the provisions of the act of March third, eighteen hundred and seventy-seven, as amended by the act of March third, eighteen hundred and ninety-one, by an officer or enlisted man in the Army, Navy, Marine Corps, or Organized Militia of the United States shall be subject to contest or cancellation for failure to make or expend the sum of $1 per acre per year in improvements upon such claim, or to effect the reclamation thereof, during the period said entryman or his successor in interest is engaged in the military service of the United States during the present war with Germany, and until six months thereafter, and the time within which such entryman or claimant is required to make such expenditures and effect reclamation of the land shall be exclusive of the time of his actual service in the Army, Navy, Marine Corps, or Organized Militia of the United States; *Provided*, That said desert-land entry shall have been made by the said officer or enlisted man prior to his enlistment; *Provided further*, That each such entryman or claimant shall, within six months after the passage of this act, or within six months after he is mustered into the service, file in the local land office of the district wherein his claim is situate a notice of his muster into the service of the United States and of his desire to hold said desert claim under this act: *Provided further*, That the term "enlisted man," as used in this section shall include any person selected to serve in the military forces of the United States as provided by the act entitled "An Act authorizing the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen.

CITIZENSHIP—LIMITATION ON AGE OF DECLARATION OF INTENTION.

[Circular No. 589.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 20, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The naturalization act of June 29, 1906 (34 Stat., 596), provides that a petition for admission to citizenship must be filed within seven years after the execution by the petitioner of his declaration of intention to become a citizen.

2. The United States Supreme Court, on January 7, 1918, in the case of the United States *v.* Antonio Morena, decided that where a declaration of intention was filed before the passage of the said act, the time within which the declarant was entitled to petition for citizenship expired seven years after the date of the act. This seven year period has now elapsed.

3. Therefore, you will not in any case accept, as evidence of status with regard to citizenship, a copy of a declaration of intention executed more than seven years before the date of the filing, unless it be accompanied by evidence that there is pending at that time a petition for naturalization, pursuant to such declaration, filed within seven years after its date.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

MORRIS v. MOYER.

Decided March 1, 1918.

CONTEST—ACT OF JULY 28, 1917.

Under the terms of section 1 of the act of July 28, 1917 (40 Stat., 248), a contest against a homestead entry upon the ground of failure to timely establish residence must fail where the entryman has in time of war entered the military or naval service of the United States prior to the service of contest notice.

VOGELSANG, *First Assistant Secretary:*

Gilbert C. Moyer has appealed from a decision of the Commissioner of the General Land Office, dated December 7, 1917, denying his application for an extension of time within which to establish

residence, and holding for cancellation his homestead entry, made April 17, 1916, for the S. ½ NW. ¼ and SW. ¼, Sec. 28, T. 27 N., R. 4 E., M. M., Great Falls, Montana, land district.

A contest against the entry was initiated June 4, 1917, by Erle E. Morris, it being charged that—

> Entryman has wholly failed to establish residence on said land and has wholly abandoned the same for more than six months last past, and that said absence from the land was not due to the entryman's employment in the army, navy or marine corps of the United States in time of war.

Proof of service of the notice of contest consists of an affidavit by the attorney for contestant that—

> He served the above notice of contest by delivering to said contestee by registered letter, the receipt for which is hereto attached, a copy of said notice of contest and of the application to contest in said case.

The postmaster's receipt for the registered letter was attached, together with a memorandum by the delivering postmaster to the effect that the letter "was delivered June 15." Entryman's answer was filed July 18, 1917, in which he denied that he had abandoned the land, and alleged that his absence therefrom is due solely to his enlistment and service in the United States Marine Corps, he having been since March 5, 1917, a private duly enlisted and serving therein.

On the same day that the answer was filed contestant filed a motion for judgment, contending that the answer is a nullity, having been executed before the attorney for the contestee, that the answer was not filed within the time required by the rules of practice, and that the facts alleged in the answer do not constitute a sufficient defense.

The local officers held that the answer was insufficient and recommended the cancellation of the entry.

Thereafter the Commissioner of the General Land Office allowed the contestee to file an affidavit showing the facts that would have entitled him to an extension of time within which to establish residence on the land. A showing was filed, but in view of the conclusion hereinafter announced it is unnecessary to consider the same.

The proof of service of notice of the contest was not in accordance with Rule of Practice 7, and the date of receipt of the registered letter was not properly established. There is, therefore, before the Department no competent evidence that the answer was not filed in time.

The notary public before whom the answer was executed made affidavit that he had never been employed as attorney for contestee.

The contention of contestant that the enlistment of contestee in the Marine Corps on March 5, 1917, was no defense to the contest is negatived by the provisions of the act of July 28, 1917 (40 Stat., 248), "An Act for the relief of homestead entrymen or settlers who

enter the military or naval service of the United States in time of war," as follows:

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

It not being denied that contestee enlisted in the Marine Corps on March 5, 1917, and was serving under said enlistment when the present war began, as to the United States, on April 6, 1917, it must be held that he had thereby cured his default prior to the initiation of the contest. Under the plain terms of the act quoted above, contestee's service under his enlistment is equivalent to residence on and cultivation of the land.

Accordingly, the contestant having in effect admitted the enlistment and service of the contestee, the contest is dismissed, the decision appealed from being reversed.

MORRIS v. MOYER.

Motion for rehearing of the Department's decision of March 1, 1918, denied by First Assistant Secretary Vogelsang, April 22, 1918.

REENTRY OF LANDS WITHIN CEDED PORTION OF CROW INDIAN RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 2, 1918.

REGISTER AND RECEIVER,
BILLINGS, MONTANA:

Undisposed of nonmineral lands within the ceded portion of the Crow Indian Reservation, Montana, were opened to a modified form of homestead entry by proclamation of September 28, 1914 (38 Stat., 2029).

Paragraph 13 of the proclamation provides:

Lands reentered. If any entry heretofore made for nonmineral lands under the provisions of the act of April 27, 1904, supra, or if any entry or purchase made under the provisions of this Proclamation is canceled, the land may be reentered or purchased at the price at which it was formerly entered or purchased and not otherwise.

Undisposed of coal lands on the Reservation were opened to the same disposition as the nonmineral lands, by proclamation of April 6, 1917 (Statutes, 1st Session, 65th Congress, Proclamations, page 9), which provides:

The said coal lands, if otherwise available, shall be subject to disposal under the aforesaid proclamation of September 28, 1914, at $2.00 per acre, until and including June 30, 1917, subject to the provisions of the said act of February 27, 1917. No entry shall be allowed after that date under said proclamation for either the coal or the noncoal lands.

In the event that any existing agricultural entry on the reservation, made with a reservation of the coal deposits, is canceled on or before June 30, 1917, the land may, if otherwise available, until and including that date, but not thereafter, be entered or purchased hereunder at the price fixed by the first entry.

After providing for a withdrawal of the lands as stated, the proclamation provided for a sale of the undisposed of lands to the highest bidders, to be held at Billings, Montana, commencing September 4, 1917.

Telegram dated August 1, 1917, approved by the First Assistant Secretary, addressed to Frank L. Wood at the Billings, Montana, land office, reads as follows:

Proclamation April six, nineteen seventeen, is construed not to prevent allowance after June thirty, nineteen seventeen, of applications presented on or before that date, nor to prevent successful contestant making entry after June thirty and within preference right period.

The question has arisen whether lands on the Reservation, now embraced in an existing entry, may be reentered if such entry is canceled on relinquishment.

The special provisions of proclamation of September 28, 1914, for reentry of lands on the Reservation were not revoked by the provisions, above quoted, of proclamation of April 6, 1917. Lands embraced in an existing entry on June 30, 1917, may be reentered, if the existing entry is canceled on relinquishment. This construction is in harmony with the instructions above referred to, that an application presented on or before June 30, 1917, might be allowed after that date, and that a successful contestant might make entry after June 30, and within the preference right period.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

MAXWELL AND SANGRE DE CRISTO LAND GRANTS.

Decided March 4, 1918.

GOVERNMENT SURVEY—MEXICAN LAND GRANT.

The line established by an approved Government survey of a Mexican private land grant, made in pursuance of section 3 of the act of March 3, 1869 (15 Stat., 342), and long acquiesced in, will be deemed the boundary of the grant.

SAME—VARIANCE BETWEEN SURVEY LINE AND LOCUS OF LAND.

One of the boundaries of a Mexican private land grant was the line of a mountain range. The grant was later surveyed by the United States, and it was subsequently alleged that as to the summit line of said range a variance existed between the survey and the summit as it exists upon the ground. *Held,* That in such case the line established by the Government survey controls, and will not be disturbed.

VOGELSANG, *First Assistant Secretary:*

This case is before the Department on appeal from a ruling made by the Commissioner of the General Land Office, under date of April 3, 1917, as to the western boundary of the Beaubien and Miranda (or Maxwell) Land Grant.

To the north the grant adjoins that of the Sangre de Cristo, and both grants were confirmed by the act of June 21, 1860 (12 Stat., 71). To the south the grant adjoins the Carson National Forest, the eastern boundary of which coincides with the western boundary of the Maxwell Grant.

The petition of Beaubien and Miranda to the Mexican Governor, upon which this grant was founded, is set forth in the Maxwell Land-Grant Case (121 U. S., 325), at page 361:

> The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills, and from there running parallel with said river Colorado in a northerly direction to opposite the point of the Una de Gato, following the same river along the same hills to continue to the east of said Una de Gato River to the summit of the table land (mesa); from whence turning northwest, to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence *following the line of said mountain in a southwardly direction* until it intersects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning. [Emphasis the Department's.]

The rough Mexican map or diseno of the claim is shown at page 370.

In the report of the Surveyor General of September 17, 1857, made under the act of July 22, 1854 (10 Stat., 308), the boundaries of the grant are set forth as follows:

> On the 8th day of January, 1841, Charles Beaubien and Guadalupe Miranda, petitioned Manuel Armijo, the civil and military Governor of New Mexico, for a grant of land in the now county of Taos, commencing below the junction of

the Rayado and Red River, from thence in a direct line to the east to the first hills, from thence following the course of Red River in a northerly direction to the junction of Una de Gato with Red River, from whence following along said hills to the east of the Una de Gato River to the summit of the table land (mesa) *from whence turning northwest following said summit to the summit of the mountain, which separates the waters of the rivers which run towards the east from those which run to the west; from thence following the summit of said mountain in a southerly direction* to the first hill east of the Rayado River; from thence following along the brow of said hill to the place of beginning. [Emphasis the Department's.]

The field notes of the survey of this grant, approved by the Surveyor General December 16, 1878, and incorporated into the patent issued May 19, 1879, under the act of March 3, 1869 (15 Stat., 342), describe the westerly boundary in the following manner, commencing at its northwest corner (the northwest and southwest corners not being in dispute):

* * * Thence from said northwest corner on a line established along the summit of said mountain range by triangulating from peak to peak of said mountain range on the following courses and distances; from said northwest corner, south two degrees thirty minutes fifty-six seconds east to peak number one three hundred and seventeen chains fifty-four links; * * *

The description then follows by courses and distances from peak to peak, seventeen in all. The line so established appears upon the approved plat of survey, the grant being returned as containing 1,714,764.94 acres.

A petition was filed by the owners of these two grants with the Commissioner, asserting that the summit of the mountain, as established by private engineers, lies to the west of the line fixed in the field notes, plat, and patent, and requesting that this summit be accepted as the boundary line between the Sangre de Cristo and Maxwell Grants and the Carson National Forest. The Commissioner held that, since the two grants are contiguous, no public land is there involved and that therefore the boundary line between them was no longer a matter within the jurisdiction of the land department, suggesting that such line be established by agreement, which apparently has been done. As to the other part, the Commissioner held that he had jurisdiction to establish the eastern boundary of the Carson National Forest or the boundary between the public land and the land embraced in the Maxwell Grant, finding, however, that this boundary is the line as fixed in the field notes, plat, and patent, which controls, and not the summit of the mountain as it might be now more definitely located by a more accurate survey thereof.

The appeal on behalf of the owners of the Maxwell Grant contends that the position of the Commissioner, in accepting the summit of the mountain as it exists upon the ground as the boundary between the Maxwell and the Sangre de Cristo grants, and declining to

accept it as the boundary between the Maxwell Grant and the Carson National Forest, is inconsistent, and also that the Commissioner's decision is erroneous under the following well-known rule of law as set forth in 9 Corpus Juris, p. 213:

> A natural monument, fixed, certain, and enduring, will control a reference to maps, plats, or field notes in the same instrument, except where the intention of the parties was obviously otherwise, where the reference to such monument was made by mistake, or where a statute provides to the contrary.

The soundness of the above, as a general rule, need not be disputed, but the question is as to its applicability to the facts here presented.

> The rule that natural monuments will control courses and distances is by no means one of general application, and the rule is not without its exceptions. These are to be ascertained by reference to the reason or principle of the rule itself. Of necessity, the rule ceases when the reason ceases. * * * (9 Corpus Juris, 216).

So, where the lines of the original survey were not run, but simply laid by protraction, the above rule has little application, the court being guided by the calls and plot accompanying the original survey, the plot being evidence of the general shape of the tract intended to be patented. (Bryant *v.* Strunk, 151 S. W., 381.)

Both of these grants under the Mexican Government had as their common boundary this summit of the mountain. They were accordingly contiguous along that line. The difficulty would arise in defining the boundary by a surveyed line. Its location by survey is a matter concerning which surveyors might well differ, and this apparently occurred in this instance, the surveyors fixing different lines as fixing the summit of the mountain. However, it is clear that each grant was to be bounded by the other, and the land department may well recognize that there is no public land existing between the two, leaving the matter of exact location to be settled by agreement between the parties.

As to the remaining portion of the westerly boundary line the situation is different. The Government is under the necessity of defining the limits of the public domain from that of the privately owned land to the east.

The difficulty surrounding the survey of Mexican grants was set forth by the Supreme Court in Rodrigues *v.* United States, 1 Wall., 582, 587, 588:

> Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what to us appears magnificent quantities. Leagues instead of acres were their units of measurement, and when an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant and was public property. When the grant was made, no surveyor

sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region.

A sketch called a diseno, which was rather a map than a plat of the land, was prepared by the applicant. It gave, in a rude and imperfect manner, the shape and general outline of the land desired, with some of the more prominent natural objects noted on it, and a reference to the adjoining tracts owned by individuals, if there were any, or to such other objects as were supposed to constitute the boundaries. Their ideas of the relation of the points of the compass to the objects on the map were very inaccurate; and as these sketches were made by uneducated herdsmen of cattle, it is easy to imagine how imperfect they were. Yet they are now often the most satisfactory and sometimes the only evidence by which to locate these claims.

In the Beaubien and Miranda claim, the Mexican grants describe the westerly line as "following the line of said mountain in a southerly direction," or, as described in the petition to the Surveyor General, "following the summit of said mountain in a southerly direction." The rough map or diseno disclosed the westerly boundary as a straight line running in a southwesterly direction from corner to corner.

The question confronting the surveyor as to the westerly line, therefore, was, Where is the summit of the mountain? The purpose of the survey was to define the grant by definite lines in place of the prior indefinite description used by the Mexican Government. The field notes, beginning at the northwest corner, state:

Thence from said northwest corner on a line established along the summit of said mountain range by triangulating from peak to peak of said mountain range on the following courses and distances. * * *

In most of the lines of the grant the distances were chained and corners placed at each mile. Here, probably due to natural difficulties, the surveyor adopted the method of establishing the line by triangulation, using the mountain peaks as his natural monuments. He returned the line as so established as constituting the "summit of the mountain." In principle, the return was the same as if the western line had been chained and artificial monuments established, although a survey now made might delineate the "summit of the mountain" with greater accuracy. The exact location of the "summit of the mountain" might even now give rise to a difference of opinion.

The survey so made was given careful consideration by the land department, as pointed out by the Supreme Court in the Maxwell Land-Grant Case (121 U. S., 373):

As regards the survey on which the patent was issued, and which is made a part of the patent, under the seal of the United States and the signature of the President, it is to be observed that the evidence shows that the General Land Office made every effort to have it accurate. The survey was made by authority of the commissioner of that office, under the supervision of the Surveyor General of New Mexico. * * * This survey was made in the autumn

of 1877. The map or plat of it is a part of the record, together with the proofs taken by the surveyors to establish the calls of the grant. Contests were initiated before the Surveyor General upon the validity of this survey by parties who were interested against it, and the case was fully heard on testimony, which testimony was filed with the Commissioner of the General Land Office. He finally approved the survey, and the patent was issued in accordance with it on May 19, 1879.

It is attempted in argument here to point out many errors and mistakes as objections to the accuracy of this survey. There is no reason to doubt that the Surveyor General and the officers employed by him, and the Commissioner of the General Land Office, all of whom gave particular attention to this survey, were well informed on the subject. They knew that it was an immense tract of land, that it would be the subject of grave criticism, and they knew more about it and were better capable of forming a judgment of the correctness of that survey than this court can be. We may add, that, after all the research, industry, and ability of special counsel for the government, when the testimony taken in the case to prove these errors, and the record of the juridical possession, have been considered with the best judgment that we can bring to them, we are not satisfied that the survey is in any essential particular incorrect; but, on the whole, we believe that it substantially conforms to the grant originally made by Governor Armijo. * * *

The northern and eastern lines of the grant were in issue in that case. It may be remembered that one of the Mexican descriptions, beginning at the northeast corner, which was located to the east of the Una de Gato River, was on "the summit of the table land (mesa) from whence turning northwest following said summit." Here, the question confronting the surveyor was, What is the summit of the table land? It may be pointed out that the beginning of this line at the northeast corner and its ending at the northwest corner were both established by triangulation, or in the same manner as the western line. The Supreme Court, in this connection, stated (Maxwell Land-Grant Case, p. 376, 377):

* * * And although there is some contrariety of opinion about this "summit of the table-land" which is to constitute the northeastern corner of the grant, we are of opinion, upon a consideration of all the evidence before us, that the survey was located as nearly in accordance with the terms of the grant as it is possible now to ascertain them.

Without going into this evidence more minutely, we are content to say that, while in favor of the correctness of this survey, in the points assailed, it is as strong or stronger than that for any other survey which could be made, or which has been suggested by the counsel for the United States, we are very clear that it is not the province of this court to set aside and declare null and void the surveys and patents approved by the officers of the government whose duty it was to consider them, and who evidently did consider them with great attention, upon the mere possibility or a bare probability that some other survey would more accurately represent the terms of the grant.

It can not be doubted that the westerly line was intended to be fixed by the survey and that no further resort to the prior description as used in the Mexican grant was contemplated. The line so

established was taken as fixing the size and shape of the grant and the area contained within it. It was accepted by the land department and was recognized by it as the boundary line in the survey of T. 25 N., R. 15 E., N. M. P. M., the plat of which was approved January 10, 1891. The lands in that township, which the present contention would place within the limits of the Maxwell Grant, were certified to the now State of New Mexico in 1901, and are no longer within the jurisdiction of the land department.

The position of the appellant is fundamentally a criticism as to the accuracy of the original survey, which, however, has now stood for nearly forty years. Section 3 of the act of March 3, 1869, *supra*, provides:

> That all surveys authorized by this act shall conform to and be connected with the public surveys of the United States in said Territories, so far as the same can be done consistently with the landmarks and boundaries specified in the several grants upon which said claims are founded: *Provided, however*, That when said lands are so confirmed, surveyed, and patented, they shall in each case be held and taken to be in full satisfaction of all further claims or demands against the United States.

Further, where a line between the holdings of two towns has been established by United States survey, which differed from the original line fixed by a Spanish surveyor but which had been recognized and accepted, the Supreme Court held that the line so surveyed controls. Carondelet *v.* St. Louis (1 Black, 179). In United States *v.* Stone (2 Wall., 525), the boundary of the Fort Leavenworth Military Reservation was in question. The Supreme Court there said of a survey which had been accepted:

> In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case. * * *

Doubts respecting the correctness of a survey of public land, which was made in good faith and passed unchallenged for fifteen years, should be resolved in favor of the title as patented (United States *v.* Hancock, 133 U. S., 193).

This Department is constrained to hold that the line established by the survey, shown on the plat and incorporated into the patent, controls and is the eastern boundary of the Carson National Forest.

The decision of the Commissioner is accordingly affirmed.

MAXWELL AND SANGRE DE CRISTO LAND GRANTS.

Motion for rehearing of the Department's decision of March 4, 1918 (46 L. D., 301), denied by First Assistant Secretary Vogelsang, May 3, 1918.

REGULATIONS CONCERNING STATE IRRIGATION DISTRICTS IN THEIR RELATION TO THE PUBLIC LANDS OF THE UNITED STATES.

[Circular No. 592.[1]]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 6, 1918.

GENERAL STATEMENT.

1. The act of August 11, 1916, chapter 319 (39 Stat., 506), entitled "An act to promote the reclamation of arid lands," reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when in any State of the United States under the irrigation district laws of said State there has heretofore been organized and created or shall hereafter be organized and created any irrigation district for the purpose of irrigating the lands situated within said irrigation district, and in which irrigation district so created or to be created there shall be included any of the public lands of the United States, such public lands so situated in said irrigation district, when subject to entry, and entered lands within said irrigation district, for which no final certificates have been issued, which may be designated by the Secretary of the Interior in the approval by him of the map and plat of an irrigation district as provided in section three, are hereby made and declared to be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes, to the same extent and in the same manner in which the lands of a like character held under private ownership are or may be subject to said laws: *Provided,* That the United States and all persons legally holding unpatented lands under entry made under the public land laws of the United States are accorded all the rights, privileges, benefits, and exemptions given by said State laws to persons holding lands of a like character under private ownership, except as hereinafter otherwise provided: *Provided further,* That this act shall not apply to any irrigation district comprising a majority acreage of unentered land.

SEC. 2. That the cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, reservoirs, reservoir sites, water, water right, rights of way, or other property incurred in connection with any irrigation project under said irrigation district laws shall be equitably apportioned among lands held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district. Officially certified lists of the amounts of charges assessed against the smallest legal subdivision of said lands shall be furnished to the register and receiver of the land district within which the lands affected are located as soon as such charges are assessed; but nothing in this act shall be construed as creating any obligation against the United States to pay any of said charges, assessments, or debts incurred.

[1] See Secretary's letter on p. 317.

That all charges legally assessed shall be a lien upon unentered lands and upon lands covered by unpatented entries included in said irrigation district; and said lien upon said land covered by unpatented entries may be enforced upon said unpatented lands by the sale thereof in the same manner and under the same proceeding whereby said assessments are enforced against lands held under private ownership: *Provided*, That in the case of entered unpatented lands the title or interest which such irrigation district may convey by tax sale, tax deed, or as a result of any tax proceeding shall be subject to the following conditions and limitations: If such unpatented land be withdrawn under the act of Congress of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), known as the reclamation act, or subject to the provisions of said act, then the interest which the district may convey by such tax proceedings or tax deed shall be subject to a prior lien reserved to the United States for all the unpaid charges authorized by the said act of June seventeenth, nineteen hundred and two, but the holder of such tax deed or tax title resulting from such district tax shall be entitled to all the rights and privileges in the land included in such tax title or tax deed of an assignee under the provisions of the act of Congress of June twenty-third, nineteen hundred and ten (Thirty-sixth Statutes, page five hundred and ninety-two), 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 twenty-third, nineteen hundred and ten, and such person may at any time thereafter, receive patent upon submitting satisfactory proof of the reclamation and irrigation required by the said act of Congress of June seventeeth, nineteen hundred and two, and acts amendatory thereto, and making the payments required by said acts.

SEC. 3. That no unentered lands and no entered lands for which no final certificates have been issued shall be subject to the lien or liens herein contemplated until there shall have been submitted by said irrigation district to the Secretary of the Interior, and approved by him, a map or plat of said district and sufficient detailed engineering data to demonstrate to the satisfaction of the Secretary of the Interior the sufficiency of the water supply and the feasibility of the project, and which shall explain the plan or mode of irrigation in those irrigation districts where the irrigation works have not been constructed, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and which shall also show the source of water to be used for irrigation of land included in said district: *Provided*, That the Secretary of the Interior may, upon the expiration of ten years from the date of his approval of said map and plan of any irrigation district, release from the lien authorized by this Act any unentered land or lands upon which final certificate has not issued, for which irrigation works have not been constructed and water of such district made available for the land: *Provided further*, That in those irrigation districts, already organized and whose irrigation works have been constructed and are in operation as soon as a satisfactory map, plat, and plan shall have been approved by the Secretary of the Interior as in this act provided, such entered and unentered lands shall be subject to all district taxes and assessments theretofore actually levied against the lands in said district and in the same manner in which lands of a like character held under private ownership are subject to liens and assessments.

SEC. 4. That upon the approval of the district map or plat as hereinbefore provided by the Secretary of the Interior, the register and receiver will note

said approval upon their records where any unentered or entered and unpatented lands are affected.

SEC. 5. That no public lands which were unentered at the time any tax or assessment was levied against same by such irrigation district shall be sold for such taxes or assessments, but such tax or assessment shall be and continue a lien upon such lands, and not more than one hundred and sixty acres of such land shall be entered by any one person; and when such lands shall be applied for, after said approval by the Secretary of the Interior, under the homestead or desert-land laws of the United States, the application shall be suspended for a period of thirty days to enable the applicant to present a certificate from the proper district or county officer showing that no unpaid district charges are due and delinquent against said land.

SEC. 6. That any entered but unpatented lands not subject to the reclamation act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), sold in the manner and for the purposes mentioned in this act may be patented to the purchaser thereof or his assignee at any time after the expiration of the period of redemption allowed by law under which it may have been sold (no redemption having been made) upon the payment to the receiver of the local land office of the minimum price of $1.25 per acre, or such other price as may be fixed by law for such lands, together with the usual fees and commissions charged in entries of like lands under the homestead laws, and upon a satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land; but the purchaser or his assignee shall, at the time of application for patent, have the qualification of a homestead entryman or desert-land entryman, and not more than one hundred and sixty acres of said land shall be patented to any one purchaser under the provisions of this act.

These limitations shall not apply to sales to irrigation districts, but shall apply to purchasers from such irrigation districts of such land bid in by said district.

That unless the purchaser or his assignee of such lands shall, within ninety days after the time for redemption has expired, pay to the proper receiver all fees and commissions and the purchase price to which the United States shall be entitled as provided for in this act, any person having the qualification of a homestead entryman or a desert-land entryman may pay to the proper receiver, for not more than one hundred and sixty acres of said lands, for which payment has not been made, the unpaid purchase price, fees, and commissions to which the United States may be entitled; and upon satisfactory proof that he has paid to the purchaser at the tax sale, or his assignee, or to the proper officer of the district for such purchaser or for the district, as the case may be, the sum for which the land was sold at sale for irrigation district charges or bid in by the district at such sale, and in addition thereto the interest and penalties on the amount bid at the rate allowed by law, shall be subrogated to the rights of such purchaser to receive patent for said land.

In any case where any tract of entered land lying within such approved irrigation district shall become vacant by relinquishment or cancellation for any cause, any subsequent applicant therefor shall be required, in addition to the qualifications and requirements otherwise provided, to furnish satisfactory proof by certificate from the proper district or county officer that he has paid all charges then due to the district upon said land and also has paid to the proper district or county officer for the holder or holders of any tax certificates, delinquency certificates, or other proper evidence of purchase at tax sale the amount for which the said land was sold at tax sale, together with the interest and penalties thereon provided by law.

SEC. 7. That all notices required by the irrigation district laws mentioned in this act shall, as soon as such notices are issued, be delivered to the register and receiver of the proper land office in cases where unpatented lands are affected thereby, and to the entryman whose unpatented lands are included therein, and the United States and such entryman shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership, and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership.

SEC. 8. That all moneys derived by the United States from the sale of public lands herein referred to shall be paid into such funds and applied as provided by law for the disposal of the proceeds from the sale of public lands.

PURPOSE AND EFFECT OF STATUTE.

2. Briefly stated, the purpose and effect of this statute is to empower the Secretary of the Interior, following the presentation of a proper application therefor, to investigate the plans and financial and physical resources of irrigation districts heretofore or hereafter organized pursuant to the law of any State, and, if he shall find and conclude that any such district has planned and is executing an altogether meritorious and feasible irrigation undertaking, to grant his approval of its said plan and undertaking, provided a majority acreage thereof is not unentered land, to the end that upon such approval, and upon compliance by such districts with certain conditions in said act specifically set forth, all unentered public land and land which has been entered, but upon which final certificate has not issued, shall be amenable to the State laws governing the district to the same extent and upon like terms as are privately owned lands within said districts.

Tax liens upon unentered and unpatented lands are expressly provided for, and no entry of lands can be made until all charges and liens under the district laws are paid.

Provision is also made for tax sale of entered lands and tax liens against unentered lands.

REGULATIONS.

3. *Application.*—Any irrigation district desiring to obtain the benefits of this act should file in the local United States land office within which the lands are situated an application, in duplicate, consisting of the following:

(*a*) A statement setting forth concisely the legal address of the district; the date when, by court decree or otherwise, it was finally declared to be fully organized; the name and title of all officers of the district, qualified at the date of the filing of the application; the gross amount of land embraced in the district; the amount of irrigable land within the district; the amount of privately owned

land within the district; the amount of entered land for which final certificate has not issued; the amount of land embraced within a withdrawal for a United States reclamation project; the amount of land otherwise withdrawn (within Indian, forest, power site, or other withdrawal); how much (per cent) of the project has been completed; what bond issue, if any, has been finally consummated, and the present bonded debt; whether contract has been made with the United States, under the reclamation act of June 17, 1902 (32 Stat., 388), or is pending, and, if any such, the date thereof; and any other facts or circumstances which would throw light on, or be pertinent to, a full understanding of the present condition or future prospects of the district.

(*b*) Proof of organization.

(*c*) Evidence of water right and sufficiency of available water supply.

(*d*) Map showing the project.

(*e*) Plans and specifications.

(*f*) Such data as may be necessary to a full understanding of the situation.

DETAILS OF APPLICATION.

4. *Proof of organization* (see par. 3*b*).—A properly authenticated copy in duplicate of the proceedings through which the district claims corporate existence should be filed. The character of this proof will of course depend upon the State statute under which the organization was effected.

5. *Evidence of water right* (see par. 3*c*).—If the lands to be reclaimed are wholly withdrawn lands, within a United States reclamation project, and the right to the use of the water depends solely upon an appropriation by the Government, no evidence of water right will be required, but if dependence is placed upon any water appropriation other than one claimed by the Government, either for the reclamation of the whole, or a portion of the lands sought to be made subject to this act, certified copy of such water right should be filed with the application, with any amendments or modifications thereof. A statement as to whether the stream or other body of water, from which the water supply is to be secured, has been adjudicated, and if so, the court in which the decree was granted and the date thereof should be made. If water measurements have not been taken, a detailed report showing the foundation for the belief that sufficient water exists should be filed.

6. *Maps* (see par. 3*d*).—There should also be filed in duplicate with the application, a tracing, showing, by smallest legal subdivision, in accordance with the latest official survey, all of the lands embraced within the confines of the district; the status of the various

tracts should be differentiated, by markings on each legal subdivision, in black india ink, letters corresponding to the status of the land, as follows:

(*a*) Privately owned land.

(*b*) Lands which have been entered, but for which final certificate has not been issued.

(*c*) Lands withdrawn under the reclamation act.

(*e*) Unentered public lands.

NOTE.—If a tract of land appears to come within two of the designations, both letters should be used.

These tracings should be made on tracing linen with india ink. Three scales are permissible, 2,000 feet to the inch, $1,000 feet to the inch, or 500 feet to the inch. No other scale should be used, and the scale most adaptable to a clear showing of the matters and things set forth thereon should be used, but in no case should any one tracing be over 36 inches in width.

The tracings should also show the outlines, properly tied, of any reservoirs, canals, ditches, power plants, transmission lines, or other aids to reclamation which are included in the system, as well as cross sections, properly drawn to scale, of dams and canals.

If the irrigation system relied upon for the reclamation of the lands within the district is entirely a United States reclamation project, it will be unnecessary to delineate it upon the map. Reference to the project will be sufficient. If, however, public lands are to be reclaimed in whole or in part, by means other than under a United States reclamation project, such system or the portion thereof not connected with the United States reclamation project should be shown.

7. *Plans and specifications* (see par. 3*e*).—If the district irrigation works have been constructed, either fully or partially, plans and specifications of the principal structures, sufficient to show the designs and methods of construction, prepared by a competent engineer, should be filed, together with an authenticated statement of the amount actually expended upon the construction and the estimated amount necessary to complete the system.

If no construction has been undertaken, preliminary plans showing the estimated cost of the project and the salient features thereof in sufficient detail to establish the feasibility of the project will be sufficient.

8. *Other data* (see par. 3*f*).—As each project must necessarily stand or fall upon its own merits, it will be impossible to specify minutely all of the data that may be required. In every instance, however, they should be so full and complete as to place before the Secretary of the Interior all of the information necessary to an in-

telligent consideration of the project as a whole as to feasibility. Additional information may be required by the Department if the data stated upon the original application prove insufficient.

9. *Affidavits and certificates.*—Each of the maps filed with the application for recognition should bear the certificate of the president or other presiding or chief officer of the district, countersigned by the secretary, clerk, or other recording officer and attested by the seal of the district, in accordance with Form No. 1, attached hereto. They should also bear the affidavit of the district's chief engineer, in accordance with Form No. 2, attached hereto. This certificate and affidavit should be inscribed upon the maps in india ink.

10. *Rights of way.*—If any unpatented public land or any reservation of the United States is affected by any of the proposed works of the irrigation district, application for right of way therefor must be filed by the district under the appropriate act before the application for recognition will be finally approved.

11. *Unsurveyed lands.*—Where any proposed district includes within its confines unsurveyed lands, the lines of survey nearest such unsurveyed lands will be protracted.

PROCEDURE.

12. *Lands in more than one district.*—Where the lands within the confines of the proposed irrigation district lie within more than one local land district, it will only be necessary to file the data in duplicate hereinbefore adverted to in one of the land districts; a blueprint copy of the map and one copy of the statement, however, should be filed in the other districts, together with a notice to the register and receiver, that the application, in duplicate, has been filed in the other district (naming it).

13. *Duty of register and receiver.*—Upon the filing of such an application in the local office the register will note upon the maps filed with the application the name of the land office and the date of filing over his written signature. After testing by his records the accuracy of the notations on said map, as required by paragraph 6 of these regulations, he will note upon his records opposite all unpatented lands shown upon the map the fact and date of such filing, after which he will at once transmit the entire record to the General Land Office.

14. *Consideration of application.*—Upon receipt of the record in the General Land Office, it will be considered with reference to its regularity and compliance with the terms of these regulations and disposed of as follows:

(*a*) If all the unpatented lands are within a United States reclamation project, depending solely upon Government water appropriation and the record is regular, it will be referred to the Reclamation Service for consideration as to feasibility, which service will make its recommendation in the premises to the Secretary of the Interior through the General Land Office.

(*b*) If the lands within the district are partially within a United States reclamation project, and partially unpatented public lands, depending for water upon other than Government appropriations, the case will be referred to the Reclamation Service for such report as it may deem proper, after which the Commissioner of the General Land Office will consider the record with respect primarily to the lands not affected by the United States reclamation project, and transmit the record with proper recommendation to the Secretary of the Interior for such action as he may deem proper.

(*c*) If the unpatented lands within the district are all public and unaffected by United States Reclamation Service withdrawal, the Commissioner of the General Land Office will consider and transmit the record to the Secretary of the Interior with recommendation.

15. Upon the approval of an application by the Secretary of the Interior, the Commissioner of the General Land Office will cause to be noted upon the tract books of his office the fact and date of such approval, and will transmit to the local land office or offices wherein the lands affected are situated copies of such maps and approval. Upon receipt by the register of such copies, he will at once note on his records opposite each tract of unentered or entered and unpatented land affected the fact and date of such approval, and notify the irrigation district thereof.

16. After such approval the register will, upon receipt of an application to enter any of the lands within the project, suspend the same for 30 days, pending the filing by the applicant of a certificate by the proper district officer, certifying that all district charges against the land have been paid. Upon the filing of such a certificate and payment of all proper fees and charges within 30 days, the application will be allowed and the entry transmitted to this office in the same manner as other entries not affected by this act.

In the event such certificate is not filed within the 30 days allowed, the register will reject the application, subject to appeal.

17. *Taxes and assessments.*—

(*a*) Where an irrigation district has been fully organized and works constructed, the district must, within 90 days from the date of notice to it of the approval by the Secretary of the Interior of its application for recognition, file with the register of the local land office within which the lands of the district are situated an officially

certified list showing the amount assessed against each smallest legal subdivision of unentered or entered and unpatented public land within the district, which list shall contain a statement that such assessment was made in due form, in compliance with the provisions of the State law and of this act. In case the 90 days allowed are found to be insufficient for the proper legal assessment and preparation of the list, an application to the Secretary of the Interior transmitted through the local land office showing fully the reasons why such list could not be filed within the specified time will be considered, and such action taken thereon as may be deemed proper. Upon the filing of such list the register will transmit the same to the Commissioner of the General Land Office for filing with the record.

(*b*) Unentered land is not subject to tax sale, but the assessment of taxes and charges will constitute a lien, which must be removed before entry of the tract is allowed.

(*c*) Unentered land or entered but unpatented land withdrawn under the reclamation act is subject not only to the district taxes and charges, but also to any reclamation charges, and no entry should be allowed thereof under paragraph 14 hereof or otherwise without a certificate from the project engineer that all required reclamation charges have been fully paid, unless the United States, by contract, shall have made the reclamation charges payable by the district.

18. *Holders of tax or delinquent certificates.*—Entered but unpatented land may be sold for taxes, and may be bid in either by individuals or by the district. In either instance the purchaser is subrogated to the rights of the original entryman, and, after the expiration of the redemption period, he or his assignee will be allowed 90 days within which to pay all proper fees and charges against said tracts, and, if he is a duly qualified homestead or desert-land entryman, patent will issue to him therefor (*a*) upon proof of reclamation and cultivation as required by section 2 of the act of August 11, 1916, supra, if the lands are within a United States reclamation project, or (*b*) upon payment and satisfactory showing that irrigation works have been constructed and that water therefrom is available as required by section 6 of said act, if the lands are not within a United States reclamation project; no person, however, may receive patent for more than 160 acres of land.

In case the purchaser or his assignee shall not, within 90 days after the expiration of the redemption period, pay the charges against said lands and apply for patent, any person qualified under the homestead or desert-land law may be subrogated to the rights of the purchaser upon proof of payment of all legal obligations against said tracts.

In case entered land within a district becomes vacant by reason of relinquishment or cancellation, no entry will be allowed therefor until acceptable proof is submitted that all proper legal charges have been paid.

CLAY TALLMAN,
Commissioner.

Approved:
FRANKLIN K. LANE,
Secretary.

FORM 1.

I, _____, the duly elected, qualified, and acting
(Name.)
_____ of the _____ Irrigation
(Designation of office.)
District, duly organized under the laws of the State of _____, as found at page ____ of _____,[1] do hereby certify that the plan of irrigation and survey herewith is submitted under authority of the said district granted by resolution of the board of directors (or trustees) of said district, adopted on the _____ day of _____, 191__, copy of which resolution, duly verified by the secretary of said district, is submitted with, and by this reference made a part of, this certificate; and application is hereby made for the designation, under the act of August 11, 1916 (39 Stat., 506), of the tracts marked hereon "b" or "e"; that the said tracts are each and every one of such character as to be subject to the provisions of the homestead or desert land laws of the United States, and that the majority acreage in the said Irrigation District is not unentered land.

_____ (Name.)
_____ (Official title.)
_____ (Irrigation District.)

Attest:

_____
Secretary (or other title of recording officer).
[SEAL.]

FORM 2.

STATE OF _____,
County of _____, *ss:*
_____, being duly sworn, says that he is the chief engineer of the _____ Irrigation District; that the tracts shown hereon to be designated under the act of August 11, 1916 (39 Stat., 506), are each and every one of such character as to be subject to the provisions of the homestead or desert land laws of the United States; [2][that he has personally examined the same; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor, within such limits, any placer, nor cement, gravel, salt spring or deposit of salt, or other valuable mineral

[1] Give citation to act or acts under which the district is organized.
[2] If the chief engineer has not made a personal examination of the land sufficiently in detail to enable him to make that part of the affidavit bracketed, it should be omitted herefrom and a separate affidavit made on the map as to such facts by some person who has made such examination.

deposit. (If necessary, insert: "except mineral deposits within the purview of the acts of Mar. 3, 1909, 35 Stat., 844, and June 22, 1910, 36 Stat., 583, or of the act of July 17, 1914, 38 Stat., 509," as the facts may warrant.) That no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land (exception as above, if necessary)]; that the plan of irrigation herewith submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, as is shown in the accompanying report; that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes, and that the limits of said Irrigation District are correctly shown hereon.

_____.

Subscribed and sworn to before me this _____ day of _____, 1900.

_____
(Notary Public.)

[SEAL.]

My commission expires _____.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 6, 1918.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

DEAR MR. COMMISSIONER: By your letter of January 7, 1918, you transmitted a draft of regulations concerning State irrigation districts and their relation to the public lands of the United States under the act of August 11, 1916 (39 Stat., 506).

The regulations are hereby approved with the following further instructions:

As to public lands unaffected by withdrawal under the reclamation laws under paragraphs (*b*) and (*c*) of section 14, you will avail yourself of all data concerning the water supply, duty of water, etc., on file in the office of the Director of the Geological Survey. As to such lands, upon the coming in of the reports of the examining field officers you will transmit the record, with an expression of your views in the premises, to the Director of the Reclamation Service. The Director of the Reclamation Service will return the record to you with such comments as he may deem advisable. You will thereupon take such further action as may be necessary and upon the conclusion thereof transmit the entire record to the Department with your recommendation.

Cordially yours,

FRANKLIN K. LANE.

HEIRS OF ETTA J. KISNER.

Decided March 13, 1918.

INSTRUCTIONS.

UNSURVEYED DESERT LAND—POSSESSORY RIGHTS UNDER ACT OF MARCH 28, 1908—RIGHTS OF HEIRS.

The heirs of one qualified to make desert-land entry, who, in her lifetime, began the reclamation of a tract of unsurveyed desert land, under the provisions of the act of March 28, 1908 (35 Stat., 52), may, upon survey of the land, make entry of the tract as heirs of the deceased claimant.

Case distinguished from Burns *v.* Bergh's Heirs (37 L. D., 161).

REGISTER AND RECEIVER, LAS CRUCES, NEW MEXICO:

June 14, 1916, James E. Kisner, Waterloo, New Mexico, made for himself and for Opal Irene Kisner, heirs of Etta J. Kisner, deceased, D. L. E. 012223 for the E. ½ Sec. 31, T. 26 S., R. 8 W., containing 320 acres. The application to make the entry was filed in your office September 4, 1915, and, as set forth in a corroborated affidavit filed with it, was based on the right of Etta J. Kisner, acquired under section 1 of the act of March 28, 1908 (35 Stat., 52). It is further set forth in said affidavit that said Etta J. Kisner died January 30, 1915; that in February, 1911, said Etta J. Kisner began to make improvements on the land, then unsurveyed, and continued to improve it to the time of her death; that the improvements made consisted of fencing, at a cost of $215.45; clearing and grubbing 12 acres of the land, $36; digging and drilling a well, $500; and purchasing and installing a fifteen horsepower gasoline engine and a vertical centrifugal pump, $600.

The plat of survey was filed in your office, June 8, 1915.

The application was referred to the Chief of Field Division for investigation and report in accordance with directions contained in circular No. 383, of February 25, 1915 (43 L. D., 528), and a favorable report was submitted thereon, whereupon the entry was allowed June 14, 1916. The examining officer found on the land the improvements named in the affidavit filed with the application to enter.

The act of March 28, 1908, *supra*, provides, in section 1:

> That an individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

It accordingly awards a preference right of entry to one who takes possession of unsurveyed land and begins the work of reclaiming it according to the desert-land laws.

In the case of Tobias Beckner (6 L. D., 134), the Department considered the case of a settler upon unsurveyed land who had largely improved it. Prior to the survey the settler died, but he had bequeathed all his property by will to Beckner. The question arose as to whether the devisee could make homestead entry in pursuance of the settler's right of entry under the act of May 14, 1880 (21 Stat., 140), which provides, in section 3:

> That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preemption laws.

It was held that the right of entry inured to the devisee, the Department stating, at page 137:

> The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death.

Where a desert-land entry has been made, the heirs of the entryman succeed to his rights upon his death (see instructions of July 16, 1891, 13 L. D., 49).

Under the act of May 14, 1880, a preference right of entry is created by the settlement, cultivation and improvement of an unsurveyed tract of land. Under the act of March 28, 1908, a preference right of entry is secured by the taking possession of a tract of unsurveyed desert land and the reclamation thereof. There is accordingly no distinction in principle between the present case and that of Tobias Beckner, *supra*, and the preference right of entry of Etta J. Kisner inured to her heirs.

The present case is to be distinguished from that of Burns *v.* Bergh's Heirs (37 L. D., 161), in which it was held that no such rights are acquired by the mere filing of a timber and stone sworn statement as would, upon the death of the applicant prior to notice, proof and payment, descend to his heirs. Section 2 of the act of June 3, 1878 (20 Stat., 89), requires a written statement, in duplicate, from the person desiring to purchase, designating the particular land, its character and the fact that the purchase is to be made for the applicant's own use and benefit. Under section 3, upon the filing of the statement, the proper notice is given and the purchase there-

after made. Under the Timber and Stone law a person filing the sworn statement has not gone into possession of the land, made improvements thereon or otherwise connected himself therewith. At the most he has filed merely a declaration of his intention to purchase the tract, and such a declaration, if not consummated by later proceedings, is not descendible to his heirs. There is accordingly a broad distinction between that case and the one here presented.

The entry of said heirs is accordingly held to be legal, and it will stand intact subject to future compliance with the requirements of law.

Copies hereof for service on parties in interest by ordinary mail.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

NIKOLAUS ZAHM.

Decided March 15, 1918.

CITIZENSHIP OF THE UNITED STATES—PREREQUISITE TO HOMESTEAD TITLE.

By the express terms of the statute, homesteads are limited to citizens of the United States, so that the Department is without authority of law to approve final proof submitted by a homestead entryman where such citizenship has not been established.

CITIZENSHIP—STATEHOOD ENABLING ACTS.

Since the terms of the enabling acts under which different States entered the Union vary, the enabling act of the particular State concerned must be looked to in order to determine whether one has become a citizen of the United States by virtue of having voted or resided in that or another State.

CITIZENSHIP AND VOTING—RESIDENCE.

Neither voting in one of the States nor residence in New Mexico at the time of the admission of the latter into the Union operates of itself to confer United States citizenship.

CASES CITED AND DISTINGUISHED—FORMER DECISION MODIFIED.

Cases of William J. Parker (36 L. D., 352) and Thomas *v.* Holley (38 L. D., 257), distinguished from instant case; case of Arnold *v.* Burger (45 L. D., 453), modified.

VOGELSANG, *First Assistant Secretary:*

Nikolaus Zahm has appealed from the decision of the Commissioner of the General Land Office rendered July 12, 1917, in the above entitled case, reinstating and indefinitely suspending the final three

year proof submitted November 11, 1916, upon homestead entry 010455, made February 11, 1910, under the act of February 19, 1909 (35 Stat., 639), for the SE. ¼ and SW. ¼ Sec. 2, T. 20 N., R. 33 E., N. M. P. M., Clayton, New Mexico, land district.

The facts, briefly stated, are that claimant was born in Germany in the year 1870, and came to this country in May, 1903, after attaining his majority. He first declared his intention to become a citizen October 30, 1908, in the State of Ohio. He failed to apply for his final papers within the time allowed by section 4 of the act of June 29, 1906 (34 Stat., 596), principally through ignorance of the law, as a result of which his initial citizenship declaration became null and void by operation of law.

The local officers rejected Zahm's final proof on the ground that he was not a citizen of the United States as required by the act of June 6, 1912 (37 Stat., 123). Thereafter, Zahm again declared his intention to become a citizen December 6, 1915, in the State of New Mexico, where he made entry and was then residing. Under prevailing laws, full citizenship can not now be bestowed upon him, in view of the existing war between this and his native country.

The Commissioner, in passing upon Zahm's rights in the premises, raised no objection as to the sufficiency of the proof in so far as residence, cultivation and improvements were concerned, and, in view of the fact that claimant had made a second declaration of intention to become a citizen, reinstated the rejected proof and ordered its suspension until the expiration of a reasonable time after cessation of the present war between the United States and Germany.

It is urged upon this proceeding that claimant, notwithstanding his final citizenship papers have not as yet issued, is a naturalized citizen of the United States; first, by virtue of the fact that he voted in the State of Ohio while residing there; and secondly, on the ground that he, on the date the Territory of New Mexico was admitted as a State and for some time prior thereto, was residing in said Territory, as a result of which, in accordance with the provisions of the act of June 20, 1910 (36 Stat., 557), enabling the Territory of New Mexico to be admitted into the Union on an equal footing with the original States, he became a qualified voter of the State of New Mexico, and, as such, a citizen of the United States.

In support of this contention, counsel for appellant relies upon the construction placed upon the enabling and subsequent acts of Congress admitting the States of Nebraska and North and South Dakota into the Union, as laid down by the Supreme Court in the case of Boyd *v.* Thayer (143 U. S., 135, 179), and by the Department in the cases of William J. Parker (36 L. D., 352), and Thomas *v.* Holley (38 L. D., 257).

The Department finds that the ruling of the Supreme Court and the Department in the cases cited is not applicable to the case at bar. In the case under consideration, appellant had attained his majority before entering the United States, and he alone could take the initiative in obtaining final naturalization. There is no ground upon which can be based a presumption that during his minority his father became a naturalized citizen of the United States. In the Boyd *v.* Thayer case, the Supreme Court, finding that Boyd's father, during the former's minority, had taken out his first papers, and the son, whose citizenship was questioned, had for years voted and held office in the State of Nebraska and labored under the impression that he was clothed with full citizenship through his father, held that the presumption was that Boyd's father, during the minority of the appellant in that case, did in fact become a fully naturalized citizen of the United States. The court further held:

> We are of opinion that James E. Boyd is entitled to claim that if his father did not complete his naturalization before his son had attained majority, the son can not be held to have lost the inchoate status he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power, but, on the contrary, that the oaths he took and his action as a citizen entitled him to insist upon the benefit of his father's act, and placed him in the same category as his father would have occupied if he had emigrated to the Territory of Nebraska.

In the cases of William J. Parker and Thomas *v.* Holley cited, the Department, along the same line of reasoning followed by the Supreme Court in the Boyd *v.* Thayer case, found in favor of Parker and Holley on the ground that during their minority their parents were naturalized by the enabling act for the admission into the Union of the Dakotas.

Section 1, article 7, of the constitution of New Mexico provides: "*Every male citizen of the United States*, who is over the age of twenty-one years, and has resided in New Mexico twelve months, * * * shall be qualified to vote at all elections for public officers * * *."

Section 1 of the enabling act of June 20, 1910, *supra*, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the *qualified electors* of the Territory of New Mexico are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico.

In order to ascertain who was a "qualified elector" within the meaning of the enabling act cited, it becomes necessary to refer back to the organic act of September 9, 1850 (9 Stat., 446–449), establishing a territorial government for New Mexico, section 6 of which provides "that the right of suffrage and of holding office, shall be exercised only by *citizens of the United States*, including those recog-

nized as citizens by the treaty with the Republic of Mexico, concluded February second, eighteen hundred and forty-eight."

From the foregoing it is manifest that one must have been a "citizen of the United States" in order to be qualified to exercise the right of suffrage in the Territory of New Mexico, and this necessary qualification was also a prerequisite under the enabling act of June 20, 1910 (36 Stat., 557), to the right to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico. Zahm's claim that he is a citizen of the United States merely because he voted in Ohio and thereafter resided in the Territory of New Mexico before and on the date said Territory came into the Union as a State, is based upon an erroneous construction of the law.

In the case of Arnold *v.* Burger (45 L. D., 453) the Department held:

> In view of the conflicting decisions of the Federal courts, the Department declines in this case to pass upon the question whether a declaration of intention to become a citizen, filed prior to the naturalization act of June 29, 1906, must, in view of the provisions of that act, be consummated within seven years from the date that act became effective, or whether, if not so consummated, it continues in force and effect after the expiration of that period.

The Supreme Court, in the case of Andrew Morena, by opinion rendered January 7, 1918, construing the act of June 29, 1906, *supra*, held that an alien who has made a declaration of intention before the act of 1906 is required to file his petition for citizenship at a time not more than seven years after the date of the act. The Department's holding in the Arnold *v.* Burger case cited is hereby modified in conformity with the views expressed by the Supreme Court in the Morena case.

The fact remains that appellant is not a citizen of the United States within the meaning of the homestead laws, and the Department is therefore without authority of law to act favorably upon the final proof submitted by him, at least for the time being. The action taken below in suspending the proof is concurred in and the decision appealed from is accordingly affirmed.

POTASH REGULATIONS, ACT OF OCTOBER 2, 1917.

[Circular No. 594.]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 21, 1918.

Under authority conferred by the act of October 2, 1917 (40 Stat., 297), entitled: "An act to authorize exploration for and disposition

of potassium," the rules and regulations herewith are prescribed to carry out the purpose of said act:

Lease regulations.
Form of application for lease.
Form of lease.
Use permit for camp site and refining works.
Form of use permit.
Patents for lands containing potash.

These regulations, together with those approved December 1, 1917, governing the issuance of "permits authorizing exploration of public lands for potassium" comprise full working instructions under said act, and you will be governed thereby in the administration thereof.

In the event of applications under this act for lands embraced within reservations, under the jurisdiction of this or any other Department, they will be referred to the appropriate bureau or Department for a report and recommendation; and if it be found necessary for the protection of rights and interests created by, or incident to said reservations, such restrictions and conditions will be made in permits and leases as may be required to effectuate such purpose.

FRANKLIN K. LANE,
Secretary.

I.

PERMITS AUTHORIZING EXPLORATION OF PUBLIC LANDS FOR POTASSIUM.

(*Regulations approved Dec. 1, 1917, by First Assistant Secretary.*)

The act of Congress approved October 2, 1917, entitled "An act to authorize exploration for and disposition of potassium" (40 Stat., 297), authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to issue prospecting permits for a period not to exceed two years, for the exploration of the land described therein for potash in any of the forms named in said act, and under authority thereof the following rules and regulations will govern the issuance of such permits:

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

2. The permit thus issued may include not more than 2,560 acres of public lands of the United States in reasonably compact form, or a similar area of lands that may have been disposed of under laws reserving to the United States the potassium deposits therein. In the latter case full compliance shall be made with the laws making such reservation.

3. The permit will confer upon the recipient the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, nitrates, and salts of potassium on the lands embraced therein. In

the exercise of this right the permittee shall be authorized to remove from the premises only such material as may be necessary to experimental work, and the demonstration of the existence of such deposits or any of them in commercial quantities.

4. If the permittee, within the two years specified, shall discover valuable deposits of one or more of the forms of potassium, as described in said act, within the area covered by his permit, such discovery shall entitle him to a patent of not to exceed one-fourth of the land embraced in the permit, to be taken in compact form. The discovery of a valuable deposit of potash under this permit shall be construed as the discovery of a deposit which yields commercial potash in commercial quantities.

The remainder of the land embraced in such permit, if containing deposits of potash, will thereafter become subject to lease, under such regulations as may be found requisite in dealing with the land containing said deposit.

5. In addition to land embraced in the permit the Secretary may, in his discretion, issue to the permittee, during the life of the permit, the exclusive right to use a tract of unoccupied, nonmineral, public land not exceeding 40 acres in area, for purposes connected with and necessary to the development of the deposits covered by the permit.

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

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

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

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

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

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

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

7. On the receipt of the application, if found in compliance with the terms of the act, a permit will issue and the district land officers be promptly notified thereof; thereafter no filings will be accepted for the lands embraced therein during the lifetime of said permit.

A copy of the act you will find herewith, together with a form of permit, which may be modified to meet the conditions of any particular case.

II.

FORM OF PERMIT AUTHORIZING EXPLORATION OF PUBLIC LANDS FOR POTASSIUM.

The form of permit issued under this act will be, in substance, as follows:

THE UNITED STATES OF AMERICA.

KNOW ALL MEN BY THESE PRESENTS, That I, Franklin K. Lane, Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to authorize exploration for and disposition of potassium," approved October 2, 1917, have granted and do hereby grant a permit to _____ of the exclusive right for a period of two years from date hereof to prospect the following described lands (_____) for chlorides, sulphates, carbonates, borates, silicates, nitrates or salts of potassium, but for no other purpose, upon the express conditions as follows, to wit:

1. To begin the prospecting for said minerals within ninety days from date hereof and to diligently prosecute the exploration and experimental work during the period of such permit, in the manner and extent as follows, to wit: _____

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

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

4. To not assign or transfer the permit granted hereby without the express consent in writing of the Secretary of the Interior;

5. To observe such conditions as to use and occupancy of the surface as may be provided by law in case any lands embraced herein have been granted with a reservation to the United States of the potassium deposits therein;

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

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

IN WITNESS WHEREOF, I have affixed my signature hereto and the seal of the Department this _____ day of _____.

[SEAL.] _____,

Secretary of the Interior.

III.

REGULATIONS PERTAINING TO LEASES FOR LANDS CONTAINING POTASH.

The act of October 2, 1917 (40 Stat., 297), authorizes the Secretary of the Interior, under such general regulations as he may adopt, to lease, for the production of the potash and other mineral deposits contained therein, public lands—

(A) Known to contain potash in commercial quantity and character and found in some or any of the forms described in said act.

(B) Embraced in any permit, under which the existence of such deposits has been demonstrated, but not included in the patent awarded to the permittee.

(C) In and adjacent to Searles Lake, California.

And by virtue of such authority, the following regulations are hereby prescribed:

1. From and after the 20th day of December, 1917, applications for leases in the form as herein provided may be filed in the proper district land office, addressed to the Commissioner of the General Land Office, for any lands in class (A) (which includes lands in Sweetwater County, Wyoming, wherein the coal deposits are reserved to the United States), by citizens of the United States, an association of such citizens or corporations organized under the laws of any State or Territory thereof, the qualifications of the applicant in this respect to be fully covered by the application.

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

3. Applications when filed with the district land office will be promptly noted of record and transmitted to the Commissioner of the General Land Office, accompanied by a statement as to the status

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

4. When an application for a lease is filed in the district land office, notice thereof shall be published at the expense of the applicant in a general newspaper, to be designated by the register, published at the capital of the State, describing the lands embraced therein, stating the purpose of the application, and that it will be submitted to the Commissioner of the General Land Office for action within thirty days from the date fixed therein, advising all adverse claimants or protestants that if they desire to object or to protect any interest as against the application, prompt action to that end should be taken; and further advising the public that any other applications for lease of the same lands may be filed at any time during said period of publication without publication of notice of said second or further application, in which case applications so filed will be considered as prescribed in section 5 hereof. Proof of publication will be required prior to action by the Commissioner on the application for lease.

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

6. The lands in class (B), if containing potash in some or any of the forms specified in said act, will be offered for leasing by publication for a period of thirty days in a newspaper designated by the register of the proper land district, published at the capital of the State, inviting applications therefor, on or before a date specified. Applications for such excess permit lands will be considered without further notice and leases awarded thereunder in general accordance with the provisions of paragraph 5 herein. Lands once included in a published notice of leasing offer, remaining unleased, may thereafter be applied for without publication of notice.

7. The verity of all representations contained in applications for leases shall be deemed an essential thereto, and a moving consideration to the award of a lease if such action is taken; misrepresenta-

tions in this respect will be treated as a proper ground for proceedings in forfeiture, as provided in section 8 of the act.

8. The acceptance of a lease under the provisions of this act will be construed as a waiver and relinquishment of all claims on the part of the applicant for any lands embraced within said lease and claimed under the provisions of any other law.

(9) If the application for lease covers deposits of potassium, referred to in section 9 of the act, reserved to the United States, the applicant will be required among other things as a condition precedent to the granting of a lease, to furnish a bond to indemnify and protect the agricultural claimant.

(10) Lands in class (C) will not be open to lease until such time as final action has been taken upon the claims now pending before the Department.

(11) A form of application, proposed form of lease, and copy of the act of October 2, 1917, will be found herewith.

IV.

Form of Application for Lease.

Blank forms for applications for lease will not be furnished, but such applications should follow substantially the form given below:

The undersigned _____, resident of _____

a _____

(Native born or naturalized; if the latter, furnish certificate; if a corporation, certified articles thereof.)

_____

hereby appl____ under the provisions of the act approved October 2, 1917 (40 Stat., 297), for a lease of certain potassium-bearing lands described as follows: _____

_____

_____ Section, _____ Township, _____ Range, _____ Meridian, in _____ Land District, _____ County, _____ aggregating _____ acres.

The deposit of potassium which it is proposed to develop is found in the following form: _____

_____

and the methods to be adopted in its development, production, and preparation for market are as follows: _____

_____

If a lease be granted, the applicant proposes to invest not less than _____ dollars during the first four years of such lease, not less than one-fourth each year, in said above described operations, and to begin active development work to that end not later than _____ after the granting of such lease.

The applicant neither holds nor owns any interest or interests, as a member of an association or associations, or as a stockholder in a corporation or corporations, or otherwise, in any lease under said act, or in any application for lease thereunder, which together with the area described in this application exceeds in the aggregate in any area fifty miles square, an amount equivalent

to 2,560 acres of land; nor holds more than one-tenth interest, direct or indirect, in any agency, corporate or otherwise, engaged in the sale or resale of the products to be obtained from the lands herein applied for if a lease be awarded hereunder.

As to the character, business, and financial standing of the applicant__, _____, reference is hereby made to _____.

If awarded a lease hereunder, a satisfactory bond as required by the regulations, will be furnished within the time specified.

Post-office address of applicant is _____.

_____.

Subscribed and sworn to by _____ before me a _____, this _____ day of _____, 19__.

_____.

V.

FORM OF LEASE OF POTASH LANDS UNDER ACT OF OCT. 2, 1917.

THIS INDENTURE OF LEASE, entered into, in triplicate, this _____ _____ day of _____, A. D. 19__, by and between the United States of America, acting in this behalf by _____ _____ Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved October 2, 1917 (40 Stat., 297) entitled "An act to authorize exploration for and disposition of potassium," hereinafter referred to as the act, which is made a part hereof, witnesseth:

Parties.

Act.

Consideration.

SECTION 1. That the lessor, in consideration of the rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine, remove, and dispose of all the potassium and other minerals in, upon, or under the following described tracts of lands situated in the county of _____, State of _____, and more particularly described as follows, to wit:

Land.

_____, containing _____ acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, or reservoirs necessary to the full enjoyment hereof, together also with the right to use any timber, stone, or other materials on said land in connection with the operations to be conducted hereunder, for an indeterminate period, upon condition that at the end of each twenty-year period succeeding the date hereof such readjustment of terms and conditions may be made as the party of the first part may determine: *Provided*, That this lease shall extend only to or include any right or interest in the lands, or the minerals therein, reserved to the United States under any entry that may be allowed, or patent that may issue, or may have issued, with a reservation of certain specified minerals to the United States. (For leases in Sweetwater County, Wyoming, insert reservation of coal.)

Use.

Term.

Reservation.

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

(*a*) To invest _____ dollars within four years from the date hereof, not less than one-fourth thereof to be expended during each of said four years, in the substantial development and production of the deposits of potassium and other minerals in the land above described, or in the reduction, manufacture, and preparation of such mineral products for market, and to furnish a bond with a specified corporate surety in the sum of one-tenth of the proposed investment, but in no case less than five thousand dollars, conditioned upon the performance of such agreement; such development, reduction works or other improvements for which said investment and expenditures are to be made shall, subject to agreed modifications to meet future conditions, in general, consist of the following: Investment. Bond.

(*b*) To pay a royalty of the percentage hereinafter stipulated of the gross value of any and all salable mineral products from the lands covered hereby at point of shipment, or on demand of the lessor, its equivalent in the products of this lease f. o. b. at the point of shipment. (Special provisions defining and construing "point of shipment" and "gross value," depending on the conditions in each case, will be here inserted.) Such royalty shall be equal to two per cent of such gross value during the first ten years of the lease, and three per cent thereafter up to the first adjustment period at the end of the first twenty years of the lease, payable monthly, the royalties for each month to be paid during the next succeeding month, to the receiver of the United States land district in which the land is situated, or if not in a land district, to the Commissioner of the General Land Office: *Provided*, That royalties over two per cent may be reduced by the lessor on proper showing made. Royalty. Point of shipment.

(*c*) To pay the receiver of the district land office on all leases annually, in advance, beginning with the date of the execution of the lease, the following rentals: Twenty-five cents per acre for the first year; thereafter fifty cents per acre for the second, third, fourth, and fifth years, respectively; and one dollar per acre for each and every year thereafter during the continuance of the lease, such rental for any year to be credited against the royalties as they accrue for that year. Rental.

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

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

Annual report. (*f*) To furnish annually a plat in the manner and form prescribed by the Secretary of the Interior showing all prospect and development work on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, or on lands covered by permit issued under section 3 of the act, as well as any buildings, reduction works or equipment, situated elsewhere and owned or operated in conjunction with, or as a part of, the operations conducted hereunder, accompanied by a report, in detail, as to the stockholders, business transacted, assets and liabilities of the lessee, together with a statement of the amount of potassium, and other minerals produced and secured by operations hereunder, and the cost of production thereof.

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

Diligence. (*h*) To develop and produce in commercial quantities, with reasonable diligence, the potassium and other mineral deposits susceptible of such production in the lands covered hereby; to carry on all mining, reducing, refining, and other operations, in a good and workmanlike manner in accordance with approved methods and practice, having due regard to the health and safety of miners and other employees, the prevention of waste and the preservation and conservation of the property for future productive operations, observing all State laws relative to the health and safety of such workmen and employees, all mining and related productive operations to be subject to the inspection of the lessor.

Result of forfeiture. (*i*) To deliver up to the lessor on the termination of this lease, as a result of forfeiture thereof pursuant to section 8 of the act, the lands covered thereby, together with any land permission for the use of which has been granted under and pursuant to the provisions of section 3 of said act, including all fixtures, improvements, and appurtenances, other than machinery, tools, and personal property located and used above ground, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises. *Provided*, That on such forfeiture the lessor, his agent, licensee, or lessee shall have the exclusive right, at the lessor's option and at any time within six months from such forfeiture, to purchase such machinery, tools, and personal property located and used above ground, the purchase price thereof to be determined in the manner prescribed in section 5 of this lease.

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

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

Unlawful interest. (*m*) To observe faithfully the provisions of section 5 of the act whereunder this lease is executed, as to the interest or interests that may be taken or acquired under leases authorized by said act.

SEC. 3. The lessor expressly reserves:

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

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

(*c*) The right on the part of the President of the United States to regulate the price of all mineral extracted and sold from the leased premises, so that the price or prices fixed shall be such as to yield a fair and reasonable return to the lessee upon his investment, and secure to the consumer any of such products at the lowest price reasonable and consistent with the provisions hereof; also the right to so regulate the disposal of the potassium products produced hereunder as to secure their distribution and use wholly within the limits of the United States or its possessions. Fixed prices. Restrict to United States.

SEC. 4. The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease at any time after the first four years of the term herein provided for, by giving six months' notice in writing to the lessor, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that all other creditors or others having an interest are fairly and equitably protected and that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered hereby: *Provided*, That in such case the right of valuation and purchase, accorded the lessor in the section next following (5) shall be exercised within said period of six months. Surrender of lease. Conditions.

SEC. 5. That on the termination of this lease, pursuant to the last preceding section, the lessor, his agent, licensee or lessee, shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, all buildings, machinery, equipment and tools, whether fixtures or personalty, placed by the lessee in or on the land leased hereunder, or on lands covered by permit under section 3 of the act, save and except underground improvements, machinery, equipment, or structures, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment and tools to be purchased as aforesaid, shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party thereto and the third by the two so designated), the valuation of the three or a majority of them to Right to purchase improvements. Price.

be conclusive; that pending such election to purchase within said period of six months, none of said buildings, or other property shall be removed from their normal position; that if such valuation be not requested, or the lessor shall affirmatively elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings and other property except said underground equipment and structures, as aforesaid.

Forfeiture.

SEC. 6. If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at date hereof, and such default shall continue for ninety days after service of written notice thereof by the lessor, then the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 8 of the act. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Successors in interest.

SEC. 7. The lessee further agrees and covenants that the obligations entered into hereby shall extend to and be binding upon its heirs and successors in interest hereunder.

Unlawful interest.

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

IN WITNESS WHEREOF, etc.

THE UNITED STATES OF AMERICA,

By _____ [L. S.]

Secretary of the Interior.

Witnesses:

_____ _____ _____ _____ [L. S.]

_____ _____ _____ _____ [L. S.]

_____ _____ _____ _____ [L. S.]

_____ _____ _____ _____ [L. S.]

VI.

USE PERMITS FOR CAMP SITE AND REFINING WORKS.

Section 3 of the act of October 2, 1917, "To authorize exploration for and disposition of potassium," provides:

That in addition to areas of such mineral land to be included in prospecting permits or leases the Secretary of the Interior, in his discretion, may issue to a permittee or lessee under this act the exclusive right to use, during the life of

the permit or lease, a tract of unoccupied nonmineral public land not exceeding forty acres in area for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

In accordance with the provisions of this section the following regulations are prescribed by which a permittee or lessee under the act may acquire the right therein granted:

1. Application may be made by the permittee or lessee identifying by serial number his permit or lease, setting forth in detail the specific reasons why it is necessary for the applicant to have the use of an additional tract of land for a camp site, refining works, or other purposes, connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

2. The application should contain a description of the lands by legal subdivisions, if surveyed, or if not surveyed, by the approximate description thereof as it will appear when surveyed, for which the right of use is desired, together with a statement of the particular reasons why it is especially adapted thereto, either in point of location, topography, or otherwise, and that it is unoccupied, nonmineral land.

3. Use permits granted hereunder will be for indeterminate periods, dependent in that respect upon the existence of the permit or lease made the basis of the right authorized by section 3. Upon the termination of such permit or lease all rights secured hereby will also cease and terminate, and such condition shall be expressly recognized and stated in the application.

4. No blank forms of application will be furnished to applicants hereunder, but they will be guided by the foregoing as to the essential requirements of the application, which will be verified by the affidavit of the applicant.

VII.

Form of Use Permit for Camp Site or Refining Works.

The form of use permit issued under section 3 of the act of October 2, 1917, will be in substance as follows:

THE UNITED STATES OF AMERICA.

KNOW ALL MEN BY THESE PRESENTS, That I, Franklin K. Lane, Secretary of the Interior, under and by virtue of section 3 of the act of Congress entitled "An act to authorize exploration for and disposition of potassium," approved October 2, 1917, have granted and do hereby grant to _____ _____, the holder of _____ bearing serial number _____, the exclusive right to use, during the life of the aforesaid _____

_____, the following described tract of land, to wit: _____

_____

for a camp site, refining works, and other purposes connected with and necessary to the proper development and the use of the deposits covered by the aforesaid _____,

all rights hereunder to cease and terminate upon the termination of the aforesaid _____.

IN WITNESS WHEREOF, I have affixed my signature hereto and the seal of the Department this _____ day of _____.

[SEAL.] _____,

Secretary of the Interior.

VIII.

PATENTS FOR LAND CONTAINING POTASH.

(a) Claims Under Existing Mining Laws.

Valid claims existent on October 2, 1917, and thereafter maintained in compliance with the laws under which initiated, may be perfected and patented under the provisions of the general mining laws and the regulations thereunder.

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

(b) Claim Resulting From Discovery Under Permit.

A permittee (or the assignee or transferee of a permittee in those cases where the consent to the assignment or transfer of the permit has been authorized by the Secretary) who has discovered valuable deposits of one or more of the substances enumerated in section 1 of the act, within the area covered by, and the two years specified in, the permit, shall file, in the proper local land office an application, under oath, for a patent for the land desired by him in the exercise of his right to a patent, as discoverer, which land, including the discovery on which the right to a patent is predicated, shall not exceed

one-fourth of the area embraced in the prospecting permit, and shall be taken in compact form and described by legal subdivisions, or if the land is unsurveyed, then in a tract which shall not exceed two miles in length, described by metes and bounds and by reference to regular survey corners if practicable, or by the approximate description the lands will bear when surveyed, to the end that the location of the land desired can be readily determined on the ground.

Application for patent may be filed by the permittee at any time during the two years specified in the permit or thirty days thereafter. No right in the permittee or in the assignee of the permittee to patent any part of the land embraced in the permit will be recognized, where the application for patent is not filed within the period herein prescribed. Application for patent and proof in support thereof by the assignee must be made within the same time as though there had been no assignment.

Applications for patents will be properly noted of record by the local land officers and, prior to the issuance of the order of publication of notice of application for patent, will be, by special letter, transmitted to the Commissioner of the General Land Office, accompanied by a statement as to the status of the land embraced in the application for patent. After the receipt of such application, no applications, filings, or selections for the lands embraced therein will be permitted until so directed, nor will publication of the aforesaid notice be ordered until receipt of instructions with regard thereto from the Commissioner of the General Land Office.

After application for patent in case the land is unsurveyed, an estimate will be made of the approximate cost of survey, including necessary office work incident thereto, of which the applicant will be duly notified, which amount applicant will deposit as required by section 2 of the act with any Assistant United States Treasurer, or designated depository, in favor of the United States Treasurer, to be passed to the credit of "Deposits of individuals for survey of public lands," and file with the surveyor general duplicate certificates of such deposit in the usual manner. Additional amounts will be deposited if necessary. Such survey will, if all be regular, be made by United States surveyors, by or under the direction of the supervisor of surveys and the United States Surveyor General. As far as practicable all such surveys will be an extension of the regular Government surveys, after which the applicant will be required to conform his boundaries thereto. Special instructions for each such survey will be issued by the surveyor general.

Except as otherwise provided in these regulations, the procedure to be followed by the applicant-permittee to obtain patent shall be conformable to that provided by the regulations for obtaining patent

to mining claims under the general mining laws as to filing the application, payment of fee of five dollars to each the register and receiver, posting and publication, proof of mineral discovery, character of minerals, formation, etc., except that proof of patent expenditure of not less than five hundred dollars in improvements will not be required, nor statement of fees and charges, nor payment of any purchase money for the land, and publication will be required for only thirty days. The discovery of a valuable deposit of potash under applicant's permit shall be construed as the discovery of a deposit which yields commercial potash in commercial quantities. The applicant must show under oath all facts in support of his claim for patent, giving kinds of minerals discovered, character and extent of the deposits, together with a showing of the facts relative to transportation facilities, water supply, possible process of manufacture, and other factors which make the alleged discovery commercially valuable.

It will be noted that said act of October 2, 1917, makes no provision for determining adverse claims through the institution of adverse suits in local courts; hence all such claims, if any, and upon the filing of sufficient and proper protests, will be determined by the Land Department. The "Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior" will, as far as applicable, govern in the handling and disposition of protests.

If all be regular, patent shall issue only for such portions of the premises applied for as aforesaid (or for the reserved mineral deposits in land applied for where the surface thereof has been disposed of with reservation of the potash deposits to the United States) as are shown to the satisfaction of the Government to be valuable for the potash therein contained.

IX.

AN ACT TO AUTHORIZE EXPLORATION FOR AND DISPOSITION OF POTASSIUM.

(*40 Stat., 297.*)

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 issue to any applicant who is a citizen of the United States, an association of such citizens, or a corporation organized under the laws of any State or Territory thereof, a prospecting permit which shall give the exclusive right for a period not exceeding two years, to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium on public lands of the United States, except lands in and adjacent to Searles Lake, which would be described if surveyed as townships twenty-four, twenty-five, twenty-six, and twenty-seven south of ranges forty-two, forty-three, and forty-four east, Mount

Diablo meridian, California: *Provided*, That the area to be included in such permit shall not exceed two thousand five hundred and sixty acres of land in reasonably compact form.

SEC. 2. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one or more of the substances enumerated in section one hereof *have been discovered by the permittee* within the area covered by his permit, the permittee shall be entitled to a patent for not to exceed one-fourth of the land embraced in the prospecting permit, to be taken in compact form and described by legal subdivisions of the public-land surveys, or if the land be not surveyed, then in tracts which shall not exceed two miles in length, by survey executed at the cost of the permittee, in accordance with rules and regulations prescribed by the Secretary of the Interior. All other lands described and embraced in such a prospecting permit from and after the exercise of the right to patent accorded to the discoverer, and not covered by leases, *may be* leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres, all leases to be conditioned upon the payment by the lessee of such royalty as may be specified in the lease and which shall be fixed by the Secretary of the Interior in advance of offering the same, and which shall not be less than two per centum on the gross value of the output at the point of shipment, which royalty, on demand of the Secretary of the Interior, shall be paid in the product of such lease, and the payment in advance of a rental, which shall be not less than 25 cents per acre for the first year thereafter; not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively; and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods, upon condition that at the end of each twenty-year period succeeding the date of any lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods, and a patentee under this section may also be a lessee: *Provided*, That the potash deposits in the public lands in and adjacent to Searles Lake in what would be if surveyed townships twenty-four, twenty-five, twenty-six, and twenty-seven south of ranges forty-two, forty-three, and forty-four east, Mount Diablo meridian, California, may be operated by the United States or may be leased by the Secretary of the Interior under the terms and provisions of this act: *Provided further*, That the Secretary of the Interior may issue leases under the provisions of this act for deposits of potash in public lands in Sweetwater County, Wyoming, also containing deposits of coal, on condition that the coal be reserved to the United States.

SEC. 3. That in addition to areas of such mineral land to be included in prospecting permits or leases the Secretary of the Interior, in his discretion, may issue to a permittee or lessee under this act the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land not exceeding forty acres in area for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

SEC. 4. That the Secretary of the Interior shall reserve the authority and shall insert in any preliminary permit issued under section one hereof appropriate provisions for its cancellation by him upon failure by the permittee or licensee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit.

SEC. 5. That no person shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof which, together with the area embraced in any direct holding of a lease under this act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, or otherwise, exceeds in the aggregate in any area fifty miles square an amount equivalent to the maximum number of acres allowed to any one lessee under this act; that no person, association, or corporation holding a lease under the provisions of this act shall hold more than a tenth interest, direct or indirect, in any other agency, corporate or otherwise, engaged in the sale or resale of the products obtained from such lease; and any violation of the provisions of this section shall be ground for the forfeiture of the lease or interest so held; and the interests held in violation of this provision shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located, except that any such ownership or interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition.

SEC. 6. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit for joint or several use such easements or rights of way upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act may reserve to the United States the right to dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease; that the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 7. That each lease shall contain provisions deemed necessary for the protection of the interests of the United States, and for the prevention of monopoly, and for the safeguarding of the public welfare.

SEC. 8. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property or some part thereof is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, *or of the general regulations promulgated* under this act and in force *at the date of the lease*, and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 9. That the provisions of this act shall also apply to all deposits of potassium salts in the lands of the United States which may have been or may be disposed of under laws reserving to the United States the potassium deposits with the right to prospect for, drill, mine, and remove the same, subject to such conditions as to the use and occupancy of the surface as are or may hereafter be provided by law.

SEC. 10. That all moneys received from royalties and rentals under the provisions of this act, excepting those from Alaska, shall be paid into, reserved,

and appropriated as a part of the reclamation fund created by the act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation act, but after use thereof in the construction of reclamation works and upon return to the reclamation fund of any such moneys in the manner provided by the reclamation act and acts amendatory thereof and supplemental thereto, fifty per centum of the amounts derived from such royalties and rentals, so utilized in and returned to the reclamation fund, shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools.

SEC. 11. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.

SEC. 12. That the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws: *Provided*, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

SEC. 13. That the Secretary of the Interior is hereby authorized and directed to incorporate in every lease issued under the provisions of this act a provision reserving to the President the right to regulate the price of all mineral extracted and sold from the leased premises, which stipulation shall specifically provide that the price or prices fixed shall be such as to yield a fair and reasonable return to the lessee upon his investment and to secure to the consumer any of such products at the lowest price reasonable and consistent with the foregoing: *Provided*, That such lease issued under this act shall also stipulate that the President shall have authority to so regulate the disposal of the potassium products produced under such lease as to secure its distribution and use wholly within the limits of the United States or its possessions.

Approved, October 2, 1917.

F. A. HYDE & CO. (ON REHEARING).

Decided April 1, 1918.

FOREST LIEU SELECTION—WHEN ENTITLED TO APPROVAL.

If the United States will thereby obtain a perfect, indefeasible title to the base lands, a selection made under the act of June 4, 1897 (30 Stat., 36), should be approved.

VOGELSANG, *First Assistant Secretary:*

The C. A. Smith Timber Company, transferee of F. A. Hyde and Company (a corporation), has moved for a rehearing of the decision of the Department of January 31, 1916, affirming the rejection by the Commissioner of the General Land Office, April 24, 1913, of forest lieu selection 2995 (now serial 05631), by F. A. Hyde and

Company, through Frederick A. Kribs as attorney in fact, for Sec. 14, T. 31 S., R. 11 W., W. M., Roseburg, Oregon, land district, in lieu of the N. ½, Sec. 18, T. 7 N., R. 18 E., and the N. ½, Sec. 16, T. 8 N., R. 19 E., M. D. M., in the Stanislaus National Forest, Sacramento, California, land district.

The application to select the Oregon lieu land was filed June 25, 1900, under the provisions of the Act of Congress of June 4, 1897 (30 Stat., 11, 36). The abstract of title furnished with the application shows that the base lands were applied for, in the name of Joseph Naphtaly, August 6, 1897, the State certificate of purchase was issued to him April 4, 1898, and the patent was issued to him February 12, 1900; and that on February 24, 1900, Naphtaly conveyed the base lands to F. A. Hyde and Company.

The charge filed against the selection, upon which this proceeding was based, alleged, in substance, that the selection was fraudulent and illegal in that the lands offered as base were procured from the State of California in violation of Section 3495 of its Political Code,—

> in that the application to said State for said base land was not made for the use and benefit of * * * the applicant named but for the use and benefit of F. A. Hyde and Company, * * * with intent on the part of said F. A. Hyde and Company * * * to present the same in exchange for public land of the United States, in violation of the act of June 4, 1897.

Said section 3495 of the Political Code of California is as follows:

> Any person desiring to purchase * * * must make an affidavit * * * that he desires to purchase the same for his own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same * * *.

In the decision under review, the Department found that this charge had been sustained, finding the application for the State patent to have been in fact made for the use of F. A. Hyde and Company. In support of the motion for rehearing it is contended, *inter alia*, that the State is estopped to rescind its patent, because of the transfer of title and rights thereunder to *bona fide* purchasers for value.

The act of June 4, 1897, had for its purpose the exchange by the United States of its lands outside of National Forests for equal areas of lands held in private ownership within National Forest boundaries. If, by the approval of this selection, the United States will obtain a perfect and indefeasible title to the lands offered by the selector as a basis for the lieu selection, then the selection should be approved. In the present case there is no question that the State patented the base lands herein to an existing natural person and that the State patent is not void and in fact is not now voidable, the

State having taken no action to avoid it, more than eighteen years having elapsed since its date and issuance, and a suit now to declare it void being barred by the California statute of limitations. The approval of the selection, therefore, will vest undoubted title to the Forest base lands in the United States, will vest in the present claimant title to the lands selected in lieu thereof, and will in no way prejudice any interest of the State, for the State now has no interest that can be asserted in any way. The selection, therefore, should be approved. Accordingly, the former decision of the Department is vacated and the case remanded for appropriate action.

The facts in this case distinguish it from the case of Hiram M. Hamilton (39 L. D., 607), and the case of the State of Oregon *v.* Hyde *et al.* (169 Pac., 757). In the former, the Department declined to accept a title shown still to be defeasible because tainted with fraud, and the State had not indicated that it was not seeking its recovery, and in the latter the claim of the State was not only not barred by any statute of limitation but the State was also strongly desirous of recovering its lands.

SOLDIERS' AND SAILORS' RIGHTS, ACT OF MARCH 8, 1918.

INSTRUCTIONS.[1]

DEPARTMENT OF THE INTERIOR,
April 2, 1918.

The Department has received your [Commissioner of the General Land Office] letter of March 23, 1918, regarding section 501 of the act of March 8, 1918 (Public No. 103), known as the Soldiers' and Sailors' Civil Relief Act, which provides:

> That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land or of his failure to perform any work or make any improvements thereon or to do any other act required by any such law during the period of such service.

You asked to be advised as to the effect of this act "with relation to the obligation of entrymen to make required payments for ceded Indian lands, and water right charges on entries within reclamation projects."

The Department very recently had occasion to construe this act in replying to an inquiry as to whether a homestead entryman of lands under a Reclamation project, afterward entering the military service, is protected from the forfeiture of his claim for noncompliance with

[1] See, also, Circular 600, at page 383.

the provisions of the Reclamation law during his absence. It was said in that connection:

> The effect of this act is to establish a moratorium for soldiers and sailors during the period of the war and unquestionably suspends the payment of any installments that may become due from a soldier entryman of lands under a reclamation project, during the period of his service, provided the entry was initiated prior to entering the service, and relieves him from any liability on account of his failure by reason of his absence "to perform any work or make any improvements" on the land.

The law is sufficiently broad to afford equal relief and protection to entrymen as to the required payments both for ceded Indian lands and within Reclamation projects.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

REGULATIONS GOVERNING INDIAN ALLOTMENTS ON THE PUBLIC DOMAIN UNDER SECTION 4, ACT OF FEBRUARY 8, 1887, AS AMENDED.

DEPARTMENT OF THE INTERIOR,
Washington, April 15, 1918.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEAR MR. COMMISSIONER: There are transmitted herewith, approved, regulations governing Indian allotments on the public domain under the fourth section of the act of February 8, 1887 (24 Stat., 388), as amended. These regulations are not intended to apply to allotments on which trust patents have issued, but only to pending applications and those that may hereafter be filed. Allotments under that section on which trust patents have issued will stand subject to the existing rules, regulations, and practice governing the investigation of such allotments prior to the issuance of fee patents.

Departmental order of October 27, 1913, directing your office to suspend the making of further allotments under the fourth section pending the promulgation of new rules and regulations is hereby rescinded, and the examination and adjudication of applications filed under said section will proceed.

Careful consideration has been given to the suggestions as to the rights of Indian wives under the fourth section, contained in your office letter of February 27, 1918, returning the corrected draft of the regulations. The Department is of opinion that the regulations, without further change as suggested, sufficiently cover the legal rights of Indian wives under that section and will amply protect such rights in all proper cases.

Very truly yours,

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

REGULATIONS.

The fourth section of the general allotment act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), was further amended by the act of June 25, 1910 (36 Stat., 855), to read as follows:

That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred and sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

CERTIFICATES.

Any person desiring to file application for an allotment of land on the public domain under this act must first obtain from the Commissioner of Indian Affairs a certificate in accordance with regulations approved September 23, 1913, showing that he or she is an Indian and entitled to such allotment, which certificate must be attached to the allotment application, blanks for which will be furnished. Application for the certificate must be made on a regular form, blanks for which will also be furnished, and must contain information as to the applicant's identity, such as thumb print, age, sex, height, approximate weight, married or single, name of the Indian tribe in which membership is claimed, etc., sufficient to establish his or her identity with that of the applicant for allotment. Each certificate must bear a serial number, record thereof to be kept in the Indian Office.

ALLOTMENT APPLICATIONS.

The applicant, upon receipt of the required certificate, will fill out the blank form of allotment application and present the same, properly executed, to the register and receiver of the land office for the district in which the land is situated. The affidavits attached to the

applications for certificate and allotment may be executed before either the register or receiver or any United States commissioner or the judge or clerk of any court of record; also before any agent, special agent, or inspector of the Indian Service, or any officer authorized to administer oaths and having a seal, in the county or land district where the land lies. United States commissioners and notaries public must attach their seal, and justices of the peace must attach to each application at least one certificate by the clerk of the proper court that they are duly authorized to administer oaths.

In case an allotment application is presented without the required certificate, the register and receiver will suspend the same for a period of 90 days from notice to enable the applicant to obtain and file such certificate, and those officers will advise the applicant and the Commissioner of Indian Affairs by duplicate notice that unless such certificate is furnished within that time, the allotment application will be finally rejected, unless prior to the expiration of the 90-day period the Commissioner of Indian Affairs shall ask for additional time within which to determine the applicant's Indian status. The local land officers will assist the Indian wherever practicable, by advice or otherwise, in the proper steps to be taken to procure allotments on the public domain.

CERTIFICATE OF ALLOTMENT AND FIELD EXAMINATION.

Upon acceptance by the register and receiver of an application under the fourth section they will issue to the applicant a "certificate of allotment" on a prescribed form, showing the name in full of the applicant, post-office address, name of the tribe in which membership is claimed, serial number of the certificate issued by the Commissioner of Indian Affairs, and a description of the land applied for. A copy of this "certificate of allotment" will be mailed direct by those officers to the Commissioner of Indian Affairs, and a copy forwarded immediately by them to the Chief of Field Division for investigation and report, if deemed necessary by him. The latter, if an investigation is made, will report as to the character of the land applied for, whether irrigable, nonirrigable agricultural land, or nonirrigable grazing land, and as to timber, mineral, coal, phosphate, oil, power-site, reservoir, and watering place possibilities; also as to the proper marking of the claim if unsurveyed. Where the application under investigation is that of a single person over 21 years of age, or of a head of family, report will also be made as to the character of the applicant's settlement and improvements. A similar report will also be made on applications filed in behalf of minor children as to the character of the settlement and improvements made by the parent, or the person standing *in loco parentis*,

on his or her own allotment under the fourth section. In case the Chief of Field Division has no information in his office showing the necessity of an examination or investigation in the field, he will report the fact promptly to the local land officers.

SEGREGATION OF THE LAND.

An allotment application under the fourth section filed prior to the regulations of September 23, 1913, does not, in the absence of a certificate from the Indian Office showing that the applicant is an Indian entitled to allotment, segregate the land, and a subsequent application for the same land may be received and suspended to await final action on the allotment application.

Where an allotment application under the fourth section, filed subsequent to the regulations of September 23, 1913, is not accompanied by the requisite certificate from the Indian Office showing the applicant to be entitled to allotment, and the applicant is given time to furnish such certificate, the application does not segregate the land, and other applications therefor may be received and held to await final action on the allotment application.

Where an allotment application under the fourth section, accompanied by a certificate from the Indian Office showing that the applicant is an Indian and entitled to allotment, as required by the regulations of September 23, 1913, is found to be in all respects complete and is accepted by the local land officers, it operates as a segregation of the land, and subsequent applications for the same land will be rejected.

TRIBAL MEMBERSHIP.

An applicant for allotment under the fourth section is required to show that he is a recognized member of an Indian tribe or is entitled to be so recognized. Such qualifications may be shown by the laws and usages of the tribe. The mere fact, however, that an Indian is a descendant of one whose name was at one time borne upon the rolls and who was recognized as a member of a tribe, does not of itself make such Indian a member of the tribe. Not every person possessing a degree of Indian blood and who has not received an allotment, but without tribal affiliation or relationship, is entitled under this section. Tribal membership, even though once existing and recognized, may be abandoned in respect to the benefits of the fourth section.

Allotments are allowable only to living persons or those in being at the date of application. Where an Indian dies after settlement and filing of application, but prior to approval, the allotment will upon final approval be confirmed to the heirs of the deceased allottee.

SETTLEMENT.

The nature, character, and extent of the settlement as well as the manner in which performed must be fully set forth in the allotment application. In examining the acts of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instinct of the race, as well as to the character of the land taken in allotment.

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

To enable an Indian allottee to demonstrate his good faith and intention, the issuance of trust patent will be suspended for a period of two years from date of settlement; but in those cases where that period has already elapsed at the time of adjudicating the allotment application, and when the evidence, either by the record or upon further investigation in the field, shows the allottee's good faith and intention in the matter of his settlement, trust patents will issue in regular course. Trust patents in the suspended class, when issued, will run from the date of suspension. Each case will be determined and adjudicated upon its own facts and merits.

In the matter of fourth section applications filed prior to these regulations, where, by the record or upon further investigation in the field, it appears that such settlement has not been made as is contemplated by these regulations, such applications will not be immediately rejected but the applicant will be informed that two years will be allowed within which to perfect his settlement and to furnish proof thereof, whereupon his application will be adjudicated as in other cases.

CHARACTER OF LAND AND AREA SUBJECT TO ALLOTMENT.

The law provides that allotments may include not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

Irrigable lands are those susceptible of successful irrigation at a reasonable cost from any known source of water supply; nonirrigable agricultural lands are those upon which agricultural crops can be profitably raised without irrigation; grazing lands are those which can not be profitably devoted to any agricultural use other than grazing.

MINORS.

An Indian settler on public lands under the fourth section is also entitled upon application to have allotments made thereunder to his

minor children, stepchildren, or other children to whom he stands *in loco parentis*, provided the natural children are in being at the date of the parent's application, or the other relationships referred to existed at such date. The law only permits one entitled himself under the fourth section to take allotments thereunder on behalf of his minor children or of those to whom he stands *in loco parentis*. Orphan children (those who have lost both parents) are not entitled to allotments on the public domain unless they come within the last-mentioned class. No actual settlement is required in case of allotments to minor children under the fourth section, but the actual settlement of the parent or of a person standing *in loco parentis* will be regarded as the settlement of the minor children.

INDIAN WIVES.

The right of an Indian woman, married to a white man, and of the children born of such a marriage, to allotment under the fourth section, is to be determined not with reference to the citizenship of the husband or the quantum of Indian blood of the children, but with reference to whether they are recognized members of an Indian tribe, or are entitled to be so recognized, and are otherwise within the terms and conditions of said section as to settlement.

An Indian woman who by reason of her marriage to a white man is prevented from complying with the terms and conditions of the fourth section, is not entitled to allotment thereunder, and for the same reason her minor children living under her care and protection are not so entitled.

An Indian woman married to a white man or other person who is not entitled to allotment under the fourth section, or who is not a settler or entryman under the general homestead law, will be regarded as the head of a family and may file application in her own behalf under said section as well as for the minor children under her care, provided she is qualified in the matter of settlement.

Where an Indian woman is separated from her husband who has not received an allotment under the fourth section, she will be regarded as the head of a family and may file application for herself and for the minor children under her care, provided she is an actual settler under said section.

A settler on the public domain under the general homestead laws is not a settler within the meaning of the fourth section. Neither is an Indian woman living on public lands with her husband who is a settler thereon under the general homestead laws, a settler within the meaning of said section; nor is she entitled to take allotments thereunder for her minor children.

SALE, HEIRSHIP, WILLS, ETC.

The existing laws and regulations relating to the sale of allotted Indian lands, the determination of heirs, the issuance of patents in fee, the disposal of trust allotments by will, and the extension of the trust period, applicable to reservation allotments under the provisions of the act of February 8, 1887, as amended, are equally applicable to allotments made under the fourth section of said act.

APPLICATION FOR UNSURVEYED LANDS.

An allotment application under the fourth section for unsurveyed lands must conform to the following rules and along the lines of those found in departmental circular of November 3, 1909 (38 L. D., 287).

It must contain a description of the land by metes and bounds, with courses, distances, and references to monuments by which the location of the tract on the ground can be readily and accurately ascertained. The monuments may be of iron or stone, or of substantial posts well planted in the ground, or of trees or natural objects of a permanent nature, and all monuments shall be surrounded with mounds of stone, or earth when stones are not accessible, and must be plainly marked to indicate with certainty the claim to the tract located. The land must be taken in rectangular form, if practicable, and the lines thereof follow the cardinal points of the compass unless one or more of the boundaries be a stream or other fixed object. In the latter event only the approximate course and distance along such streams or object need be given, but the other boundaries must be definitely stated; and the designation of narrow strips of land along streams, water courses, or other natural objects will not be permitted. An allotment to a minor child need not be contiguous to that made by the head of a family, but it is required that each allotment made to an individual, whether the head of a family, a single adult, or a minor child, when such allotment embraces more than one legal subdivision, must be composed of contiguous tracts, as in ordinary disposition of the public domain under a settlement law. An additional allotment must be governed by the same rule.

The approximate description of the land, by section, township, and range, as it will appear when surveyed, must be furnished; or, if this can not be done, an affidavit must be filed setting forth a valid reason therefor.

The address of the claimant must be given, and it shall be the duty of the register and receiver, upon the filing of the township plat in their office, to notify him thereof, by registered letter, at such address, and to require the adjustment of the claim to the public survey within ninety days. In default of action by the party noti-

fied, the register and receiver will promptly adjust the claim to the public land survey, if possible, and report their action to the General Land Office.

Notice of the application, selection, filing, or location, describing the land as above directed, must be posted in a conspicuous place upon the land, and a copy of such notice and proof of posting thereof filed with the application.

INDIAN OCCUPANCY.

The local officers will ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend and transmit to the General Land Office all applications made by others than the Indian occupants, for lands in the possession of Indians who have made improvements of any value whatever thereon.

CHARGES AND PROTESTS AGAINST INDIAN ALLOTMENTS.

The act of April 23, 1904 (33 Stat., 297), limits the jurisdiction of the Secretary of the Interior to cancel first or trust patents issued on Indian allotments to specific instances, without authority from Congress. In view of the fact that information respecting the classes defined in said act is obtainable from the Department's records, no charges preferred as to those classes will be entertained. Third parties are never invited to attack Indian allotments with the hope or expectation of securing any advantage by reason of such attack. Such parties must assume and pay the expense of a hearing, but at the same time they acquire no preference right to enter the land in the event of the cancellation of the allotment, and this whether first or trust patent has issued or not. Section 2 of the act of May 14, 1880 (21 Stat., 140), does not apply to proceedings of this character.

However, where a party claims equitable rights to lands covered by an Indian allotment for which trust patent has been issued, on account of prior settlement and improvements, a hearing may be ordered on direction of the Department with the view of recommending to Congress that such patent be canceled, if the showing made at the hearing justifies such action. In this class of cases, and in cases of charges preferred against allotments on which trust patents have not issued, the following rules will be observed:

The charges must be filed in the proper local land office in the form of a duly corroborated affidavit, clearly setting forth the specific grounds for such charge. The local officers will forward the papers to the General Land Office, which will give the Indian Office full information thereof.

Where it is charged that the lands applied for are not of the character subject to allotment; that the required settlement has not been made; that the contestant has a prior and better claim, and that the applicant for allotment is not seeking to obtain the land in good faith, but is acting in the interest of another person not entitled thereto, the General Land Office will cause a preliminary investigation to be made by an agent in the field as to the truth and merits of the charges, if such action is deemed necessary. The charges will be dismissed, unless it appears that there is a strong probability of the charges being true.

Where the only charge is that the applicant is not an Indian entitled to allotment, the papers will be forwarded to the Indian Office, where investigation of such charges will be had.

Where there is a strong probability that the charges are true, a hearing will be had before the proper local land officers after due notice to all parties. The taking of testimony and other proceedings in such hearings will be in accordance with the rules of practice governing proceedings before the local land officers.

Nothing in the foregoing will prevent the department from accepting an Indian's relinquishment of an unpatented allotment and directing its cancellation if, after the charges are filed, it is shown that the allotment ought to be canceled.

ALLOTMENTS WITHIN NATIONAL FORESTS.

By the terms of section 31 of the act of June 25, 1910 (36 Stat., 855, 859), allotments under the fourth section of the act of February 8, 1887, as amended, may be made within national forests. Applications must be made in accordance with the provisions of said section, and will be governed by these regulations, and such additional regulations as may be prescribed by the Secretary of the Interior in conjunction with the Secretary of Agriculture.

RELINQUISHMENTS.

Relinquishments of Indian allotments, if filed in a local land office, will not be noted on the records of that office, but will be forwarded to the General Land Office, without action, and will be transmitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for consideration and recommendation. Where the application has not been approved, the Commissioner of Indian Affairs has authority to accept or reject the relinquishment, as he may deem proper. Where the allotment application has been approved, departmental approval of the recommendation of the Commissioner of Indian Affairs must be had before the relinquishment can be accepted. On the acceptance of a relinquishment, the General

Land Office will be notified of the fact. The land affected will not become subject to entry until after the local land officers have noted the fact of the relinquishment and cancellation on their records.

NOTICE OF ACTION.

Notice to Indian allottees, or to their parents, if minors, of any action adverse to their interests, must be given by registered letter to the proper Indian superintendent, as well as to the party in interest.

INDIAN HOMESTEADS.

These regulations do not apply to homestead entries by Indians under either the act of March 3, 1875 (18 Stat. L., 420), or July 4, 1884 (23 Stat., 96), as the rules and regulations governing regular citizen homestead entries are applicable to this class of entries by Indians. The act of July 4, 1884, expressly states that no fees or commissions shall be charged on account of Indian homestead entries, and a patent different in character from the citizen homestead patent is issued on entries made under either of said acts. The acts in question are printed in the appendix to these regulations as matter of information.

PENDING APPLICATIONS.

These regulations will be applicable to all pending applications under the fourth section, as well as to all such applications that may hereafter be filed. In respect to the issuance of trust patents on such allotments, "by the act of May 8, 1906 (34 Stat., 182), Congress amended this section [6] so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act [February 8, 1887] to State laws." *United States* v. *Pelican* (232 U. S., 422, 450.)

Approved April 15, 1918.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

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APPENDIX.

Act of February 8, 1887 (24 Stat. L., 388).

AN ACT To provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled [Section 1 has been amended by the act of February 28, 1891, and by section 17 of the act of June 25, 1910], That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the

Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. [This section has been amended by section 9 of the act of June 25, 1910.] That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. [This section has been amended by section 17 of the act of June 25, 1910.] That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the

President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all time subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. [This section has been amended by the act of May 8, 1906.] That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges,

and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Act of February 28, 1891 (26 Stat. L., 794).

AN ACT To amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, be, and the same is hereby, amended so as to read as follows:

"SEC. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or re-

surveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities."

SEC. 2. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations, and conditions as shall be prescribed by such Secretary for a term not exceeding three years for farming or grazing or ten years for mining purposes: *Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming and agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

SEC. 4. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the

Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabitated together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: *Provided*, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet": *And provided further*, That no allotment of land shall be made or annuities of money paid to any of the Sac and Fox of the Missouri Indians who were not enrolled as members of said tribe on January first, eighteen hundred and ninety; but this shall not be held to impair or otherwise affect the rights or equities of any person whose claim to membership in said tribe is now pending and being investigated.

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Act of May 8, 1906 (34 Stat. L., 182).

AN ACT To amend section six of an act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act approved February eight, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee

simple and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this act shall not extend to any Indians in the Indian Territory.

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, such allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

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Act of June 25, 1910 (36 Stat. L., 855).

AN ACT To provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes.

* * * * * * *

SEC. 5. That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made.

SEC. 9. That section three of the act entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), be, and the same hereby is, amended to read as follows:

"SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special alloting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

* * * * * * *

SEC. 17. That so much of the Indian appropriation act for the fiscal year nineteen hundred and ten, approved March third, nineteen hundred and nine, as reads as follows, to wit: "That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper, not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the act of February eighth, eighteen hundred and eighty-seven," be, and the same is hereby, repealed, and sections one and four of the act of February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-four), be, and the same are hereby, amended to read as follows:

"SEC. 1. That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, act of Congress or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigible lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided*, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided, further*, That where a treaty or act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified in this act, with the consent of the Indians expressed in such manner as the President in his discretion may require."

"SEC. 4. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the act of which this is amendatory. And the fees to which the

officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior."

* * * * * * *

SEC. 31. That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section [17] of this act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

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Act of March 2, 1917 (39 Stat., 969).

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

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

* * * * * * *

For the survey, resurvey, classification, and allotment of lands in severalty under the provisions of the act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), entitled "An act to provide for the allotment of lands in severalty to Indians," and under any other act or acts providing for the survey or allotment of Indian lands, $100,000, to be repaid proportionally out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes and to remain available until expended: *Provided*, That no part of said sum shall be used for the survey, resurvey, classification, or allotment of any land in severalty on the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona, who was not residing upon the public domain prior to June thirtieth, nineteen hundred and fourteen.

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Act of March 3, 1875 (18 Stat., 420).

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

* * * * * * *

SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satis-

factory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however,* That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: *Provided,* That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interests he may hold or claim by reason of his former tribal relations shall be void.

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Act of July 4, 1884 (23 Stat., 96).

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

* * * * * * *

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

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(4–012.)

FORM OF APPLICATION.

(These forms can be obtained from a local land office.)

Certificate No. _____. Serial No. _____

Application for Allotment of Public Lands.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
_____ _____, *19—*.

I, _____, (_____) whose post-office address
(Male or female.)
is _____, do hereby apply to have allotted to _____
(Me or my minor child,

_____ under the provisions of section 4 of the act of February 8, 1887 naming it.)
(24 Stats. L., 388), as amended by the act of February 28, 1891 (26 Stats. L., 794), and the act of June 25, 1910 (36 Stats. L., 855–859), the _____
[1] _____
_____
_____
_____
containing _____ acres, and I do solemnly swear that the land above described is [2] _____ in character; that I am an Indian of the _____ tribe; that I am the _____ of _____, aged
(Father or mother.)
_____ years; that [3] _____ ha__ not heretofore received an allotment under any law or any other acts of Congress except [4] _____
_____
_____
that I have made actual bona fide settlement on the [5] _____
_____
_____
that I have made improvements thereon as follows: [6]
_____
_____
_____
_____
that I have used or occupied the land [7] _____
_____
_____
that I am the [8] _____ of the identical person named in the accompanying certificate from the Commissioner of Indian Affairs; that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose

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[1] Insert description of the land, if surveyed, by legal subdivisions; if unsurveyed, by metes and bounds, beginning with natural or other objects that may be easily identified, or a permanent artificial monument or mound set for the purpose, or in such other manner as to admit of its being readily identified when the official survey comes to be extended.

[2] Insert "Irrigable," "Nonirrigable-agricultural," or "Nonirrigable-grazing," as the case may be.

[3] Insert "I," "he," or "she," as the case may be.

[4] Give character of prior entry or allotment, if any, together with acts under which filed or received.

[5] Insert description of lands on which settlement has been made.

[6] Insert manner in which settlement has been made, such as posting notices, marking of four corners, erection of house, etc.

[7] Give length and nature of use or occupancy

[8] Cross out "of the" or insert father, mother, grandfather, etc., as appropriate.

of fraudulently obtaining title to mineral land; that the land is not occupied or improved by any other Indian, and contains no valuable watering places.

———— ————, *Witness.*

———— ————.

———— ————, *Witness.*

Sworn to and subscribed before me this _____ day of _____ 19__.

———— ————.

(Official character. See note below.)

This affidavit may be sworn to before either the register or receiver of the land district in which the land is situated, or before any United States commissioner, the judge or clerk of any court of record; also before any agent, special agent or inspector of the Indian Service, or before any officer authorized to administer oaths and having a seal in the county or land district where the land is situated. United States commissioners must attach their seal and justices of the peace must attach to each application at least one certificate by the clerk of the proper court that they are duly qualified to administer oaths.

—

Corroborative Affidavit.

We, _____ and _____, do solemnly swear that we are well acquainted with _____, an Indian of the _____ tribe, and know that actual bona fide settlement has been made by the applicant on the _____ and that he has used or occupied the land [1] _____ and that the lands applied for in the foregoing application are _____ (Insert "irrigable," _____ in character. "nonirrigable-agricultural," or "nonirrigable-grazing.")

———— ————.

———— ————.

Sworn to and subscribed before me this _____ day of _____, 191__.

———— ————,

———— ————.

(Official character.)

UNITED STATES LAND OFFICE,

————————, 191—.

I, _____, Register of the Land Office, do hereby certify that the above application is for [2] _____ lands and that there is no prior valid adverse right to the same.

———— ————,

Register.

The register and receiver will examine proofs carefully to see that they are correct and properly executed.

No application will be accepted by the local officers unless a certificate from the Commissioner of Indian Affairs is furnished that the person for whose

[1] Give length and nature of use or occupancy.

[2] Insert "surveyed" or "unsurveyed," and "irrigable," "nonirrigable-agricultural," or "nonirrigable-grazing," as the case may be.

benefit the application is made is an Indian entitled to allotment of public land under the act of February 8, 1887, as amended (departmental order of Sept. 23, 1913). No application for a minor child will be accepted unless the parent making the application has settled on public land under the fourth section of said act, which land must be described in the application for the child.

If the land is unsurveyed, the same must be described according to the rules approved November 3, 1909 (38 L. D., 287), a description of the lands by metes and bounds, with reference to artificial monuments or natural objects, being given, as well as an approximate description by section, township, and range, as it will appear when surveyed.

Extract from the act of Congress approved February 8, 1887:

"SEC. 5. * * * And if any conveyance should be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned (twenty-five years or longer, in the discretion of the President), such conveyance or contract shall be absolutely null and void."

Extract from the act of Congress approved June 25, 1910:

"SEC. 5. That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made."

ROSE MILLER.

Decided April 16, 1918.

ADDITIONAL ENTRY UNDER THE FIRST PROVISO TO SECTION 3 OF THE STOCK-RAISING ACT.

One seeking to make an additional entry under the first proviso to section 3 of the act of December 29, 1916 (39 Stat., 862), must have completed the term of residence required on his original entry, or will have completed it within six months from the date of the filing of his application; and a statement, under oath, showing this, should be filed with the application.

VOGELSANG, *First Assistant Secretary:*

Rose Miller has appealed from the decision of the Commissioner of the General Land Office, rendered December 1, 1917, in the above-entitled case, rejecting homestead application 025669, filed February 9, 1917, under the act of December 29, 1916 (39 Stat., 862), for the W. ½ Sec. 32, T. 144 N., R. 101 W., 5th P. M., Dickinson, North Dakota, land district, as additional to her unperfected homestead

entry 025000, made November 13, 1916, for the S. ½ Sec. 34, T. 144 N., R. 102 W., 5th P. M.

It appears that the land applied for is not contiguous to the tract embraced in appellant's original entry. The entry not having been made until November 13, 1916, and residence on the land having been thereafter established, proof of compliance with the requirements of law as to the original entry can not be submitted prior to the expiration of three years from date of establishment of residence thereupon. (See paragraph 1 of regulations, 41 L. D., 479.)

The requirements as to residence contained in the acts of June 6, 1912 (37 Stat., 123), and December 29, 1916, *supra*, under the latter of which the additional application was filed, are identical. (See paragraph 7 of regulations, 45 L. D., 628.)

In the first place, the tract applied for being noncontiguous to that originally entered, and proof not having been submitted upon the latter, claimant's right to make additional entry, if any such right exists at this time, is governed by sections 2 and 3 of the act of December 29, 1916, *supra*.

The proviso to section 2 of said act (under which the application for additional entry and petition for designation of both tracts involved were filed) limits the right to make an original or additional entry for land which has not been designated as subject to entry, to persons who are qualified to make the particular form of entry applied for.

The first proviso to section 3 of the act allows the making of an additional entry of a tract, within a radius of twenty miles from the original, "subject to the requirements of law as to residence and improvements," which, together with the former entry, will not exceed 640 acres.

Under the statutory provisions above referred to, it follows that unless one has fully complied with the requirements of law as to residence in connection with the original entry, or may do so within six months immediately subsequent to date of filing of the additional application under the Stock-raising act, he is not qualified to make an additional entry thereunder. It would be impossible in the case at bar for applicant to establish residence upon the land additionally applied for within six months immediately subsequent to the date of the filing of the application, and thereafter reside upon and improve the same as required by the act of December 29, 1916, without abandoning her original entry. The fact that considerable time may elapse before the accompanying petition for designation may be acted upon, during which applicant may become qualified, does not warrant acceptance of the application.

It is, however, not necessary that formal proof of compliance with the law shall have first been submitted upon the original before the right to apply for an additional entry under the act of December 29, 1916, *supra*, exists. It will suffice if the requirements of law as to the original shall have been actually complied with, or can be complied with within the six months from date of filing the additional application. This liberal construction placed upon the words contained in section 2 of the act, "any person qualified to make original or additional entry," is based upon the well established principle that, within the six months immediately following the date of allowance of the additional entry, said entry is not subject to contest for failure to establish residence, and therefore, if within that period of time claimant could show full compliance with the requirements of law in connection with the original entry, he or she could very properly, before the expiration of the six months, commence residence on the land as required by the act of December 29, 1916.

To concur in the view advanced upon this proceeding by counsel for appellant, that the Department has not the right to inquire into the qualifications of an entryman prior to the allowance of the application, or during the pendency thereof while action is being taken upon the petition for designation, and then only in the event that adverse proceedings shall have been instituted against said entry by an individual or the Government, as the case may be, would in effect permit one to segregate unappropriated public lands indefinitely without assurance that he or she would be qualified to make such entry on the date the land became subject thereto, and thus prevent the same from being entered by a qualified applicant in good faith, without placing upon the latter the inconvenience and expense of instituting contest proceedings against the entry of record. Such a construction would be contrary to public policy and the law.

It is therefore held that one seeking to make additional entry under section 3 of the act of December 29, 1916, is a qualified entryman, within the meaning of section 2 of said act, only in the event that he or she is qualified at the date of filing such application or may become qualified within the six months immediately subsequent thereto, by completing, within that time, the term of residence required by law in connection with the original entry, and a statement to that effect, under oath, should be filed, together with such additional application.

The decision appealed from is accordingly affirmed.

MARSHALL HUMPHREY.

Decided April 17, 1918.

ASSIGNMENT OF RECLAMATION ENTRY—PURCHASER AT JUDICIAL SALE—LAND LATER ELIMINATED FROM PROJECT.

A purchaser at sheriff's sale of the land embraced in a homestead entry within a Reclamation project is an assignee of such entry under the act of June 23, 1910 (36 Stat., 592), if otherwise qualified, as of the date of the sheriff's sale, even though the land be eliminated from the project prior to delivery of the sheriff's deed.

VOGELSANG, *First Assistant Secretary:*

Marshall Humphrey has appealed from a decision of the Commissioner of the General Land Office, dated October 20, 1917, holding a final certificate for cancellation and an assignment under the provisions of the act of June 23, 1910 (36 Stat., 592), for rejection, as to the NW. ¼, Sec. 34, T. 1 N., R. 2 E., G. & S. R. M., within the Phoenix, Arizona, land district.

A homestead entry covering said land was made by Robert Rosser (who signs his name as Ross and Rosso, but who is generally known as Rosser), on June 28, 1909, who submitted final proof of compliance with the ordinary provisions of the homestead law, which was accepted December 9, 1912, subject to the provisions of the Reclamation act of June 17, 1902 (32 Stat., 388). The land was formerly within the Salt River irrigation project, but on December 15, 1916, it was released from the provisions of the Reclamation act. Pending this withdrawal, on March 10, 1915, Marshall Humphrey filed notice of mortgage interest in the land. August 5, 1916, he filed in the local office a sheriff's certificate of sale on foreclosure executed July 18, 1916, by the sheriff of Maricopa County, Arizona, certifying that the land embraced in the entry had been sold at sheriff's sale to the mortgagee, Marshall Humphrey, subject to redemption within six months from date of sale. May 31, 1917, Humphrey filed a sheriff's deed, executed by said sheriff, conveying the land to him. May 14, 1917, the local officers issued to Humphrey a final certificate on application filed May 4, 1917.

In the decision appealed from the Commissioner held that as the land embraced in the entry was released from the provisions of the Reclamation act prior to the expiration of the time for redemption and prior to the execution of the sheriff's deed, the provisions of the act of June 23, 1910, authorizing the assignment of reclamation homestead entries, do not apply, and further held that the action of the local officers in issuing the final certificate to the mortgagee-purchaser was erroneous by reason of the fact that the assignment had not been accepted by him.

The act of June 23, 1910, provides for the assignment of homestead entries within a Reclamation project, and by its terms such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the act of June 17, 1902, may receive from the United States a patent for the lands. By virtue of said act Humphrey became the mortgagee-purchaser of the land under the sheriff's sale, and a purchaser under such circumstance has long been recognized by the Department as an assignee under the terms of said act. (See General Reclamation circular, paragraphs 44, 45, 46, in 45 L. D., p. 396.) Humphrey complied with all the requirements of the Department in the matter of filing proper notices, and has submitted upon this appeal sufficient showing as to his qualifications as assignee, and the assignment to him is recognized and accepted.

The mortgagee-purchaser's rights, having accrued while the land was within a Reclamation withdrawal, were not affected or defeated by the release of the land from the withdrawal. The legal title to the land vested in the mortgagee-purchaser on the date of the sale of the land to him by the sheriff. As said in Murfree on Sheriffs, section 712:

> The purchaser of land at sheriff's sale is clothed with the legal title from the day of the sale. His deed whenever he subsequently obtains it, relates back to that and gives him all the legal advantages that can be derived from the transfer of the title. It defeats any intermediate conveyance or incumbrance that may have been made by the debtor * * *. The execution of the sheriff's deed is but the exercise of a bare power disconnected with any estate in the land itself. (See also Cowles v. Coffey, 88 N. C., 340.)

The fact that Rosser had the right, under the Arizona statutes (paragraph 1375, Civil Code of Arizona, 1913), to redeem the property within six months after the date of the sale, would not change this rule. All the right, title, interest, and claim of Rosser in and to the land, was acquired by Humphrey at and on the date of the sale, subject only to such right of redemption. The right of redemption, under the statute, must be strictly confined to those persons coming within its terms. It clearly should not be urged by the Government to defeat rights acquired under one of its own statutes. Especially is this true in view of the fact that the time within which redemption is allowed has long since expired and all parties who could have been affected have acquiesced in said sale. The sheriff's deed, when delivered, relating back to the date of the sale, vested Humphrey with the complete legal title as of said date, and at that time the land was within the Reclamation withdrawal. Humphrey thereby became substituted to and acquired all the right, title, interest, and claim of Rosser to the land, and upon the release of the land from the withdrawal he had the right to do what Rosser could have done,

namely, apply for and receive a final certificate, upon a proper showing of his qualifications as provided by the regulations.

The decision appealed from is reversed.

BAUER v. NUERNBERG.

Decided April 19, 1918.

CONTESTED HOMESTEAD—ALLEGED SPECULATIVE ENTRY—SUFFICIENCY OF CHARGE IN CONTEST AFFIDAVIT.

A charge in a contest affidavit that the homestead entry is speculative is sufficient if therein it is alleged that, prior to entry, the entryman offered to sell his relinquishment thereof, and that he afterwards sold the same.

Case of Stubendordt *v.* Carpenter (32 L. D., 139), cited and distinguished.

HOMESTEAD SETTLEMENT ON ENTERED LAND—PARAMOUNT RIGHT ON CANCELLATION OF ENTRY.

Homestead settlement on a tract covered by the entry of another confers no right while said entry remains of record, but on its relinquishment the right of the settler attaches at once, and is paramount to the intervening entry of a third person.

HOMESTEAD SETTLEMENT—REGULATIONS OF MAY 22, 1914.

The regulations of May 22, 1914 (43 L. D., 254), are without application where land is restored to the public domain as the result of relinquishment under section 1 of the act of May 14, 1880 (21 Stat., 140).

Cases of California and Oregon Land Co. *v.* Hulen and Hunnicutt (46 L. D., 55), and Dowman *v.* Moss (19 L. D., 526, and 176 U. S., 413), cited and distinguished.

VOGELSANG, *First Assistant Secretary:*

On May 19, 1916, Alexander Nuernberg made homestead entry, at the Minot, North Dakota, land office, for the NE. ¼ Sec. 8, T. 151 N., R. 90 W., 5th P. M., against which, on June 15, 1916, Albert Bauer filed contest affidavit, charging:

> That said homestead entry was not made in good faith; that the same was made for the purpose of sale and speculation. That before making said entry said entryman offered his relinquishment for sale for $500.00 to me, and after making said entry offered same to me for $500.00, which offers were made in writing; that on or about June 10th, 1916, said entryman closed a deal for sale of relinquishment to said land to John Berg for $550.00; that said entryman has made no improvements on said land himself, but I have broken up about thirty-five acres. Said entry has been fraudulent and void from the beginning, and said entryman never at any time has intended to comply with the homestead laws.

The affidavit was corroborated by Joe Reiswig and G. W. Kelm, who swore that they had seen letters written by entryman offering to sell his relinquishment, and that they had been on the land, and "same has no buildings."

A relinquishment of the entry and an application to make homestead entry for the land were filed on June 20, 1916, by John A. Berg, and on July 21, 1916, Bauer applied to make entry for the land, claiming a preference right under his contest, which the local officers denied. On July 28, 1916, Bauer's application to contest was formally rejected as not stating a cause of action, and on August 8, 1916, he filed an "amended affidavit of contest," amplifying the original charge.

By decision of April 2, 1917, the Commissioner of the General Land Office held that the original application to contest was insufficient, in that the charges made did not constitute a cause for contest. Bauer has appealed.

It appears that Berg's application was allowed on February 5, 1917.

The Department is unable to agree that the original contest affidavit did not allege any facts in support of the charge that the entry was speculative, such charge being followed by an allegation that both before and after making the entry, Nuernberg offered in writing to sell his relinquishment, and that he did actually sell his relinquishment to Berg.

The local officers, in rejecting the affidavit, cited Stubendordt *v.* Carpenter (32 L. D., 139). In that case the entryman contracted several months after making entry to sell his relinquishment, and the Department held that such contract was not in violation of the statute and was not ground for the cancellation of the entry, if good faith on the part of the entryman at the time of making his entry was apparent. In the present case it was charged that both before and after making the entry offers had been made to sell the relinquishment, and proof of such charge would be sufficient to warrant the conclusion that the entry was made for speculative purposes.

Bauer alleges that he was a settler on the land at the date of the relinquishment of the entry. If such was the fact, Berg's entry was made subject to such settlement right. Under the rule announced in Dowman *v.* Moss (19 L. D., 526), which has been affirmed by the Supreme Court of the United States (176 U. S., 413), if Bauer's settlement existed at the time Nuernberg's relinquishment was filed, it attached at once and was not defeated by Berg's application to make homestead entry for the land.

Nothing said by the Department in the case of California and Oregon Land Company *v.* Hulen and Hunnicutt (46 L. D., 55) in any way modified the rule announced in Dowman *v.* Moss. In the former case the land was not subject to either settlement or entry until an hour fixed. Upon presentation of three applications for the land, in two of which claims of *prior* settlements were alleged, it was held that the land not having been subject to settlement *prior* to

the time of restoration, the settlements of Hulen and Hunnicutt could not have attached prior to the application of the land company, which was presented prior to the restoration of the land and became effective at the same instant that the settlement rights attached. The disposition of the case was wholly based upon the regulations of May 22, 1914 (43 L. D., 254), while in the case at bar, as in all cases where land is restored to the public domain through relinquishment of a preemption, homestead or timber culture entry, those regulations are without application. The relinquishment of Nuernberg became effective immediately upon being filed, under section 1 of the act of May 14, 1880 (21 Stat., 140), as follows:

> That when a preemption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

In cases not controlled by regulations such as those of May 22, 1914, *supra*, it has long been settled law in the Department that as between a settler and a homestead applicant whose claims are simultaneously initiated, the settler is recognized as having the superior right. See Box *v.* Dammon *et al.*, 18 L. D., 133; Sandsmark *et al. v.* Sovick, 28 L. D., 243; O'Hornett *v.* Waugh *et al.*, 28 L. D., 267.

Accordingly the decision appealed from is reversed and the case remanded for appropriate proceedings under the regulations of April 1, 1913 (42 L. D., 71). If Berg applies for a hearing under paragraph 3 thereof, testimony may be submitted on both questions—the truth of the contest charges and the claimed settlement of Bauer.

STATE OF CALIFORNIA ET AL.

Decided April 22, 1918.

SCHOOL LANDS—INDEMNITY SELECTION—RULE OF APPROXIMATION.

The rule of approximation is administrative merely, and will not be applied to State school indemnity selections.

VOGELSANG, *First Assistant Secretary:*

The Miller and Lux Company, transferee of the State of California, has appealed from the decision of the Commissioner of the General Land Office, rendered August 24, 1917, holding for cancellation the State's indemnity school land selection for the NE. ¼ SE. ¼, Sec. 30, T. 19 S., R. 11 E., M. D. M. (40 acres), upon the ground that the selection is invalid because not supported by sufficient base.

It appears that on October 27, 1891, the State of California filed indemnity school land selection, R. and R. No. 4551, for the N. ½ SE. ¼, Sec. 30, T. 19 S., R. 11 E., M. D. M. (80 acres), in lieu of 80 acres of alleged losses in seven school districts.

On March 10, 1917, the State surveyor general of California separated the selected tract into two forty-acre tracts and redesignated base for the tracts separately, which action was approved as to the NW. ¼ SE. ¼ on the base designated therefor, but as to the NE. ¼ SE. ¼, the State land office records disclosed that the base designated included 11.86 acres of Sec. 16, T. 5 N., R. 18 W., S. B. M., which did not exist, all of said section 16 having been sold by the State many years ago.

It is contended on behalf of the transferee, upon appeal, that this is a case in which the rule of approximation should have been applied. There is no statutory authority for the rule of approximation. It grew out of the fact that a literal execution of the law was impracticable without frequent denial to entrymen of part of their entry right (31 L. D., 225). They were in no position to proffer additional area for the overplus, and failure to apply the rule in such cases might have resulted in impeding, if not defeating, the object of the law. This is not true as to a State selection.

In the case at bar the State of California disposed of part of the base designated years ago, without doubt for value received. It now owns no part of said section 16, of which 11.86 acres was proffered as base. The remaining 28.14 acres can not be accepted in exchange for a forty-acre tract, under the rule of approximation, for the reason that the State is in position to proffer other base, so that an equal exchange may be made, which, as stated, might not be so in the case of an entry claimant.

The regulations of June 23, 1910 (39 L. D., 39), provide that:

> All lists of indemnity school lands must be prepared so that each selected tract will correspond in area with the base tract, and separate base or bases must be assigned to each smallest legal subdivision of land selected.

The decision of the Commissioner was right, and is accordingly affirmed. The State will be allowed thirty days from receipt of notice in which to supply a sufficient base for said selection. Upon failure to do so within the time specified, the selection will be canceled and the case closed without further notice.

STONE DENHAM.

Decided April 25, 1918.

INSTRUCTIONS.

REPAYMENT—FORMER INDIAN LANDS—ACT OF JUNE 6, 1912.

Upon reclassification and reappraisal of former Indian lands, the entryman is entitled to repayment of the difference between the amount paid and the price fixed by reappraisal, although during the pendency of his application for reclassification and reappraisal a patent for the land has issued.

VOGELSANG, *First Assistant Secretary:*

I refer to your [Commissioner of the General Land Office] communication of April 15, 1918, requesting instructions under the facts hereinafter set forth.

On May 20, 1910, Stone Denham made homestead entry, at the Aberdeen, South Dakota, land office, for lots 1 and 2 and the S. ½ NE. ¼ Sec. 1, T. 13 N., R. 21 E., B. H. M. (159.91 acres), Cheyenne River Indian lands, under the act of May 29, 1908 (35 Stat., 460). The said lands had been classified as agricultural lands of the first class and appraised at $6.00 per acre. On May 14, 1917, Denham applied for the reclassification and reappraisal of the lands, and on January 19, 1918, the Department approved a recommendation by the Office of Indian Affairs that said lots 1 and 2 be classified as grazing land at $2.50 per acre and that the appraisal of the S. ½ NE. ¼ be reduced to $4.50 per acre.

Commutation proof was submitted on said entry, and after payment for the land at $6.00 per acre, together with interest on the deferred payments, final certificate issued May 31, 1917, followed by patent on October 10, 1917.

You submitted two questions:

1. Are the reclassification and reappraisal effective inasmuch as the lands were patented at the time the reclassification and reappraisal were approved.

2. Is the entryman entitled to have his entry adjusted to the reappraisement and to receive payment of moneys paid by him in excess thereof, including sums paid as interest on the annual installments in excess of the amounts which would have been required had the interest been computed at the reappraised price.

Action on Denham's petition, which was authorized by the act of June 6, 1912 (37 Stat., 125), was not taken within the lifetime of his entry, but the reclassification and reappraisal were in effect an admission that the prior classification and appraisal were erroneous. There is nothing in the act which requires or even authorizes the Department to withhold from Denham the benefits of the reclassification, and in my opinion the fact that patent has issued (the reclassification having been applied for prior to the issuance of final certificate) does not warrant the withholding of the amounts paid by him in excess of the price fixed in the reappraisal.

Accordingly, both your questions are answered in the affirmative.

Very truly yours,

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

CITY AND COUNTY OF SAN FRANCISCO.

Decided April 27, 1918.

RIGHT OF WAY FOR RESERVOIR SITE—ACT OF DECEMBER 19, 1913—STATUTORY CONSTRUCTION.

An amendment of its map to include additional lands necessary for the protection of its water supply, is such a change of location as may be made by the City and County of San Francisco, California, at any time prior to the completion of the work, under the first proviso to section 2 of the Act of December 19, 1913 (38 Stat., 242).

VOGELSANG, *First Assistant Secretary:*

This is an appeal by the City and County of San Francisco from the decision of the Commissioner of the General Land Office, dated December 11, 1917, rejecting its application, filed on November 19, 1917, under the act of December 19, 1913 (38 Stat., 242), for 386.81 acres of land surrounding the Priest Regulating Reservoir, and situate in Secs. 30 and 31, T. 1 S., R. 16 E., M. D. M., Sacramento, California, land district.

The lands applied for were withdrawn under the act of December 19, 1913, *supra*, and the act of June 25, 1910 (36 Stat., 847), by Executive order of January 31, 1914, and were restored to entry by Executive order of October 13, 1917. The matter has been orally argued before the Department.

On June 22, 1916, the Department approved the application and map of the city and county of San Francisco for the Priest Regulating Reservoir site and for certain lands adjacent thereto and necessary to the protection of the water of said reservoir from contamination. The reservoir site embraced an area of 46.65 acres and the adjacent protective area, 141.12 acres.

Section 1 of the act of December 19, 1913, *supra*, granted to the city and county of San Francisco certain rights of way—

> together with such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation, and maintenance of said water-power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation, and communication as may be established.

The application under consideration is based upon the fact that ownership and control of the land applied for by the City and County of San Francisco are necessary for the protection of its proposed water supply from contamination as it passes through the Priest Regulating Reservoir.

Section 2 of the said act of December 19, 1913, provides, in part, as follows:

> That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations, and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: *Provided, however,* That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes of location of said rights of way or lands shall operate as an abandonment by the city and county of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original map: *And provided further,* That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided for herein.

In the decision appealed from the Commissioner of the General Land Office held, in substance, that any application for a change of location must have been filed within three years from the date of the passage of the act of December 19, 1913; that such is the effect of that Executive order of restoration, dated October 13, 1917, and that the application presented was not for a change of location, but an original application for an additional area and, therefore, filed out of time.

The project of the City and County of San Francisco contemplates a large reservoir above Priest Regulating Reservoir, the water to be transmitted to the latter by means of an underground aqueduct. At the Priest Regulating Reservoir the water is to be dropped to a power house below, the generation of hydro-electric power being required of the city under section 9 of the act of December 19, 1913. The Priest Regulating Reservoir is necessary to the proper regulation of the flow of water in connection with the hydro-electric development. Here is the only point at which the water is exposed to the air, and it is therefore necessary, since it is to be used for domestic purposes, that it be protected from contamination. The original application and maps embraced what was then thought to be the area which drains into the regulating reservoir. Surveys have shown that the area now applied for is within its watershed.

This project of the City and County of San Francisco is an enormous undertaking, requiring a huge expenditure of money over a considerable period. Under such circumstances, it is obvious that all contingencies can not be foreseen and that changes of plan will become necessary as the work progresses. That this would be the case was recognized in section 2 of the granting act, as above quoted. That section required the filing of maps for rights of way and lands desired by the city and county within three years from its date, but permitted changes of location at any time before the final completion of the work. If the present application be for change of location, it was filed in time, and the Commissioner's ruling in that regard was erroneous.

In recommending to the President the signing of the restoration order of October 13, 1917, this Department stated, in its letter of October 11, 1917:

> Aside from the lands appropriated by the city and county the withdrawn lands are no longer subject to appropriation by the city and county inasmuch as the time for so doing under the granting act expired December 19, last. I recommend, therefore, that you sign the inclosed order.

The language quoted refers to the first part of section 2 of the act of December 19, 1913, and has no relation to changes of location which are permissible under the first proviso of that section.

The determination of the question presented by the appeal of the City and County of San Francisco rests upon the definition to be given to the word "change" in the first proviso to section 2 of said act. A change as to an application for a right of way or lands may, of course, be total or partial, or may involve an increase or diminution of area. The scope and meaning of the word, in this statute, should be so determined as to advance, not defeat, the main purpose of the act, namely, the securing of an adequate supply of pure water to the City and County of San Francisco. The grant covered all lands within the territory specified, irrespective of width or length, as might be determined by this Department to be necessary or properly incident to the accomplishment of that purpose. While the act required the City and County of San Francisco, within three years from the date of its passage, to file its application and maps "showing the boundaries, locations, and extent of said proposed rights of way and lands," the proviso under consideration makes it perfectly clear that its rights are fixed, not by such preliminary application and maps, but by this Department, in the light of the situation as it shall be revealed at any time "before the final completion of any of said work." It is now shown that the preservation of the Priest Regulating Reservoir site from pollution requires amendment of the application and maps heretofore filed to

include the additional land sought. The grant made by the statute attaches upon this adjudication by the Department, unless its hands are tied by an interpretation of the word "change" which would defeat the purpose of the grant, though another meaning of that term, in harmony with such purpose, is available. "Change" of filing, location, or entry is not a new expression in public land legislation, but is found in the act of February 24, 1909 (35 Stat., 645), and several older acts relating to the same subject, wherein it had been held to mean "amend or alter," in whole or in part; and while amendment under most public land laws has been limited to the area originally entered, that rule has been due to the fact that the area entered fixed the right, whereas here the area needed determines the grant. The City and County of San Francisco is not required, under any fair construction of the proviso, to relinquish any part of the lands originally applied for in order to avail itself of the right conferred by that proviso, except to the extent that such lands are not necessary to the project.

The decision appealed from is, accordingly, reversed, and the record returned for appropriate action in harmony herewith.

LANDS WITHIN FORMER FORT PECK INDIAN RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 4, 1918.

REGISTER AND RECEIVER,
GLASGOW, MONTANA:

I am in receipt of your letter dated March 2, 1918, in which you ask to be advised as to the withdrawal, for the purpose of sale, of lands within the former Fort Peck Indian Reservation, Montana.

Section 11 of the act of May 30, 1908 (35 Stat., 558), reads as follows:

> That all lands hereby opened to settlement remaining undisposed of at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre, under regulations to be prescribed by the Secretary of the Interior; and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder for cash, without regard to the minimum limit above stated: *Provided*, That not more than six hundred and forty acres shall be sold to any one person or company.

Lands within the reservation became subject to settlement and entry as prescribed by proclamation dated July 25, 1913, March 21,

1917, April 28, 1917, and March 14, 1918. Nonmineral lands which became subject to settlement under the first proclamation will be automatically withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, on July 25, 1918, if then undisposed of. The mineral or coal lands which became subject to disposition with a reservation of the coal deposits under the later proclamations, will remain subject to entry for the full period of five years from the date of the proclamation under which they were opened. If undisposed of at that time, they will then automatically be withdrawn from disposition under the homestead and desert land laws, for the purpose of sale.

Homestead and desert land entries may be allowed after July 25, 1918, for nonmineral lands on the reservation under the following circumstances:

(A) A settler on the lands may make entry after July 25, 1918, if he made settlement within three months prior to that time, and presents a proper application to enter within the three months allowed for that purpose.

(B) Lands which on July 25, 1918, are embraced in a homestead or desert land entry may be reentered if such entry is canceled on contest, relinquishment or otherwise.

(C) Lands which on July 25, 1918, are embraced in a prior withdrawal may be entered if such prior withdrawal is revoked.

Section 9 of the act of Congress approved August 1, 1914 (38 Stat., 593), provides:

> That the Secretary of the Interior is hereby authorized to make allotments in accordance with the provisions of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-eight) to children on the Fort Peck Reservation who have not received, but who are entitled to, allotments as long as any of the surplus lands within said Reservation remain undisposed of, such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe.

The section last cited will permit allotments to Indians to be made on the lands withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, until such time as the sale is directed by the Secretary of the Interior.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

CITIZENSHIP PAPERS—ACCEPTANCE AND RETURN.

INSTRUCTIONS.

[Circular No. 599.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 14, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The following instructions will, after July 1, 1918, govern in the matter of accepting evidence regarding citizenship in public land cases and of returning citizenship papers to the parties:

1. As stated in the instructions of February 20, 1918, Circular No. 589 [see page 297], you will not accept as showing an applicant's status, evidence of a declaration of intention to become a citizen executed more than seven years before the date of the filing, unless it be shown that there is pending a petition for naturalization pursuant thereto, filed within seven years after the date of the declaration.

2. You will not accept as evidence of a party's status, a triplicate declaration of intention to become a citizen of the United States or an original certificate of naturalization issued since September 26, 1906; but if such evidence be offered, you will return it to the party and will allow him 30 days after notice within which to furnish a certified copy of the paper made by the clerk of the court whence it issued, on the form prescribed by the Bureau of Naturalization. An original paper issued on or before the date mentioned, or a certified copy thereof, will be received as heretofore.

3. Where a party states his status as to citizenship and refers to evidence thereof already on file in the General Land Office you will accept this as sufficient, provided he furnishes such data as will serve to identify the application or entry with which the paper is alleged to have been filed.

4. No triplicate declaration of intention, or original certificate of naturalization issued since September 26, 1906, will hereafter be returned by this office to the party, or to any person applying therefor on his behalf. He must file application therefor with the clerk of the court named in the document, making arrangement with said official to supply a certified copy for the files of this office, and furnishing a description of the land involved or such other data as will enable this office to identify the case in which the paper was filed. The clerk will thereupon forward the request for its return (as well as said copy) to the Bureau of Naturalization, Department of Labor, and the document will be returned through the same channel, if favorable recommendation be made by that bureau.

5. If the declaration of intention or certificate was filed with an application which has been rejected, this office will return the document direct to the applicant on his personal request therefor.

6. Request for the return of a certificate of naturalization issued prior to September 27, 1906, should be sent to this office direct and the paper will be returned, provided it be clearly shown that the person applying therefor is the proper person to receive the paper. Triplicate declarations of intention as well as copies of declarations, more than seven years old, are of no value to the parties and will be retained in the files of this office.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—RIGHTS IN CONNECTION WITH PUBLIC LANDS.

[Circular No. 600.[1]]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Section 501 of the act of March 8, 1918 (Public No. 103), known as the Soldiers' and Sailors' Civil Relief Act, provides:

"That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the act entitled 'An act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war,' approved July twenty-eighth, nineteen hundred and seventeen; the act entitled 'An act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war,' approved August seventh, nineteen hundred and seventeen; the act entitled 'An act to provide

[1] See page 343.

further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' approved August tenth, nineteen hundred and seventeen; the joint resolution 'To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service,' approved July seventeenth, nineteen hundred and seventeen; or any other act or resolution of Congress: *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated prior to entering military service, before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the register of the United States Land Office."

2. You will observe that the purpose of said section is generally to enlarge, but in no respect to limit, the benefits conferred upon persons in the military or naval service in connection with public-land claims by the acts and resolution therein mentioned, or any other act or resolution of Congress. No attempt will be made to issue detailed instructions to govern the many situations which will arise under the several public-land laws and this act, though it may be said that the general purpose of the act is to relieve claimants, under the conditions stated, from the penalty of forfeiture on the ground of their failure to do any act required by the law under which their claims are made during the period of their military service. The Department has already had occasion to hold that the act has effect to suspend payments by those in the military or naval service in connection with homestead entries for ceded Indian lands, and for lands within reclamation projects.

3. With respect to payments on homestead entries for ceded Indian lands, by the instructions of November 20, 1917 (Circular No. 574), you were advised that where a person entered land formerly embraced in an Indian reservation for which payment of a certain price per acre for the benefit of the Indians was required, and thereafter entered the military or naval service of the United States, the entry

would not be canceled on account of the failure of the soldier or sailor to make payment of any amounts falling due during the term of his enlistment, but such entry would be held suspended, pending consideration by Congress of legislation designed to extend the time for such payments during the period of military service or the existing war. As said act of March 8, 1918, operates to grant such extension, no entries will be canceled upon the ground indicated until the expiration of six months after the end of the war and after the discharge of the entryman from the service, unless such discharge shall have occurred at an earlier date, in which case said six-month period will begin to run from the time of his discharge.

4. In cases where the entryman has filed notice of his entrance into the military or naval service, as permitted by paragraph 8 of the circular of instructions of August 22, 1917, issued under the act of July 28, 1917, you will nevertheless call upon him for the payment when due, but will in your notice inform him that he is entitled to the benefits of said act of March 8, 1918, and need not make such payment while in the service unless he wishes to do so. In all cases where there is response by him or on his behalf that he has entered the military or naval service, you will forward the papers to this office with your report.

5. The same procedure should be followed in connection with payments required under other classes of entries.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SARAH E. LEWELLEN.

Decided May 20, 1918.

RECLAMATION FARM UNITS—EXCHANGE—CONDITIONS OF ASSIGNMENT.

Where, prior to an exchange of reclamation farm units under the act of March 4, 1915 (38 Stat., 1215), the entryman has, in connection with the original unit, fulfilled the ordinary homestead requirements and submitted proper proof thereof, the lieu farm unit may be assigned, under the act of June 23, 1910 (36 Stat., 592), subject to compliance with the requirements of the Reclamation law as to payment, reclamation and cultivation.

VOGELSANG, *First Assistant Secretary:*

April 23, 1908, Sarah E. Lewellen made homestead entry 01116 for lots 2, 3 and 4, Sec. 18, T. 48 N., R. 9 W., N. M. P. M., 150.19 acres, Montrose, Colorado, land district. The land involved is in the Un-

compahgre Valley reclamation project, and such entry was made subject to the provisions of the Reclamation act of June 17, 1902 (32 Stat., 388). October 18, 1913, the Commissioner of the General Land Office accepted the entrywoman's final proof of compliance, in connection with her entry, with the ordinary provisions of the Homestead law.

October 29, 1913, the entrywoman filed in the local office homestead application 09729 to exchange farm units under the provisions of the act of March 4, 1915 (38 Stat., 1215), for unit "H," or the E. ½ SW. ¼, Sec. 32, T. 51 N., R. 11 W., N. M. P. M., within the same reclamation project and land district. This application, upon proper showing therefor, was allowed December 31, 1915.

May 19, 1917, there was filed in the local land office a deed, executed by Sarah E. Lewellen, conveying the land embraced in her entry, now unit "H," to Marguerite Katherine Moynihan, an affidavit of assignor executed by Lewellen, and affidavit of assignee executed by Moynihan; also an affidavit of assignee executed by John A. Spring, and affidavit of assignor by Moynihan, and a deed executed by Moynihan, conveying the land involved to John A. Spring. Such instruments were intended to be an assignment of the entry, though a *mesne* assignee, to John A. Spring.

January 29, 1918, the Commissioner of the General Land Office rejected such assignments as follows:

> The Act of March 4, 1915, authorizing the exchange of farm units provides "that such entrymen shall be given credit on the new entry for the time of bona fide residence maintained on the original entry," but does not provide that the entrymen shall be given credit for the cultivation and improvements of the original entry. The entrywoman Lewellen will, therefore, be required to cultivate and improve the land embraced in H. E. 09729 for a period of three years from the date of making entry and will then be required to submit the final proof in connection therewith. The Act of June 23, 1910 (36 Stat., 592), provides that assignments of reclamation homestead entries may be made by entrymen after filing with the Commissioner of the General Land Office satisfactory proof of residence, improvement and cultivation for the time required by law. As the entrywoman in this case has not submitted final proof in connection with the entry, there is no authority of law whereby it may be assigned and the attempted assignments are hereby held for rejection, subject to the assignees' right to appeal within 30 days from notice hereof.

From this decision appeal has been taken to the Department.

The record has been examined in connection with the law applicable thereto and the Department is unable to concur in the conclusion reached by the Commissioner. The act of March 4, 1915 (38 Stat., 1215), under which the exchange of lands made in this case was approved, reads as follows:

> That any person who has made homestead entry under the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight), for land believed to be susceptible of irrigation

which at the time of said entry was withdrawn for any contemplated irrigation project, may relinquish the same, provided that it has since been determined that the land embraced in such entry or all thereof in excess of twenty acres is not or will not be irrigable under the project, and in lieu thereof may select and make entry for any farm unit included within such irrigation project as finally established, notwithstanding the provisions of section five of the Act of June twenty-fifth, nineteen hundred and ten, entitled "An Act to authorize advances to the reclamation fund," and so forth, and acts amendatory thereof: *Provided*, That such entrymen shall be given credit on the new entry for the time of bona fide residence maintained on the original entry.

The act of June 23, 1910 (36 Stat., 592), under which assignment is made, provides as follows:

That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the Act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said Act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation Act.

It appears from the record that the entrywoman complied with the requirements of the Homestead law as to her original entry and submitted proof thereof. The Commissioner's decision finds this proof to have been satisfactory, but holds that she is required to cultivate and improve the land embraced in the lieu entry made under the act of March 4, 1915, *supra*, for a period of three years and to submit proof thereof. Further, that as no final proof had been submitted in connection with the new entry, it was not subject to assignment.

The act of March 4, 1915, was a remedial statute, designed to relieve persons who had made homestead entries upon lands within reclamation projects believed to be susceptible of irrigation, but subsequently determined to be nonirrigable. Such persons were given the privilege of surrendering the original entries and selecting in lieu thereof any farm unit included within the irrigation project as finally established, the entryman in such case to be given credit "on the new entry for the time of bona fide residence maintained on the original."

In cases where full compliance with the Homestead law had not been had upon the original entry, entryman would, of course, be required to complete such compliance upon the new; but in this case, as already stated, full compliance had been had with the requirements of the Homestead law. The only thing remaining to be done, in the view of the Department, in such a case, is compliance with

the requirements of the Reclamation law as to irrigation, and cultivation of one-half the irrigable area of the new entry, and the payment of all charges due in connection with the new entry. In other words, the status of such an entryman with respect to the new entry is identical with the status existing under the original. Therefore, in such case as the one now before the Department, it is my opinion that neither the entrywoman nor her successors in interest are required to further comply with the provisions of the general homestead laws upon the new entry, that such a claim is subject to assignment under the act of June 23, 1910, *supra*, and that the assignee takes the land subject to compliance with the requirements of the Reclamation law as to payment of charges and reclamation and cultivation of the area of the entry required by that law.

The decision appealed from is reversed and the case returned to the General Land Office for action in accordance herewith.

RELIEF OF DESERT-LAND ENTRYMEN, ACT OF MARCH 4, 1915, AS AMENDED BY ACT OF MARCH 21, 1918.

INSTRUCTIONS.

[Circular No. 602.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 22, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Under the provisions of the act of March 21, 1918 (Public No. 108), a copy of which is appended, the relief provided for in the last three paragraphs of section 5 of the act of March 4, 1915 (38 Stat., 1161), is extended to lawful desert-land entries initiated prior to March 4, 1915, provided they were pending on March 21, 1918; and as to assigned entries made prior to March 4, 1915, relief is authorized where the transfer was made prior to March 21, 1918.

Except as herein modified the regulations set forth in paragraphs 34 to 51 of Circular No. 474 (45 L. D., 345) will be observed in acting on applications for relief presented pursuant to this legislation.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Public No. 108, Sixty-fifth Congress. [H. R. 175.]

AN ACT To amend an Act entitled "An Act making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and fifteen and for prior years, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the last three paragraphs of section five of the Act of March fourth, nineteen hundred and fifteen, "An Act making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and fifteen, and for prior years, and for other purposes," be, and the same are hereby, extended and made applicable to any lawful pending desert-land entry made prior to March fourth, nineteen hundred and fifteen: *Provided,* That in cases where such entries have been assigned prior to the date of the Act the assignees shall, if otherwise qualified, be entitled to the benefit hereof.

Approved, March 21, 1918.

SWAMP-LAND GRANTS AND MINERAL LANDS.

May 25, 1918.

INSTRUCTIONS.

VOGELSANG, *First Assistant Secretary:*

Under date of April 20, 1918, you [Commissioner of the General Land Office] submitted an inquiry as to whether mineral lands are included in the swamp-land grant. The question has arisen in connection with the letter dated March 27, 1918, of Charles E. Bauer, of Baton Rouge, Louisiana, representing the holder of title from the State, as to the status of lots 2 and 3, Sec. 5, T. 12 N., R. 11 W., L. M. The letter referred to accompanies your communication.

It would appear that on May 25, 1896, your office rejected the State's swamp-land claim to the land above described because the field notes of survey did not show said lots to be swamp in character. June 24, 1916, the Department, upon the showing of one John M. Nabors, claiming title under the State's selection made in 1859, ordered the selection reinstated under paragraph 1 of instructions of October 1, 1903 (32 L. D., 270, 276). July 25, 1916, your office promulgated the Department's decision and reinstated the swamp-land claim. August 11 and October 31, 1916, the local officers acknowledged receipt of copies of the Department's decision and reported that they had not notified the State or Nabors because the lands were mineral, being included in petroleum withdrawal No. 48, Louisiana No. 2, made by Presidential order of May 22, 1916. November 3, 1916, your office directed the suspension of the promulgation and so advised the Department, action to be withheld until it should

be determined whether mineral lands fell within the swamp-land grant.

The act of March 2, 1849 (9 Stat., 352), granted to the State of Louisiana swamp and overflowed lands. Section 2 provided for the listing of such lands, subject to the approval of the Secretary of the Interior, "and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof." Only those lands not claimed or held by individuals and not included in special surveyed lots or tracts fronting on water courses were to be listed and approved.

The general swamp act of September 28, 1850 (9 Stat., 519), specifically extended to and its benefits were conferred upon each of the States of the Union in which swamp and overflowed lands were situated. The act provided that it should be the duty of the Secretary of the Interior to make out lists and plats and transmit the same to the governors of the several States, and at the request of the governor of any State to "cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State * * *." This later act was more liberal in the terms of the grant than was the act of 1849 and it was early held to be also applicable to the State of Louisiana. As the Department is advised, it has been the practice, in recent years at least, to issue patents for swamp lands in the State of Louisiana. The legislation with respect to patents, as carried forward in Revised Statutes, section 2480, is general in terms and would appear to authorize issuance of patents for Louisiana swamp lands. By the act of March 12, 1860 (12 Stat., 3), the benefits of the swamp-land grant were extended to the States of Minnesota and Oregon.

In none of the acts mentioned is there contained any express reservation or exception of mineral lands. It remains to be seen, therefore, whether public policy and the statutes extant justify an implied exception or reservation of mineral areas in connection with the swamp grants.

From a very early day, salt springs, salines and lead mines were reserved from sale and disposition by the Government. The Preemption act of September 4, 1841 (5 Stat., 453, 456), in section 10, provided that "no lands on which are situated any known salines or mines shall be liable to entry" under that act. The Oregon Donation act of September 27, 1850 (9 Stat., 496, 500), expressly stated that no mineral lands, nor lands reserved for salines, should be liable to any claim thereunder.

The confirmatory act of July 23, 1866 (14 Stat., 218), entitled "An Act to quiet land titles in California," provided that in all cases where the State had theretofore made selections of any portion of

the public domain in part satisfaction of any grant and had disposed of the same to purchasers in good faith, the lands so selected should be, and were thereby, confirmed to the State—

Provided, That no selection made by said State contrary to existing law shall be confirmed by this act for lands to which any adverse preemption, homestead or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States * * * or to any mineral land.

This act is applicable to swamp-land selections as well as to selections of other classes. Section 2485, Revised Statutes, was based upon said act, which section, in part, reads as follows:

All selections of any portion of the public domain, to which no homestead, preemption or other right has been acquired by any settler under the laws of the United States, and not being mineral land, * * * are confirmed to the State of California.

This legislation is essentially a Congressional declaration to the effect that mineral lands are not to be included within the swamp-land grant.

Turning to the decisions of the Supreme Court of the United States, it is found that as early as 1840 the court used the following language in the case of United States *v.* Gratiot (14 Peters, 526, 538, 13 U. S., 648):

It has been the policy of the Government, at all times in disposing of the public lands, to reserve the mines for the use of the United States.

Similar expressions along this line are contained in other decisions as follows:

The policy of the Government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. [Morton *v.* Nebraska, 21 Wall., 660, 667.]

Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. [Jennison *v.* Kirk, 98 U. S., 453, 458.]

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when

the surveys of it were made, did not pass to the State under the school-section grant. [Mining Company *v.* Consolidated Mining Company, 102 U. S., 167, 174.]

In several acts of Congress relating to the public lands of the United States, passed before July, 1866, lands which contained minerals were reserved from sale or other disposition. * * *

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar and copper, can be obtained under the pre-emption or homestead laws or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. [Deffebach *v.* Hawke, 115 U. S., 392, 400, 404.]

The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition. * * * In all of these cases, and in all grants of public lands in aid of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such a grant been held to pass them. * * *

It [Interior Department] can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance. [Barden *v.* Northern Pacific Railroad, 154 U. S., 288, 317, 327.]

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. * * * In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction. [Burke *v.* Southern Pacific Railroad Company, 234 U. S., 669, 691.]

In the very recent case of United States *v.* Sweet, decided January 28, 1918 (245 U. S., 563), the Supreme Court had occasion to go into a question essentially similar to the one under consideration. The Utah school grant, which contained no exception of mineral land, was there involved. The Circuit Court of Appeals for the 8th Circuit (226 Fed., 421), had held that the grant carried mineral (coal) lands. That decision was reversed. In the course of the opinion the Supreme Court, through Mr. Justice Van Devanter, used the following language:

While the early land laws occasionally and specially provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal; and this purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown in the Oregon Donation Act, the Homestead Act (which adopted the mineral land reservation of the Preemption Act of 1841), the grant to the several states for the benefit of agricultural colleges, the railroad land grants and other land acts of that period. Noticeable among those acts is one which, in dealing with grants to Nevada and surveys in that state, declared, "in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale," chapter 166, paragraph 5, 14 Stat. 86, and another declaring, "no act passed at the first session of the Thirty-Eighth Congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 Stat. 567. Although applied in one instance to lands in Nevada and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress that every grant of public lands, whether to a state or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and permanent in their nature—the first in enlarged terms as section 2318 (Comp. St. 1916, paragraph 4613) and the other as section 2346 (section 4658).

The early case of Cooper *v.* Roberts (18 How., 173) has been relied upon as authority for holding that mineral lands pass under a grant unless specifically reserved. That case involved a school section in Michigan, and, in concluding its opinion, the Supreme Court, in United States *v.* Sweet, *supra*, used the following language:

* * * Some observations in the opinion are not in accord with our present conclusion. These were relied upon in Mining Co. *v.* Consolidated Mining Co., *supra*, as our records show, and were in effect disapproved. Besides, when they were made the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were afterwards enacted and carried into the Revised Statutes. See Lindley on Mines (3d Ed.) section 136. The case, therefore, is neither controlling nor persuasive here.

In his opinion of September 11, 1916, the Acting Attorney General held, in effect, that mineral (petroleum) lands passed under the Louisiana swamp-land grant for the reason that there was no exception of mineral in the grant, and cites said case of Cooper *v.* Roberts, *supra*, in support of his conclusion. This expression of opinion is *obiter* for the reason that the question under consideration had been effectually disposed of by the conclusion reached in the earlier portion of the Acting Attorney General's decision.

The Department has, on a number of occasions, held that mineral lands do not pass even where the granting act contains no exception of them. It so determined with reference to the Nevada school land

grant of March 21, 1864 (13 Stat., 30), in the case of Keystone Lode *v.* Nevada (15 L. D., 259). A similar holding was made with reference to the railway grant of May 17, 1856 (11 Stat., 15), to the State of Florida, in the case of Florida Central and Peninsula Railroad Company (26 L. D., 600). The Department has uniformly so held with respect to the grants to the State of Utah. See Utah *v.* Allen (27 L. D., 53); Richter *v.* Utah (27 L. D., 95); State of Utah (29 L. D., 69); and State of Utah (32 L. D., 117).

The leading text writers upon mining matters have taken a like view with respect to the law in this regard. Snyder, in his work on Mines, pages 135, 187 and 198, uses the following language:

Enough is shown by the foregoing sections to indicate that, as a general rule, the mineral lands have been excepted from the operation of grants to the states by the general government. * * *

We have already adverted to the effect of the general policy of the government to dispose of mineral lands only in one way, and to reserve them in all cases where their express disposition is not authorized, and to reserve them in all cases where grants of lands are made in aid of any *quasi*-public function. * * *

The general policy is announced by the statute itself in the following words: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise directed by law." * * *

It will thus be seen that in all grants to the state composing the public mineral-land states of the Union in aid of education and for other state purposes, including the regular school sections sixteen and thirty-six, congress has in many instances excepted by express provisions from the grant all mineral lands, known mines and salines; and that in all other cases where the policy has not been expressed in the statute, it has nevertheless been recognized and enforced by the courts to the end that those grants do not convey mineral lands. In general, it may be said, the rule which governs the acquisition of mineral lands applies with equal force to these grants; and decisions under the one, as a general rule, bear with equal force upon the questions involved in the other. Whence it follows that upon these sections, at any time prior to the confirmation by the commissioner to the state, valid mining locations may be made and possession taken thereunder.

In Lindley on Mines, Third edition, pages 239, 241 and 245, are found the following expressions of opinion:

Kindred exceptions were inserted in all the more recent grants; but in some of the earlier ones, notably those donating sixteenth and thirty-sixth sections, and the five hundred thousand acre grant, the law was silent as to mineral lands. But, as we have already seen, the uniform policy of the government prior to the enactment of the general mining laws was to reserve mineral lands from sale, pre-emption, and all classes of grants. Of course, since the passage of the mining laws, title to mineral lands can be obtained only under these laws. * * *

* * * No lands can be selected or located in satisfaction of *any* of the grants to the States which at the time of the proposed selection are known to be mineral lands. * * *

It follows that land chiefly valuable for its deposits of petroleum never could, nor can it now, be selected by the States in satisfaction of any of their grants.

The foregoing citations point to but one conclusion. This Department feels impelled to conclude that mineral lands were not included within the scope of the swamp-land grant and should not be patented thereunder. It is true that such grant has been denominated a grant *in praesenti*, and the question at once arises as of what date is the mineral character of the land to be determined. Until the selected lands are finally approved and certified or patented to the State the fee simple title remains in the Government. The claim of the State is *sub judice* and the grant is in course of administration until title has passed.

In the case of Rogers Locomotive Works *v.* Emigrant Company (164 U. S., 559, 570, 574), the following language was used:

> While, therefore, as held in many cases, the act of 1850 was *in praesenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act. * * * It belonged to him (the Secretary of the Interior), primarily, to identify all lands that were to go to the State under the act of 1850. When he made such identification, then, and not before, the State was entitled to a patent, and "on such patent" the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.

In the case of Little *v.* Williams (231 U. S., 335, 340) the court, after quoting the above language, continued as follows:

> What was there said has since been regarded as the settled law upon the subject. * * *
>
> As this land was never so identified, and, so far as appears, its identification was never even requested by the State, it follows that, even if at the date of the act the land was in fact swamp or overflowed, the State never acquired more than an inchoate title to it, a claim which was imperfect both at law and in equity.

In the case of Chapman and Dewey Lumber Company *v.* St. Francis Levee District (232 U. S., 186, 198), the following appears:

> But it is said on behalf of the levee district that, even though the lands were not included in the patent, they passed to the State under the Swamp-Land Act independently of any patent, and passed thence to the district under the state act of 1893. The contention is not tenable. The lands were never listed as swamp lands and their listing does not appear to have been ever requested, doubtless because they were not surveyed. Assuming that in fact they were swamp lands, the State's title under the Swamp-Land Act was at most inchoate and never was perfected. Not only so, but the State relinquished its inchoate title to the United States as part of a compromise and settlement negotiated in 1895, and the relinquishment is binding upon the levee district as a subordinate agency of the State.

The claim of a State being incomplete and inchoate until patent, the mineral character of the land may be investigated and determined by the Department up to the time patent issues in accordance with the doctrine announced by the Supreme Court with reference

to railroad grants in the case of Barden *v.* Northern Pacific Railroad Company (154 U. S., 288). If claimed swamp-lands are ascertained to be in fact mineral in character, patent must be denied, because mineral lands are not included within the operation of the swamp-land grant. However, this principle is held to be applicable only in those States where the general mining laws operate.

In passing, it may be stated that the fact that a tract of land is included within a petroleum withdrawal does not necessarily establish its mineral character. Under certain conditions, claims may be passed to patent notwithstanding the existence of such a withdrawal. See the case of Henry Hildreth on rehearing (46 L. D., 17). In the case of State of Louisiana, decided by the Department April 19, 1917, unreported, involving the State's swamp-land claim to lots 1 and 2, Sec. 19, T. 17 N., R. 13 W., included in this same withdrawal, upon the showing there submitted, it was concluded that the lands were in fact nonmineral and that patent should issue.

With regard to the specific matter here presented, data should be obtained, if the same are not already at hand, sufficient to enable the land department to ascertain and determine the actual character of the land claimed. A report from the Geological Survey, or possibly from the Field Service, and a showing on behalf of the State, are available sources of information. Upon the actual facts disclosed appropriate action should be taken by your office in accordance with the views herein above set forth.

STATE OF NEW MEXICO.

Decided May 28, 1918.

SCHOOL LANDS—UNSURVEYED SECTION TENDERED AS BASE.

By the terms of Section 2275 of the Revised Statutes as amended by the act of February 28, 1891, where unsurveyed school sections are embraced within a reservation, it is unnecessary that they be identified by the public survey as a prerequisite to acceptability as base for lieu selection by the State, protraction or other method approved by the Secretary of the Interior sufficing.

LANDS RESERVED FOR INDIAN PURPOSES—TENDERED BY STATE AS BASE.

Certain unsurveyed lands in New Mexico reserved for Indian purposes, and upon which were located several fourth section Indian allotments, were tendered by the State as base for a lieu selection. *Held*, That such lands were acceptable base, although it had not been determined whether they would be permanently reserved for Indian purposes.

VOGELSANG, *First Assistant Secretary:*

The State of New Mexico has appealed from a decision of August 17, 1916, by the Commissioner of the General Land Office, holding for cancellation its indemnity school selections of certain tracts, offering as base therefor 502.80 acres in Sec. 2, T. 8 N., R. 6 W.,

N. M. M., claimed to have been lost to the State on account of the offering as base therefor 502.80 acres in Sec. 2, T. 8 N., R. 6 W., Laguna Pueblo grant.

The official plat of survey of T. 8 N., R. 6 W., approved August 31, 1881, shows an area of 137.20 acres of section 2 as surveyed and as lying outside of the grant mentioned and the remainder of the section as being within the grant.

August 22, 1899, the United States Court of Private Land Claims, by authority conferred on it by the act of March 3, 1891 (26 Stat., 854), confirming the grant in part, excluded from it the lands in said T. 8 N., R. 6 W. The land in the township is unsurveyed, except as to the area above mentioned, which had been surveyed prior to the decision of the court.

The reason assigned by the Commissioner for the action taken was "There is no authority for the granting of indemnity for an alleged loss in an unsurveyed township."

This holding is assigned as error in the appeal. It is further contended that while there is no loss to the State on account of the grant mentioned in its selection, and admitting that the State erred in claiming loss on that ground, nevertheless the State is entitled to its selections because the section offered as base is in an existing withdrawal or reservation made by the Secretary April 12, 1904, for the benefit of the Laguna and Acoma Pueblo Indians.

The Assistant Commissioner, in his communication of October 3, 1916, transmitting the case on appeal, refers to the withdrawal for Indian purposes, but appears to regard this as affording no sufficient ground for indemnity, because of its temporary character, which was to hold the land from disposal—

> Until a proper investigation can be made of the needs of the Indians as will tend to show whether or not the lands should be permanently reserved for them.

He further reported that no permanent reservation had been made up to that time, but that nine fourth-section Indian allotments, embracing 338.67 acres in said section 2, had been made, but had not been approved.

It now appears that under date of March 21, 1917, all of the lands in said township were withdrawn by the President and set apart as a reservation for the benefit of certain Indians, excepting any tracts therein the title to which had passed out of the United States or to which valid legal rights had attached.

The enabling act of June 20, 1910 (36 Stat., 561), for the admission of New Mexico into the Union, provides, in section 6, in part, as follows:

> That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this

act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein.

Section 2275 Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), in part provides:

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein.

Under the above legislation, the holding of the Commissioner would be clearly untenable in view of the present status of the lands offered as base. Such a ruling could only have application in case of loss for some cause other than by a reservation, because in the latter it is provided that the area of loss shall be determined by "protraction or otherwise." See State of California (15 L. D., 350).

It is believed that the character of withdrawal or reservation affecting this land at the time of the selections brings it within the provisions of the act of June 20, 1910, *supra*, and section 2275 Revised Statutes, so as to afford proper base for indemnity selection. In his opinion of September 20, 1910 (see 39 L. D., 411, 413), Acting Attorney General Fowler, speaking of temporary withdrawals with a view to possible use for forest purposes, stated:

Where lands have been withdrawn for a definite purpose, I see no impropriety in saying that they are "reserved" for that purpose or in speaking of them as constituting a "reservation" for that purpose. So, the withdrawn lands referred to in your letter may be properly designated as a "reservation," since they are set aside and reserved from sale or other disposition until their availability for forest purposes shall have been determined.

In the case of the State of California (37 L. D., 499, 501), the Department said:

It will thus be seen that the base land was temporarily withdrawn December 13, 1904, and for more than four years thereafter remained in that condition. To hold that for a period of more than four years, during which time the desirable public lands in the State were being rapidly disposed of, the State must remain passive and await the final action of the land department of the Government respecting lands which are temporarily withdrawn, is to impose upon the State conditions which it is believed are wholly inequitable, and not at all compatible with the meaning of section 2275, as amended.

It is undoubted that while a temporary withdrawal exists lands embraced therein are not subject to disposal under any of the public land laws, and if, while so withdrawn, the lands are surveyed and thereafter placed in a permanent reservation, it is not believed that the State would acquire any right to school sections involved until the reservation embracing them should be finally extinguished.

In State of Wyoming (27 L. D., 35, 39), it was held:

The words, "or other reservation" here used, when considered in the light of existing conditions, include and manifestly were intended to include every reservation (other than Indian or military) or withdrawals of lands for a public purpose, without respect to whether they should be temporary or permanent in character, and irrespective of the purpose for which such reservation or withdrawal was made. In other words, after specifically providing for Indian and military reservations, these words provide generally for *all other reservations* made by the United States for public purposes.

See, also, State of California (20 L. D., 327), and United States *v.* Grand Rapids and Indiana Railroad Company (17 L. D., 420).

In view of the withdrawal and reservation of the land offered as base for indemnity, the selections will be allowed, in the absence of other objection.

The decision appealed from is accordingly reversed.

CITIZENSHIP PAPERS—ACCEPTANCE AND RETURN—CIRCULAR NO. 599 MODIFIED.

INSTRUCTIONS.

Washington, D. C., May 29, 1918.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

The Bureau of Naturalization, Department of Labor, has informally requested this Department to modify paragraph 4 of the circular (No. 599) of May 14, 1918.[1] It is represented by that Bureau that for the present it has discontinued returning the papers, referred to in said paragraph, through clerks of court, having adopted the practice of forwarding the papers to an inspector, who satisfies himself of the identity and loyalty of the persons named therein; that to comply with the provisions of said paragraph would necessitate that Bureau making the certified copies required thereby, clerks of court being forbidden to make certified copies unless they have the originals before them, and that the Bureau of Naturalization is unable, with its present force, to make such copies.

You are therefore directed, on request, to return to the Bureau of Naturalization any triplicate declaration of intention or original certificate of naturalization issued since September 26, 1906, retaining a certified photographic copy of the papers for your files.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

[1] See page 382.

BENJAMIN F. NEWKIRK.

Decided May 31, 1918.

RECLAMATION CHARGES—STATE SCHOOL LANDS—ACT OF AUGUST 13, 1914.

School lands in private ownership as the result of purchase from the State are not subject to the penalty provided in section 9 of the act of August 13, 1914 (28 Stat., 686, 689).

HOPKINS, *Assistant Secretary:*

Benjamin F. Newkirk has appealed from a decision of the Director of the Reclamation Service dated October 6, 1917, sustaining the action of the project manager relative to certain matters connected with his water right application for the N. ½ NW. ¼, Sec. 36, T. 9 N., R. 5 E., B. H. M., Belle Fourche Project, South Dakota. The above land is a part of the grant to the State of South Dakota in aid of common schools, the township plat having been approved by the surveyor general March 9, 1881.

The appellant purchased the land, at public auction, from the State, July 31, 1917, and his water right application was filed August 13, 1917. Prior to the sale the project manager announced that the land would be subject to the penalty provided in section 9 of the act of August 13, 1914 (38 Stat., 686), being 10% of the announced water right charge of $40.00 per acre, and that the land would also be assessed with the operation and maintenance charges accrued prior to the season of 1915, which accrued charges might be made a part of the total construction charges and distributed over a period of twenty years.

With his water right application Newkirk filed a protest against the action of the project manager. The protest contained the following allegations:

1. That the building charge under Public Notice is $40.00 with $4.00 penalty, making a total of $44.00 per acre.

2. I am advised that there are accrued O. & M. charges amounting to $1.80 per acre.

3. I am advised that the Reclamation Service will not construct any of the ditches, etc., necessary for making delivery of water to said tract of land.

4. The plats at the Reclamation Office indicate 52 acres irrigable.

I hereby enter protest to each and every one allegations of the Project Manager, above numbered 1 to 4, and hereby represent that I am entitled to a Water Right contract at the rate of $40.00 per acre, and that no back O. & M. charges or penalties thereon, and that the Government should make delivery of water to said tract of land as has heretofore been done with each tract in private ownership, and that the irrigable acreage should be reduced, to such acreage as can be practicably and profitably irrigated.

The appellant has waived the fourth paragraph of his protest.

Section 9 of the act of August 13, 1914, *supra*, provides:

> That in all cases where application for water right *for lands in private ownership or lands held under entries not subject to the reclamation law shall not be made within one year after the passage of this act*, or within one year after notice issued in pursuance of section four of the reclamation act, in cases where such notice has not heretofore been issued, the construction charges for such land shall be increased five per centum each year until such application is made and an initial installment is paid. [Emphasis added.]

The question presented is whether lands so owned by the State of South Dakota prior to their sale to an individual are within the scope of the above section as being "lands in private ownership."

The farm unit plat embracing the N. ½ NW. ¼ of said section 36 was approved March 27, 1912. No subdivision of that section into farm units appears upon that plat except as to its E. ½ SE. ¼, but upon the plat approved May 3, 1915, the section is subdivided into 80-acre units.

Section 360 of the Political Code of South Dakota (Compiled Laws of South Dakota, 1910, page 93) provides:

> It shall be the duty of the board of school and public lands, on or before February 1st of each year, to direct the selections as nearly as may be practicable of not less than fifty thousand (50,000) acres, or more than seventy-five thousand (75,000) acres from the common school, endowment or indemnity lands of the state, to be offered for sale in any one year; *provided*, that it shall be left to the discretion of said board of school and public lands to defer sales during any one year if financial conditions should not be favorable to a satisfactory sale; *provided*, that if at any time when such directions is to be made there shall be in the state treasury or its depositories a sum in excess of one hundred thousand dollars ($100,000.00), proceeds of the sale of said land not loaned out upon interest, then the selection of said lands for that year shall be deferred for one year.

Section 370 provides, in part:

> Not more than one-third of the lands of any class granted to the state for educational or charitable purposes shall be sold within the first five years, and not more than two-thirds of such lands shall be sold within the first fifteen years after the date of the vesting of title thereto in the state. No more than one-tenth of the lands granted by the act of congress of February 18, 1881, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho and Wyoming for university purposes," and vested in the State of South Dakota by section 14 of the act of congress of February 22, 1889, entitled, "An act to provide for the division of Dakota into two states, and enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the union on an equal footing with the original states and to make donations of the public lands to such states," shall be offered for sale in any one year.

Section 59 of chapter 180, Laws of 1907 (Compiled Laws, page 716), provides, in part:

> No lands belonging to the state within the areas to be irrigated from works constructed or controlled by the United States, or its duly authorized agencies, shall hereafter be sold, except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawals shall be accepted, except upon the conditions prescribed in this section.

Lands owned by the State of South Dakota under its school land grant do not literally fall within the term "lands in private ownership or lands held under entries not subject to the reclamation law" as used in section 9 of the act of August 13, 1914, *supra*. Under the legislation of the State, several conditions must be present before they may be offered for sale, and, further, within irrigation projects of the United States, they can not be sold until the farm units have been established. The State has an important interest in these lands and its interest is entitled to consideration, so that the sale will be in harmony with its laws and made at a time when, under all the circumstances, it will prove beneficial to the fund to be used for common schools, without unnecessary delay, to the injury of the reclamation project. The purpose of section 9 was to induce private owners of lands, and entrymen, to promptly subject their lands to the construction, operation and maintenance charges, secure a general use of the water and rapidly place the lands in cultivation, to the benefit both of the United States and the water users. The State does not irrigate and cultivate its lands, but disposes of them to private individuals. Such individuals are unable to present any water right application until the State has offered the lands for sale, and the action of the project engineer would penalize the purchaser from the State, because the State officers, acting within the discretion conferred upon them by the State law, had not made an earlier sale. Such State lands are also not within the spirit of section 9 of the act of August 13, 1914, *supra*, but fall rather in the same category as unentered public lands of the United States. This allegation of the protest is well founded, and the decision of the Director as to it is reversed.

Relative to the second allegation of the protest the record discloses that the demand is for operation and maintenance charges accrued for the years 1912, 1913 and 1914 at the rate of 60 cents per acre per annum, such charges for subsequent years not accumulating, in view

of an order of the Reclamation Service dated December 6, 1916. This tract is embraced in the public notice of May 2, 1912, which directed that the lands be classified into four classes.

Class A included all public lands entered on or before January 24, 1911, and all lands in private ownership held under trust deed or signed under contract with the Belle Fourche Valley Water Users Association on or before that date. Lands of class A were made subject to a building charge of $30 per acre of irrigable land, payable in certain installments.

Class B included all lands embraced in class A, the entryman or owner being given the opportunity of making payments at a differently graduated scale than in class A. The building charge for class B was $35 per acre.

Class C included all public lands vacant on and after January 24, 1911, and all lands in private ownership which on that date were not held under trust deed or were not signed under contract with the Belle Fourche Valley Water Users Association. Lands in class C were subject to a building charge of $40 per irrigable acre payable in certain installments.

Class D was described as follows:

> Class D includes all lands in this unit now or hereafter owned by the State of South Dakota, and they shall be subject to the charges, limitations, terms and conditions as for lands of class A, if water-right application be made within two years of the date thereof. All lands in class D for which water-right application shall not have been made within the said period of two years, shall become subject to the charges, conditions and limitations imposed upon lands in class C.

This land accordingly falls within class C as to construction, operation and maintenance charges. Paragraph 11 (B) of the public notice provides:

> For operation and maintenance for the irrigation season of 1912 and annually thereafter, until further notice, shall be 60 cents per acre of irrigable land, whether water is used thereon or not. For all lands in classes A and B the portions of the installments for operation and maintenance shall be due December 1, 1912, and annually on December first of each year thereafter, whether or not water-right application is made or water is used thereon. *For lands of class C the portion of the first installment for operation and maintenance shall be paid at the time of entry or filing of water-right application; the portion of the second installment shall become due on December first of the following year, and subsequent portions on December first of each year thereafter.* [Emphasis added.]

Under the very terms of the public notice the tract was not subject to operation and maintenance charges until the filing of the water-right application. The action of the project manager was erroneous and the decision of the Director as to this feature of the protest is likewise reversed.

As to the third allegation of the protest the appellant states.

That the Reclamation Service will not make any ditches to make delivery of water to said tract. It is my understanding that the Policy of the Reclamation Service is to make delivery to each and every farm unit of Government land and to each and every tract of Privately owned land. I am informed that the school section takes the status of privately owned land, but no ditches run to or across said section 36. In order to get water to said section 36, it is necessary that a ditch be constructed from the Beresford Lateral from the north on section 25. The Government is in much better position, and I consider it, its duty to construct such lateral and secure right-of-way therefor. For me to construct such a lateral across the private lands of others and damage their land and crops, would involve not only considerable expense but also might involve me in litigation. * * *

It will be necessary to deliver water to three points on this land on account of its broken character. The survey for only one of these laterals has so far been made. The project Mgr informs me that no profile and final estimate of costs have so far been prepared for this survey but that his estimate of the probable cost of this lateral slightly less than half mile in length with seven or eight drops, will be about $300; the other two laterals not yet surveyed with no drops but the same length can be constructed in my judgment for about $100 to $125.

The project manager reports that:

No deliveries have been provided for State lands for the reason that said lands were not subdivided at the time the distributing systems were being constructed and it was impossible to determine what form the farmsteads would eventually take. And, further, that this office is not permitted to spend Government funds on lands already under Public Notice that will tend to increase the final cost to the United States. * * *

* * * the cost of making delivery to the tract of land in question will probably be about as stated in the appeal, but that the principal delivery (the one estimated to cost $300), serves two other 80-acre tracts of school land for which water right application has been made and which should assume at least $200 of the cost of construction of the delivery.

The delivery of water upon the various irrigation projects is sometimes made upon the farm unit and sometimes at a point within a reasonable distance therefrom, according to the circumstances existing in each particular case. The question of the point of delivery must necessarily be left to the sound discretion of the local officers of the Reclamation Service, and no abuse of that discretion is here present. Further, the construction charge of the project has now been fixed exclusive of the cost of these ditches and there is no other provision to defray the expense thereof. As to any right of way for such ditches over contiguous land which may be necessary, attention may be called to section 31, chapter 180, South Dakota Laws of 1907 (Compiled Laws, 1910, page 710) which provides:

Any person, association or company who may have or hold any possession, right or title to any agricultural lands within the limits of this state shall be entitled to the usual enjoyment of the waters of the streams or creeks in said state and for the purpose of directing flood waters for irrigation or for stock

purposes any person, association or company may build or construct dams across any dry draw or water course within the state and such person, association or company shall have the right of way through, and over any tract or piece of lands for the purpose of conveying said water by means of ditches or flume.

The decision of the Director is in this respect affirmed.

The matter is remanded for further proceedings in harmony herewith.

INSTRUCTIONS.

June 8, 1918.

TURTLE MOUNTAIN INDIANS—HOMESTEAD ENTRY—ACT OF APRIL 21, 1904.

A Turtle Mountain Indian who has received a patent in fee on his allotment, and thus become a citizen of the United States, may subsequently make a homestead entry upon the public domain, and it is immaterial, as regards such subsequent right, whether he satisfied his allotment right on lands within the former Turtle Mountain reservation or upon the public domain.

VOGELSANG, *First Assistant Secretary:*

The Department is in receipt of your [Commissioner of the General Land Office] letter of March 22, 1918, requesting instructions as to whether "a Turtle Mountain Indian, who has received a patent in fee on his allotment, thus having become a citizen of the United States, has the right to make a homestead entry on the public domain the same as a white citizen."

The proposition is clearly established that in taking an allotment in severalty from the tribal lands an Indian does not exhaust or in any wise affect his right as a citizen of the United States by virtue of section 6 of the act of February 8, 1887, to make a homestead entry of public lands (30 L. D., 375; 42 L. D., 192), and in principle no distinction can be made between a member of the Turtle Mountain band or tribe and a member of any other tribe of Indians. Nothing is found in the treaty of 1892, ratified by the act of April 21, 1904 (33 Stat., 189–194), to warrant any other conclusion, and members of this band of Indians who have received allotments on the reservation, should, therefore, be accorded the same rights on the public domain as are granted to other Indians who attain citizenship, without discrimination.

This raises a question whether, as a citizen, the rights under the homestead law of a member of the band who has received a patent in fee for lands on the public domain under article 6 of the aforesaid agreement, are any different from those of a member of the band who has received an allotment on the reservation. In other words, for the purpose of determining their rights on the public domain, can the members of this band be divided into two classes, those who took allotments or homesteads on the reservation and those who made selection on the public domain.

Article 6 of the agreement in question provides that:

> All members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon the reservation above ceded may take homesteads upon any vacant land belonging to the United States without charge, and shall continue to hold and be entitled to such share in all tribal funds, annuities, or other property, the same as if located on the reservation: *Provided*, That such right of alternate selection of homesteads shall not be alienated or represented by power of attorney.

In the judgment of the Department, the law gives no warrant for such a classification or distinction. By the treaty concluded with these Indians in 1892, amended and ratified by the act of April 21, 1904, *supra*, they surrendered all right, title and interest in and to some nine million acres of land lying along the northern boundary line of North Dakota, which tract, except the small reservation of two townships, had previously been opened to settlement. It was therein stipulated that said Indians were to receive one million dollars for the cession of the lands involved and the relinquishment of their claims against the Government; and in addition, as above shown, all members who were unable to procure allotments on the small reservation, were to be permitted to take homesteads on the public domain free of charge, the Government to hold the title to such lands for a period of twenty years, and the Indians to be considered and treated as though located on the reservation. As said by the Department in the case of Voight *v.* Bruce (44 L. D., 524)—

> The situation was this. The Indians had a reservation which they held in common, but it was of limited area, so after providing for its division in severalty it was agreed that those Indians who were unable to secure lands on the reservation could select them on the public domain and that without charge, in order to put all members of the band as nearly as possible on an equality. The revised roll of the band showed who were the intended beneficiaries under the law, both as to reservation and public lands.
>
> The privilege granted these Indians to take lands on the public domain was part of the consideration for the cession. In addition to the payment to them of one million dollars for such cession, those members of the band who were unable to secure land on their reservation were allowed to select lands on the public domain.

In this view of the matter, the right of selection on the public domain was not a gratuitous grant of lands of the United States, but was in fact given to compensate or indemnify the individual Indian for his failure or inability to obtain his share of lands on the reservation. By taking an allotment or homestead on the public domain, the Indian merely exhausted his special right under article 6 of the agreement. He forfeited no tribal rights and stands on the same footing and should be treated and dealt with in all respects as one who received lands on the reservation. Thus will all members of the band be put "as nearly as possible on an equality," which was the announced purpose of the sixth article of the treaty.

UNITED STATES EX REL. SOUTHERN PACIFIC RAILROAD COMPANY v. LANE.[1]

STATUTES; PROVISOS; PUBLIC LANDS; INDEMNITY LANDS; RIGHTS OF WAY.

1. A proviso must be interpreted in the light of the terms of the act to which it is attached. Its operation is usually confined to the clause or provision immediately preceding, but where necessary to give effect to the legislative intent it will be construed as applying to the entire act. A proviso, however, may contain legislation not directly related to the subject-matter of the act itself, thus enlarging the scope of the act, or even assuming the function of an independent enactment (Citing *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* 31 App. D. C., 498.)

2. Under the proviso of the Act of Congress of August 30, 1890 (26 Stat. at L. 391, chap. 837), requiring that all patents for lands thereafter taken up under any of the land laws of the United States should contain a reservation from the lands granted of a right of way for ditches or canals constructed by the authority of the United States, it was the duty of the Land Department of the Government, in issuing a patent to the Southern Pacific Railroad Company for indemnity lands under the Act of July 27, 1866 (14 Stat. at L. 292, chap. 278), which lands were selected by that company after the passage of the Act of 1890, to insert in the patent a reservation from the lands thereby granted of such a right of way.

No. 3010. Submitted December 5, 1916. Decided February 6, 1917.

STATEMENT OF THE CASE.

HEARING on an appeal by the relator from a judgment of the Supreme Court of the District of Columbia dismissing a petition for the writ of mandamus to compel the Secretary of the Interior to reissue a patent to certain lands. *Affirmed.*

The Court in the opinion stated the facts as follows:

Relator, the Southern Pacific Railroad Company, appealed from a judgment of the supreme court of the District of Columbia denying a writ of mandamus to compel Franklin K. Lane, the Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to reissue a patent to certain indemnity lands to which it became entitled under the provisions of the Act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278), entitled, "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast."

Section 3 of the act provides: "That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said

[1] Reported in 46 App. D. C., 74, and printed with the permission and through the courtesy of Charles Cowles Tucker, Esquire, Reporter.

railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

Under the authority conferred by this act, relator company selected a large tract of land embraced within the indemnity limits, which selection was duly approved by the Secretary of the Interior and clear-listed for patent to relator. A patent was issued therefor, which contained the following reservation: "And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States." Relator is seeking to compel the reissue of the patent with this restriction eliminated.

Mr. A. A. Hoehling, Jr., *Mr. Stanton C. Peelle*, and *Mr. C. F. R. Ogilby* for the appellant:

Mr. Charles D. Mahaffie, Solicitor for the Interior Department, and *Mr. C. Edward Wright*, Assistant Attorney for the appellees.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

The Secretary of the Interior bases his authority for placing the reservation in the patent upon an Act of Congress of 1890, passed long subsequent to the date of the original grant and the location of the line of railroad under it, but prior to the selection of the indemnity lands in question. Undoubtedly, if, as contended by counsel for relator company, the same interest passed by the grant of these lands as to the odd-numbered sections within the primary belt, such

interest would relate back to the date of the original grant, and the government could not, under the authority of the later act, insert in the patent a reservation such as was done in this instance. It is important, therefore, to determine the nature of the grant originally made of these indemnity lands. The odd-numbered sections of land within the primary belt or place limits Congress granted outright. The title became fixed upon the filing of a map definitely locating the line of railroad, and related back to the date of the grant. It amounted to a grant *in praesenti*. *Van Wyck v. Knevals*, 106 U. S., 360, 366, 27 L. ed. 201, 203, 1 Sup. Ct. Rep. 336; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S., 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566. As to these lands, the grantee acquired title by the terms of the act as soon as the location of the odd-numbered sections had been ascertained by survey. The act was self-executory upon identification. It contemplated present conditions and excluded all conditions not then existing. It contemplated existing private rights in portions of the lands granted, and made provision for this contingency by conferring upon the grantee the power to select lands in lieu thereof from a designated strip adjacent thereto.

As to the indemnity lands, however, the act was not self-executory. All it fixed was the right and quantity of indemnity; not the quality, description, or location of the land that might be selected when at some future time the right should arise. Its operation depended upon a future contingency, in which, should it arise, the grantee became the moving party. The railroad company was given power to make selection of indemnity lands only defined as within certain limits in their then present condition. In *United States v. Southern P. R. Co.*, 223 U. S., 565, 570, 56 L. ed. 553, 555, 32 Sup. Ct. Rep. 326, these indemnity railroad grants are defined as follows: "An indemnity grant like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised."

It follows, therefore, that all the right conferred by the act as to the indemnity lands was the power of selection. It did not amount to a grant *in praesenti*. No interest was conveyed in any particular described lands, but only the power to select lands of even quantity within certain defined limits in their present condition, with all the restrictions, reservations, or easements which may have been imposed upon them by Congress. In other words, within the primary belt

or place limits the grantee takes the land in the condition existing at the time of the location of the line of the railroad under the grant, and within the indemnity limits in the condition existing at the time of selection. The distinction is concisely stated in *Oregon & C. R. Co. v. United States*, 189 U. S., 103, 112, 47 L. ed. 726, 730, 23 Sup. Ct. Rep. 615, as follows: "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

It logically follows that if there is nothing to prevent the disposition by the government of the odd-numbered sections of land within the indemnity limits prior to selection, there is no limitation upon the right of Congress to impose upon such lands prior to selection the reservation of an easement for ditches and canals essential in carrying out a great public scheme for the development of that section of the country in which the greater portion of the public domain lies.

This brings us to the main question in the case—the right of the Secretary of the Interior to insert this reservation of easement for ditches and canals in the patent. The claim of authority is based upon a proviso to the Act of Congress of August 30, 1890 (26 Stat. at L. 391, chap. 837). The scope of the proviso may be understood more clearly by a brief reference to the legislation of which it forms a part. The Sundry Civil Act of October 2, 1888 (25 Stat. at L. 526, 527, chap. 1069, Comp. Stat., 1916, section 4696), contained an appropriation to enable the Geological Survey, under direction of the Secretary of the Interior, to conduct an investigation as to "the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows," and to make a detailed report to Congress of the expenditure of the money appropriated to meet the expense of conducting the investigation, including "the amount used for actual survey and engineer work in the field in locating sites for reservoirs." In furtherance of this great reclamation scheme upon which the Government was just embarking, the act provided that "all lands which may hereafter be designated or selected by such United States surveys for

sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law."

The Act of Congress of August 30, 1890, provided that "so much of the Act of October second, eighteen hundred and eighty-eight * * * as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof. No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

It will be observed that this act, independent of the proviso, provides for two things. Without in any way changing the scope or object of the Act of 1888, in so far as power was vested thereunder to survey and establish reservoir sites and the location of canals or ditches as an initial step to the general reclamation scheme, it simply restored to entry and settlement the lands withdrawn under the prior act. The act also placed a limitation upon the amount of land which any person may acquire by occupation, entry, or settlement under any of the land laws, and also validated entries or settlements heretofore made. This limitation as to amount applied only to individual entrymen, and had no reference to railroad indemnity grants.

We now approach the construction of the proviso above quoted, upon which the Secretary of the Interior justifies the insertion in railroad indemnity patents of an easement reservation in favor of the United States for the construction of ditches and canals. The rule of

statutory construction is familiar, that a proviso must be interpreted in the light of the terms of the act to which it is attached. Its operation is usually confined to the clause or provision immediately preceding, but where necessary to give effect to the legislative intent it will be construed as applying to the entire act. A proviso, however, may contain legislation not directly related to the subject-matter of the act itself, thus enlarging the scope of the act, or even assuming the function of an independent enactment. *Stephen* v. *Illinois C. R. Co.* 128 Ill. App. 99; *Hall's Safe Co.* v. *Herring-Hall-Marvin Safe Co.* 31 App. D. C. 498; *National Bank* v. *Cleveland*, 156 Fed. 251.

With these elementary rules in mind, it will be observed that the proviso in question relates to two classes of lands,—"entries or claims validated by this act," and "lands hereafter taken up under any of the land laws of the United States." To determine the intent of Congress in using the sweeping, all-inclusive language, descriptive of the latter classification, the general scope and subject-matter of the legislation of which this act forms a part must be considered. It was part of the initial legislation relating to a great project for conserving the flood waters and reclaiming the arid lands of the United States susceptible of irrigation west of the one hundredth meridian. In the body of the act reservoir sites are reserved generally on public lands. This reservation, considering the scope of the legislation of which the act forms a part, and especially the unaffected provisions of the earlier act of which it is amendatory, would be almost ambiguous without the further reservation of an easement for the construction of ditches and canals. For why reserve from the public domain reservoir sites, and not the right of way for ditches and canals, the agencies essential to convey the stored flood waters from the reservoirs to the land?

Had the act embraced only general land laws, the contention of relator would not be without force; for the term "general land laws" relates to laws available to any member of the public possessing the requisite qualifications to take up and upon compliance with certain conditions acquire title to a portion of the public domain. But Congress used no qualifying word. The language is general,—"any of the land laws." True, the right of relator company to select the land in question is conferred by special act. It is not a general land law, but a special land act. No member of the public could acquire land under it, for it provides a method by which the particular corporation may under certain prescribed conditions and for a special purpose acquire title to the land. It will hardly be contended, however, that this is not a land law of the United States. Indeed, an act granting the right or power to select indemnity railroad lands has been expressly held to be a land law of the United States under the administrative jurisdiction of the Secretary of the Interior.

Wisconsin C. R. Co. v. *Price County*, 133 U. S., 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; *Weyerhaeuser* v. *Hoyt*, 219 U. S., 380, 388, 55 L. ed. 258, 261, 31 Sup. Ct. Rep. 300.

There is nothing exceptional in a railroad indemnity grant to distinguish it from the general purpose of the Act of 1890. The lands here involved, until selected, were a part of the public domain subject to be taken up by any qualified citizen under the general land laws of the United States. The power granted to any such citizen to acquire title to public lands is not different from the power granted to a railroad upon the happening of a certain contingency to likewise acquire title to similar lands within a limited area. The power is the same, and there is no sound reason for reading into the statute a distinction as to conditions. The railroad company and the entryman must alike invoke the operation of a land law of the United States in the Land Department, the disposing agency of the government.

We think, therefore, that the broad language of the proviso embraces all public land west of the one hundredth meridian, subject at the date of the act to be taken up under any of the land laws of the United States, general or special, unless otherwise exempted by the terms of the law granting title to the lands or the power to acquire title, either by entry or selection. No such exemption exists here.

The judgment is affirmed, with costs. *Affirmed.*

MARTIN v. WHITMORE.

Decided May 7, 1918.

DESERT ENTRY—SEC. 5, ACT OF MARCH 4, 1915—CREDIT FOR IMPROVEMENTS OF PRIOR ENTRYMAN.

While a desert land entryman, *in making annual proof* is not entitled to credit for improvements placed upon the land by a former entryman whose relinquishment he has purchased, he may, in the event he invokes the benefits of section 5 of the act of March 4, 1915 (38 Stat., 1138, 1161), claim credit for money so expended.

VOGELSANG, *First Assistant Secretary.*

Milton E. Whitmore has appealed from a decision of the Commissioner of the General Land Office, dated September 25, 1917, holding his desert land entry for cancellation upon the contest of George H. Martin.

The entry was made October 21, 1913, for the SW. ¼, SW. ¼ NW. ¼, W. ½ SE. ¼, and SE. ¼ SE. ¼, Sec. 10, T. 4 N., R. 29 E., W. M., 320 acres, La Grande, Oregon, land district. First annual proof was filed October 20, 1914, alleging an expenditure of $387.50,

itemized as for posts and wire used and labor involved in the construction of 3½ miles of 3-wire and one-half mile of 2-wire fence, enclosing the entire tract, and a cross fence. Second annual proof was filed October 19, 1915, alleging an expenditure of $300 in the purchase of a 6 H. P. gas engine to be used for pumping water for irrigating purposes, and $28 for material and labor in constructing a house to shelter the engine.

The contest affidavit, which was filed January 20, 1916, alleged:

> Milton E. Whitmore did not expend the sum of $387.50 nor any other sum in the construction of a fence necessary for the reclamation of said land during the first year after making entry nor at any other time; that he did not expend the sum of $328 nor any other sum for a gas engine and for a house for the same during the second year after making entry nor at any other time; and that he has made no expenditures for the necessary irrigation, reclamation, and cultivation of said land since making entry, as required by law.

After due proceedings, hearing was held before a designated officer, and upon consideration of the testimony the local officers recommended, under date of February 23, 1917, that the contest be dismissed. Upon appeal, the Commissioner reversed the decision below, and further appeal brings the case before the Department, where oral argument has been heard.

The facts are clear and undisputed. The tract was originally embraced in the desert land entry of D. W. Bailey, made October 20, 1909, who submitted first annual proof in 1910, claiming credit for expenditures amounting to $348.02, consisting of labor and material used in fencing and cross fencing the entire tract. Second annual proof was submitted October 19, 1911, itemizing an expenditure of $335.85 in the purchase and transportation of a gasoline engine and pump and in the construction of an engine house, etc. These proofs were apparently satisfactory to the Commissioner. Later a third proof was filed, but the expenditures therein set forth for which credit was claimed semed to be largely a duplication of those claimed in the second proof. The acceptable expenditures made by Bailey amounted to $683.87.

October 21, 1913, Bailey filed a relinquishment of the entry, Whitmore agreeing to give him $650 for the improvements on the land, $325 being paid in cash and the balance on credit. Whitmore received a bill of sale for these improvements, and thereafter claimed credit for them in the two annual proofs submitted and hereinbefore referred to. Nothing whatever was done on the land by Whitmore from the time he made entry until Martin's contest was initiated. Since the hearing he has filed third annual proof, showing an expenditure of $320 for drilling and casing a well 153 feet deep upon

the land. He has also filed an application for an extension of time within which to submit final proof under the first of the last three paragraphs of section 5 of the act of March 4, 1915 (38 Stat., 1138, 1161).

Entryman in this case is not entitled to the extension of time asked for, inasmuch as, under the decision in Herren *v.* Hicks (41 L. D., 601), the improvements placed upon the land by Bailey and purchased by him can not be made the basis of annual proof such as will satisfy the usual requirements of the desert-land law. The expenditures, however, appear to be acceptable in support of a claim for relief under the last two paragraphs of section 5 of the said act of March 4, 1915, and the entryman may, if he so desires, invoke the benefits of either of those paragraphs, notwithstanding the intervention of contest (see Weir *v.* Overr, 46 L. D., 203), and to this end the contest will be suspended for a period of thirty days from notice hereof to permit such an application to be filed, should he wish to show himself entitled to that form of relief. It will be incumbent upon him, in that event, to clearly establish, if it be a fact, that the land is not irrigable from any known source of water supply.

The decision appealed from is modified accordingly and the case remanded for further and appropriate action hereunder, including an investigation by a special agent, if such investigation be deemed necessary by the Commissioner of the General Land Office.

HENRY WHITE.

Decided May 25, 1918.

THREE-YEAR HOMESTEAD—CULTIVATION—EQUITABLE ADJUDICATION.

The pendency of an application for reduction of the required area of cultivation under the provisions of the act of June 6, 1912, excuses an entryman from submitting final proof in support of the entry until final disposition is made of such application, and where the offer of final proof is thus delayed until after the expiration of the statutory period the entry need not be sent to the Board of Equitable Adjudication for confirmation.

VOGELSANG, *First Assistant Secretary.*

Henry White has appealed from a decision of the Commissioner of the General Land Office, dated March 17, 1917, denying his application for the reduction to ten acres of the required area of cultivation in connection with his homestead entry, made September 25, 1912, for the SE. ¼ NE. ¼, Sec. 9, S. ½ NW. ¼, SW. ¼ NE. ¼, and E. ½ SW. ¼, Sec. 10, NE. ¼ NW. ¼, and NW. ¼ NE. ¼, Sec. 15, T. 36 N., R. 1 E., M. M., Havre, Montana, land district.

The application for reduction, filed October 25, 1915, under the provisions of the act of June 6, 1912 (37 Stat., 123), stated that the soil of the entire claim is of a gravelly nature, the surface being rough and uneven; that the altitude is over four thousand feet, and that frosts occur in June and the latter part of August.

A special agent who examined the claim on August 17, 1916, reported as follows, under date of February 7, 1917:

> The entry can be cultivated as follows: SW. ¼ NE. ¼, Sec. 10, twenty acres; SE. ¼ NW. ¼, Sec. 10, five acres. The remainder of the entry is not susceptible of cultivation because same is cut by deep coulees and extremely rough. The entry is located in the foothills of West Butte.
>
> The improvements consist of a house 8 x 16, and one mile of wire fence. Claimant was living on the homestead entry at the date of my visit. I recommend that the required area of cultivation be reduced to twenty-five acres.

Entryman was not notified of the decision of March 17, 1917, until after he had, on August 24, 1917, filed notice of intention to submit final proof. The proof was submitted October 13, 1917, and shows that residence was established in March, 1913; that the only absence was from November, 1913, to April, 1914, when entryman was working for wages; that five acres were cultivated in 1913, seven acres in 1914 and 1915, and ten acres in 1916 and 1917. The five acres planted in 1913 produced ten bushels of barley per acre, but the oats planted in 1914 failed to mature. The ten acres of barley planted in 1916 and 1917 were cut for hay. The improvements, valued at $250, consist of a house 8 by 16 feet, barn 16 by 18 feet, and one mile of fencing.

In his appeal claimant alleges that the area not in cultivation is rough and stony, making it almost impossible to plow, and that the land is more valuable for grazing.

Under the facts developed, inasmuch as there was a long delay in acting on the application for reduction, and that the lifetime of the entry had almost expired before he was notified of the adverse action, it is believed that the cultivation actually performed should be accepted as sufficient, and final certificate and patent issue, in the absence of other objection. Although the final proof was not submitted within the statutory period, and notice of intention to submit the proof was not filed until thirty-two days prior to the expiration of the lifetime of the entry, submission of the case to the Board of Equitable Adjudication for confirmation is not necessary, the entryman being warranted in delaying the submission of proof until advised of action on his application for reduction.

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

CHARLES A. GALUSHA.

Decided June 21, 1918.

RECLAMATION ENTRY—ESTABLISHMENT OF FARM UNIT—FINAL CERTIFICATE.

Prior to the due establishment of farm units, and the conformation of the particular entry to an approved unit, proof of reclamation of the land embraced within a reclamation homestead entry under the act of June 17, 1902 (32 Stat., 388), will not be accepted.

VOGELSANG, *First Assistant Secretary:*

Charles A. Galusha has appealed from a decision of the Commissioner of the General Land Office dated August 14, 1917, rejecting a final affidavit submitted in connection with homestead entry 022470, for Lot 1 and the N. ½ NW. ¼ Sec. 17, T. 1 S., R. 2 E., G. & S. R. M., Salt River Irrigation Project, within the Phoenix, Arizona, land district.

Final proof was accepted on June 4, 1917, subject to the provisions of the Reclamation act. A farm unit plat was approved November 23, 1915, whereon the land embraced in this entry is shown as lying within three farm units. January 18, 1917, a public notice was issued announcing the availability of a water supply for the land shown on the farm unit plat. June 25, 1917, the entryman filed his final affidavit, which was approved by the Project Manager. In the decision appealed from, the Commissioner held that such approval was erroneous, as it appeared from the record that the entryman has not yet conformed his entry to a single farm unit and for that reason rejected said affidavit.

Section 13 of the act of August 13, 1914 (38 Stat., 686), provides that all entries under reclamation projects containing more than one farm unit shall be reduced in area and conformed to a single farm unit within two years after the issuance of a farm unit plat for the project. Although the farm unit plat was approved November 23, 1915, it was not made public or promulgated until January 18, 1917, hence entryman had two years from January 18, 1917, within which to conform his entry to a single farm unit and to dispose of the excess of his entry above one farm unit. The record discloses that entryman has already reclaimed the land in the entire entry and has made final proof thereof in the form required.

Entryman contends that in view of the above facts the Commissioner erred in rejecting his final affidavit. Paragraphs 56 and 57 of the General Reclamation Circular (45 L. D., 385, 399), provide:

56. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law and have submitted proof which has been found satisfactory thereunder by the General Land Office but who

are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units have not been established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry, as finally adjusted to an approved farm unit, and payment of all charges due under the public notices and orders issued in pursuance of the reclamation law.

57. The act of August 9, 1912 (37 Stat., 265), expressly requires reclamation of one-half of the irrigable area of the entry as finally adjusted before final certificate and patents may issue thereunder, and, therefore, the act does not authorize the issuance of final certificate on homestead entries made subject to the reclamation law, prior to the establishment by the Secretary of the Interior of farm units, and the conformation of the entry to an approved unit, for the reason that prior to that time the entry is still subject to adjustment in area, and it can not be determined what area must be ultimately reclaimed under the provisions of the act.

It is not believed to be in the interest of good administration to accept the final proof of reclamation until the entry is conformed to an approved unit as required by the regulations cited.

The decision appealed from is affirmed.

ADMINISTRATIVE RULING.

RIGHTS OF WAY FOR RESERVOIRS AND CANALS—APPLICATION IN CONFLICT WITH APPROVED RIGHT—WHEN SUBSEQUENT APPLICATION MAY BE APPROVED.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE FIRST ASSISTANT SECRETARY,
Washington, D. C., June 24, 1918.

Dear Mr. TALLMAN: I am returning herewith letter, submitting map for approval, in the matter of the application of Edward L. Kafader and George T. Neasham [Susanville 05789], applicants for reservoir and canal easements.

I suggest that the application be held suspended, and that you prepare for my signature a letter to the Attorney General, requesting him to commence an action in the proper forum for the forfeiture of all of the rights of the present grantee to these identical lands accruing to him by approval of his map and application on June 11th, 1911.

In my judgment, it is safer practice in all cases to have decree of forfeiture entered before approval of second application for easement over the same lands, and, unless some argument to the contrary is advanced, I shall adhere to that rule henceforth.[1]

Cordially,

ALEXANDER T. VOGELSANG.

[1] Note: For earlier rule, see Desert Irrigation Co. *et al. v.* Sevier River Land and Water Co. (40 L. D., 463), and H. H. Tomkins (41 L. D., 516).

MINNESOTA DRAINAGE LAWS—ACT OF MAY 20, 1908—AMENDMENT OF REGULATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1918.

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

Paragraph No. 19 of Circular of Instructions No. 470, of April 15, 1916 (45 L. D. 40), issued under the Act of May 20, 1908 (35 Stat., 169), is amended to read as follows:

19. Affidavits as to qualifications or as to the status of lands which may be required of purchasers under these regulations may be executed before an officer authorized to administer oaths and having a seal or where such purchasers are in actual service in the military or naval service of the United States, the affidavits may be made before the officer commanding in the branch of the service in which the party is engaged. The affidavit as to the non-saline character of the land cannot be made on information and belief. This affidavit, however, may be made by a reliable party who has actual knowledge of the facts. (See case of Mendenhall *vs.* Howell *et al.*, 14 L. D., 461).

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

JOHNSON v. KOLAROFF.

Decided July 5, 1918.

CITIZENSHIP—NATURALIZATION PROCEEDINGS—DUTY OF LAND DEPARTMENT.

The land department is not charged with a duty to inquire into the regularity of naturalization proceedings, and an order of court, apparently regular, admitting to citizenship, will be treated as conclusive and not subject to collateral attack.

VOGELSANG, *First Assistant Secretary:*

Jess A. Johnson has appealed from the decision of the Commissioner of the General Land Office, dated March 5, 1918, denying his application to contest the homestead entry of George K. Kolaroff, for the NE. ¼, W. ½, NW. ¼, SE. ¼, NW. ¼, NE. ¼, SW. ¼, Sec. 34, T. 26 N., R. 29 E., N. M. P. M., within the Clayton, New Mexico, land district.

The entry was made November 25, 1910, by Kolaroff, who stated in his application that he was a naturalized citizen and was married. The record discloses that on December 14, 1909, he made declaration of his intention to become a citizen, and on March 7, 1916, a certificate of naturalization was issued to him by a court of competent jurisdiction.

March 14, 1916, entryman made final three-year proof on his entry and final certificate issued thereon March 20, 1916. November 6, 1916, the Department of Labor advised the Commissioner of the General Land Office that Kolaroff had obtained his certificate of naturalization without meeting the requirements of law and that steps were being taken or would be taken looking to the cancellation thereof. It appears that Kolaroff had neglected to furnish a certificate from the Department of Labor stating the date, place, and manner of his arrival in the United States, at the time he applied for final naturalization. However, on October 16, 1917, the Commissioner of Naturalization advised the Commissioner of the General Land Office that proceedings to cancel the citizenship certificate of entryman had been dismissed and that no other action adverse thereto was then contemplated.

August 15, 1917, Johnson filed this contest, alleging:

> George K. Kolaroff has abandoned said land and abandoned all idea of securing patent therefor; that he is not a citizen of the United States and is disqualified to become such; that suit has been initiated in the Federal District Court for the District of New Mexico to set aside the final certificate of naturalization, which was inadvertently or erroneously issued to said contestee; that said contestee is now a fugitive from justice.

The local officers denied the application, and their action was affirmed by the Commissioner, on appeal by Johnson.

An analysis of the foregoing statement of facts and of the charge clearly discloses that contestant has failed to state a cause of action sufficient to justify the Department in granting a hearing thereon. Having earned a patent, it is immaterial that contestee has not resided on the land since said time. It is no duty of the Department to inquire into the regularity of the proceedings under which contestee acquired his naturalization certificate, but the order admitting him to citizenship, having the force and effect of a judgment, is conclusive as to all matters necessarily before the court and involved in the issue and is not open to collateral attack. Spratt *v.* Spratt, 4 Pet. (U. S.) 33.

The decision appealed from is affirmed.

HOY, ASSIGNEE OF HESS.

Decided July 13, 1918.

SOLDIERS' ADDITIONAL RIGHT—ASSIGNMENT—ADMINISTRATIVE RULING OF FEBRUARY 15, 1917.

The bequest by a soldier of his soldiers' additional homestead right is not an assignment within the meaning of the Administrative Ruling of February 15, 1917 (46 L. D., 32).

VOGELSANG, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office, March 11, 1918, rejecting the application of Frank M. Hoy to make soldier's additional entry of SW. ¼ SE. ¼, Sec. 5, and NE. ¼ NW. ¼, Sec. 8, T. 39 N., R. 53 E., M. D. M., in the Elko, Nevada, land district.

The application is based partly on the assignment of the unused right of William R. Hess, a civil war soldier, to enter 0.55 acre, which right was recertified April 3, 1900, in the name of John M. Rankin, the soldier's assignee, and partly on an assignment of the right of Sylvester Ramey, a civil war soldier, to enter 80 acres, which he did not use or assign during his lifetime, but which is claimed to have passed to his granddaughter and legatee, Hazel V. Isachsson, by virtue of said soldier's last will and testament, executed May 18, 1908, and which, after the testator's death on August 13, 1908, was duly admitted to probate in Idaho—the assignment of said supposed right by said legatee, Hazel V. Wilson (nee Isachsson), to one Glavis (the immediate assignor of said applicant) bearing date April 2, 1917.

The Commissioner's decision found the right of Hess in the hands of his assignee satisfactory as a basis of entry; but held the application for rejection on the ground that the assignment of Ramey's right was made by his said legatee subsequent to the administrative ruling dated February 15, 1917, set forth in Circular No. 528 (46 L. D., 32), which promulgated the rule that: "No soldier's additional right assigned by the heirs generally or by the administrator of a deceased soldier * * * , after the date hereof, will be recognized as the valid basis of entry of public land." A letter of the Secretary of the Interior adhering to said administrative ruling, and restating the grounds thereof, is to be found in 46 L. D., at p. 274.

Prior to said administrative ruling, several decisions had been based on the previous departmental view that the soldier's additional right was not a life estate merely, but, although neither exercised in person nor assigned by the soldier during his lifetime, passed, upon his dying intestate, to his personal representative (Williford Jenkins, 29 L. D., 510; Julia A. Lawrence, Ib., 658; Allen Laughlin, 31 Id., 256; Edgar A. Coffin, 33 Id., 245; Frederick Roth, Ib., 424; William

E. Moses, 37 Id., 194),—although in some cases held assignable by his heirs (David Werner, 32 Id., 295; William D. Kilpatrick, 38 Id., 234; Austin A. Ball, 40 Id., 72),—or, upon his dying testate, to his specific or his residuary legatee thereunder (Fidelo C. Sharp, 35 Id., 164; David Werner, *supra*). If the right survived the soldier's death, it was entirely logical to apply that doctrine to cases of bequest as well as of intestacy; but it did not follow that where the devolution by will was not specific, but operated only by force of a residuary clause, it amounted to an exercise, by assignment, of the soldier's statutory right, giving it thereafter the attributes of property under the doctrine of Webster *v.* Luther (163 U. S., 331). No such extension of the Department's former interpretation of that doctrine was ever declared or intimated; indeed, the case of Elmer D. Richards (45 L. D., 99), although not involving the precise point, looks in the other direction. The former doctrine went no further than to place the soldier's general residuary legatee in the shoes of the deceased soldier, as possessing the power to exercise the soldier's right either in person or by its assignment.

The later construction of the act is (to quote from the administrative ruling) "that the soldier's additional right may be used (1) by the soldier in his lifetime, either directly, by entering the land, or indirectly, in his lifetime, by conveying his right to entry to an assignee," etc., and that "if the right is not exercised in the manner indicated and *within the term during which it was appropriable*, the right lapses and ceases to exist. Unused, it never becomes an asset of the estate of the soldier."

A conveyance, whether of specific property or of a right or power, must have the qualities of a deed—a present and irrevocable transfer, whether carrying immediate or future enjoyment of the subject-matter; while a will vests no present right, but is ambulatory and revocable, speaking only from the instant when its maker, being dead, can no longer speak or act otherwise—a will, and a deed or other conveyance, being thus mutually exclusive. (See Robb *v* W. & J. College, 185 N. Y., 485, 78 N. E., 359; Kytle *v.* Kytle, 128 Ga., 387, 57 S. E., 748). In its nature, then, a will can not be a conveyance or assignment by the testator; it is merely a direction who shall have his property after his death (McRae's Admr. *v.* Means, 34 Ala., 349, 365; *In re* Stinson's Estate, 228 Pa., 475, 77 Atl., 807; Barnes *v.* Barnes, 187 Fed., 781, 792). And the only difference between a soldier's specific bequest of his unused additional right and his general residuary bequest would be that the one would show that the testator's thought was directed toward the supposed right, while no thought or intention relative to it could be implied from the other; but in neither case would the testamentary instrument have the quality of an as-

signment or conveyance of such right—now held to lapse if unused by the soldier during his lifetime.

This construction was made inapplicable to cases "where the right was actually sold and the transaction wholly completed and formally consummated by actual delivery of the written assignment prior to the date hereof" (February 15, 1917). To this extent, only, was the new construction made nonretroactive.

Therefore the Commissioner was right in holding that the date determinative of the application of the new or the former rule is that of the soldier's legatee's assignment to Glavis, April 2, 1917, rather than that of the soldier's death, when his will became operative, August 13, 1908.

The decision of the Commissioner is affirmed.

HOY, ASSIGNEE OF HESS.

Motion for rehearing of the Department's decision of July 13, 1918 (46 L. D., 421), denied by First Assistant Secretary Vogelsang, September 25, 1918.

LANDS ENTERABLE UNDER ENLARGED HOMESTEAD ACT—CIRCULAR 541, APPROVED APRIL 6, 1917, MODIFIED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 17, 1918.

The concluding paragraph of section 43, Circular No. 541, approved April 6, 1917, entitled, "Suggestions to Homesteaders and Persons Desiring to make Homestead Entries," is hereby modified in order to describe the character of land properly subject to entry under the Enlarged Homestead act in the following terms:

Lands containing merchantable timber, or valuable minerals other than coal, phosphate, nitrate, potash, oil, gas, or asphaltic minerals, and lands within a Reclamation project, or lands which may be irrigated at a reasonable cost from any known source or water supply, may not be entered under these acts. Entry may be allowed for the surface only of lands containing any of the minerals named. A legal subdivision will not be regarded as irrigable and excluded from designation or entry under these acts because a minor portion of it is susceptible of irrigation, unless said portion is at least one-eighth thereof. Where there is an application for additional entry after submission of final proof on the original, the land covered by said original will not be regarded as irrigable, and excluded from designation, upon the ground that more than one-

eighth of any subdivision is irrigable, unless said original embraces the equivalent of twenty or more acres of land in a reasonably compact body that can be thoroughly irrigated and reclaimed.

These instructions will also govern the classification of lands as nonirrigable under the Stock-raising-Homestead act.

S. G. HOPKINS,
Assistant Secretary.

EXCHANGE OF LANDS FORMERLY WITHIN GRANT TO CALIFORNIA AND OREGON RAILROAD.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 17, 1918.

Sec. 1. Proposals for exchange should be addressed to the Commisioner of the General Land Office and filed in the United States land office of the district in which the land is situated, setting forth by section, township and range, the lands tendered for exchange, and by similar description the lands desired in return therefor. Such proposal should include an agreement to pay the expense of a field examination, in case the Secretary determines to effect an exchange, if a cruise shall show the same feasible and to the interest of the Government.

Sec. 2. With the proposal for exchange should be furnished a duly authenticated abstract of title to the lands submitted as a basis of exchange, brought down to the date of the proposal, showing at such time the legal and equitable title to be vested in the proponent and the lands free from all liability for taxes, pending suits, judgment liens, or other encumbrances, except such as may be set forth in the proposal and due provision made for the extinguishment thereof.

The proposal should also be accompanied by as full data as are available as to the character of the land and the amount and kind of timber on the land proposed to be exchanged.

Sec. 3. The district officers, on the receipt of a proposal for exchange, shall file the same, giving it a serial number, and, after due notation on the records of the lands desired in exchange, transmit the same to the General Land Office with a statement as to any existing conflicts, if such be shown on their records.

Applications to enter tendered for any of the lands involved in a proposed exchange will be received, duly noted of record and suspended until further advised.

Sec. 4. On the receipt of a proposal for exchange in the General Land Office, it shall be given a preliminary examination, and, if found substantially in the required form and *prima facie* justifying favorable action, it shall be submitted to the Secretary, with such recommendations as may be deemed appropriate, for his consideration and such instructions as to subsequent action thereon as he may deem advisable in the premises.

Sec. 5. In the event of favorable action by the Secretary on the proposed exchange as submitted to him, the General Land Office will refer the same to the field for a cruise of the tracts involved, if such cruise has not already been made, and call upon the proponent to deposit such sums with the receiver of the proper land office as may be estimated as necessary to pay the expense thereof.

Sec. 6. Before final action is taken upon a proposal, such a cruise shall be had and furnished as shall disclose the kind, character and value of the timber standing and being upon each forty acre subdivision of the lands involved in the proposed transaction, and owned by each of the parties thereto, so that it can be determined from such cruise whether the lands offered in exchange are of approximately equal aggregate value to those sought in exchange.

A comprehensive report by the field officer in charge of the cruise shall also be made, setting forth such facts with respect to the topography of the land tendered in exchange, the extent and direction of the water courses thereon which should be known, in order to determine the value of the timber on such lands as a logging proposition.

Sec. 7. If after a cruise of the lands involved and such other investigation as may be deemed expedient, the proposed exchange seems advisable, either in whole or in part, and the proponent agrees to and accepts such conclusion, the Commissioner shall direct a publication of the notice of the proposal in a newspaper of general circulation, published in the city of Portland, for a period of thirty days, describing said lands and advising all persons having any claim thereto that the same should be filed in the District Land Office within said period of publication.

Sec. 8. In the absence of any adverse claims filed in response to the notice of publication, or otherwise, or after the disposition of such claims, the proposals for exchange will be taken up for such final action as may be warranted on the facts presented as to the relative value of the lands involved considered in the aggregate, and the resulting advantage to the United States by the acceptance of the proposal, due consideration being given to any intervening proposals for the right of exchange.

Sec. 9. So far as can now be anticipated, the only adverse claims that can arise, or be entitled to consideration under a proposal for exchange, so far as the revested lands are concerned, are such as may

be asserted under the preference right accorded settlers by Sec. 5 of the act of June 9, 1916 (39 Stat., 218), or under the mining laws, either of which, if well founded, will serve to except the land covered thereby from the exchange; and inasmuch as said act extends the mining laws generally to the revested lands (power sites excepted only), none of the revested lands if known to be mineral in character, or withdrawn as power sites, can be held subject to exchange,—matters that should not be overlooked by the field officer in submitting his general report.

Sec. 10. After due consideration of the proposal, the reports obtained thereon and such other evidence as may be submitted, the Commissioner will submit to the Secretary his report with respect to the proposal and his recommendation as to the action that should be taken thereon.

Sec. 11. On the approval of the proposal by the Secretary, the proponent will be advised thereof, and called upon to file in the General Land Office a deed, duly recorded, of the lands accepted in exchange, with the abstract brought down to the date of recordation, and upon the receipt of such deed and abstract, the Commissioner will direct the issuance of a patent to the proponent for the lands given in exchange.

CLAY TALLMAN,
Commissioner.

Approved:
S. G. HOPKINS,
Acting Secretary.

SACRESTAN v. SANTA FE PACIFIC RAILROAD CO.

Decided July 11, 1918.

INDIAN ALLOTMENT—ACT OF MARCH 4, 1913—ACT OF FEBRUARY 8, 1887, AS AMENDED BY ACT OF FEBRUARY 28, 1891.

Nothing in the act of March 4, 1913 (37 Stat., 1007), nor the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), requires of an Indian allottee residence upon, cultivation and improvement of the land.

VOGELSANG, *First Assistant Secretary:*

The land involved in this case is the NE. ¼ SE. ¼, Sec. 5, T. 8 N., R. 4 W., N. M. P. M., Santa Fe, New Mexico.

October 1, 1912, Juan Sacrestan (Tse-wi-ya), an Indian of the Laguna Pueblo tribe, filed application to have the above land allotted to him under section 4 of the act of February 8, 1887 (24 Stat., 388),

as amended by the act of February 28, 1891 (26 Stat., 794), and section 17 of the act of June 25, 1910 (36 Stat., 855, 859). The application was supported by a corroborated affidavit, alleging that the Indian had settled upon the land for his own use and benefit, that the land was nonirrigable and valuable only for grazing purposes. The local officers rejected the application, April 30, 1913, for the reason that the land was patented to the Santa Fe Pacific Railroad Company, June 10, 1881, under its grant by the act of July 27, 1866 (14 Stat., 292). No appeal was taken from this action, but after the passage of the act of March 4, 1913 (37 Stat., 1007), entitled "An Act for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California," Juan Sacrestan filed a corroborated affidavit, executed December 29, 1913, in which it was alleged that he had occupied the land applied for by him in allotment for more than five years, using the same for grazing purposes. That act provides:

> That the Secretary of the Interior be, and he is hereby, authorized in his discretion to request of the present claimant under any railroad land grant a relinquishment or reconveyance of any lands situated within the States of Arizona, New Mexico, or California passing under the grant which are shown to have been occupied for five years or more by an Indian entitled to receive the tract in allotment under existing law but for the grant to the railroad company, and upon the execution and filing of such relinquishment or reconveyance the lands shall thereupon become available for allotment, and the company relinquishing or reconveying shall be entitled to select within a period of three years after the approval of this Act and have patented to it other vacant nonmineral, nontimbered, surveyed public lands of equal area and value situated in the same State, as may be agreed upon by the Secretary of the Interior, * * *

May 25, 1914, the General Land Office, finding from the showing made that Juan Sacrestan came within the provisions of the act of March 4, 1913, requested the Santa Fe Pacific Railroad Company to reconvey the land in question, to the end that it might become available for allotment to the Indian, "and that the railroad company may be permitted to select other lands in lieu thereof as provided for by the said act." Complying with this request, the company, on January 17, 1918, filed deed reconveying to the United States the tract of land in question. The deed was submitted to the Department, but the same was returned to the General Land Office without approval, and that office was directed to cause field examination of the Indian claim to be made. This was done, and the special agent reported that the land is level prairie, devoid of timber, without springs or streams, all of it being nonirrigable grazing land; that no improvements had been made on the land and there was no cultivation; that the Indian had "no residence" on the land—"claimant has used the land for grazing purposes, passing over it with sheep about once a year." The special agent recommended

that proceedings be directed against the Indian on the ground that he "has not lived on this land for five years as required by the act of March 4, 1913."

In a decision of February 12, 1918, the General Land Office found from the statements contained in the special agent's report that the Indian had not occupied the lands as required by the act of March 4, 1913, and thereupon held his allotment application for rejection. Both the Indian and the Santa Fe Pacific Railroad Company were notified accordingly.

In the meantime, the Santa Fe Pacific Rairoad Company, pursuant to the letter from the General Land Office dated May 25, 1914, sold its lieu right as to the land in question to Leroy O. Moore, and at the request of the purchaser, on May 23, 1916, filed in the land office at Las Cruces, New Mexico, application to select the NE. ¼ SE. ¼, Sec. 4, T. 9 S., R. 4 W., N. M. P. M., containing 40 acres, in lieu of the 40 acres relinquished to the United States and covered by the Indian allotment application. The company has appealed from the decision of the General Land Office dated February 12, 1918, holding the Indian's allotment application for rejection.

The General Land Office, in its letter of May 25, 1914, requesting the railroad company to reconvey the land in question to the United States for the purpose of allotting the same to Juan Sacrestan, found that the Indian came within the provisions of the act of March 4, 1913, and was entitled to the land in allotment. It is not believed that this finding is materially affected by the subsequent examination and report of the special agent. The above act contains no requirement that the Indian shall reside upon, cultivate and improve the lands applied for in allotment, the language being, "which are shown to have been occupied for five years or more by an Indian entitled to receive the tract in allotment under existing law but for the grant to the railroad company." The "existing" law under which this Indian applied for the land in question is section 4 of the act of February 8, 1887, as amended, which does not provide for and has never been construed to require "residence" on the part of the applicant. In the case of Frank Johnson (28 L. D., 537), construing an act containing substantially the same language as that employed in the act of March 4, 1913, it was held that, according to the ordinary signification of the word, an "occupant" of a tract of land is the one who has the actual use and possession of it whether he resides upon it or not. See case of Whittington *v.* State of Mississippi (30 L. D., 149), and Bobbitt *v.* Endsley (30 L. D., 435). Moreover, the act of March 4, 1913, is remedial in character and should be construed liberally so as to effectually carry out the purpose for which is was passed, namely, to save the claims of Indian occupants, in the examination of whose acts and deter-

mination of intention and good faith, "due and reasonable consideration should be given to the habits, customs and nomadic instincts of the race, as well as to the character of the land taken in allotment." Furthermore, the question of compliance by this Indian with the provisions of section 4 of the act of February 8, 1887, as amended, under which his application for allotment was made, is solely one between him and the Government and will be determined and adjudicated accordingly.

The reconveyance by the Santa Fe Pacific Railroad Company, covering the land in question, will be accepted, and the allotment application of Juan Sacrestan therefor will be allowed, subject to the regulations of April 15, 1918, governing Indian allotments on the public domain under section 4 of the act of February 8, 1887, as amended, the decision of the General Land Office of February 12, 1918, being hereby reversed.

INSTRUCTIONS.

July 23, 1918.

RIGHT OF WAY ACROSS HOMESTEAD—NO BAR TO PATENT TO HOMESTEADER—WHAT PASSES UPON FINAL CERTIFICATE AND PATENT.

A railroad right of way and station grounds, employed for railroad purposes, across land embraced in a homestead entry, are no bar to the issuance of final certificate and patent upon the entry, although such right of way and station grounds are occupied for other than railroad purposes by persons claiming under the railroad company.

HOPKINS, *Assistant Secretary:*

I am in receipt of your [Commissioner of the General Land Office] letter of July 8, 1918, submitting for the consideration of the Department the case of Clinton R. Clark, who made homestead entry No. 035484, December 1, 1916, at Havre, Montana, for the NW. ¼ Sec. 23, T. 31 N., R. 14 E., M. M. Commutation proof was made March 20, 1918, and action thereon has been suspended pending investigation.

The right of way acquired by the Great Northern Railway Company, 150 feet wide, under the provisions of the act of February 15, 1887 (24 Stat., 402), crosses the above tract from the southwest to the northeast. A strip 125 feet wide upon the easterly side of this right of way and 25 feet wide on its westerly side, for station grounds, was acquired by the railway company under the provisions of the act of March 3, 1875 (18 Stat., 482), under the Department's approval of June 29, 1915 (Havre 028244). A special agent has reported that upon the right of way and the station grounds there are

the following buildings, built under some arrangement with the railway company, the exact nature of which does not appear: Two grain elevators, three lumber yards, three general merchandise stores, a cafe, two hotels, a bank, a hardware store, a printing office, a blacksmith shop, a pool and billiard hall, a feed barn, and five dwelling houses. The question presented is as to whether the use of the right of way and station grounds for the above purposes prevents the issuance of patent upon the homestead entry.

The nature of the title acquired by the railway company under the right of way acts was defined by the Supreme Court in Rio Grande Western Railway Company *v.* Stringham (239 U. S., 44) at page 47 as follows:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition or 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.

In Northern Pacific Railway Company *v.* Townsend (190 U. S., 267) the first paragraph of the syllabus reads:

> Where the United States grants a right of way by statute to a railroad company which files a map of definite location, and the road is constructed, the land forming the right of way is taken out of the category of public land subject to preemption and sale, and the land department is without authority to convey rights therein. Homesteaders filing entries thereafter can acquire no interest in land within the right of way on the ground that the grants to them were of full legal subdivisions the descriptions whereof include part of the right of way.

Under the above authorities, it is clear, especially since the right of way and station grounds are in actual use by the railway company, that the homestead entryman has no interest therein, and accordingly the use thereof for trade and business purposes as indicated in the report of the special agent, is no bar to the issuance of final certificate and patent upon the homestead entry if the proof is otherwise sufficient.

Speaking of the use of the premises, the special agent states:

> The legality of any lease for the purpose of erecting residences, general store buildings, banks, pool halls, hotels or cafes is questionable. The field examination disclosed the fact that the right of way for nearly its entire length across this homestead was staked out in lots, or allotments, and it is upon some of these lots that the business houses and dwellings were found.

As to this feature of the case you express the opinion—

> that the patenting of the homestead will doubtless operate to put an end to the use of the railroad right of way for trade and business purposes, wherefore no special action need be taken of that feature of the case at this time.

I concur in your conclusion that no action so far as this Department is concerned need be taken relative to the last mentioned mat-

ter at this time, but this is not to be construed as recognizing the right of the railway company to use or lease any portion of its right of way or station grounds for other than the purposes contemplated by the acts of Congress mentioned.

GEORGE M. INGEBO.

Decided August 13, 1918.

ENLARGED HOMESTEAD—ADDITIONAL ENTRIES—ACT OF FEBRUARY 20, 1917.

One who perfects an entry of 40 acres under the ordinary provisions of the homestead law, and an additional entry of 120 acres under the act of March 2, 1889, the former embracing land not subject to designation under the enlarged homestead act, may thereafter make entry under the act of February 20, 1917, for such an area of designated land as when added to the additional entry will not exceed 240 acres.

HOPKINS, *Assistant Secretary.*

George M. Ingebo has appealed from a decision of the Commissioner of the General Land Office dated November 28, 1917, rejecting his application to make an additional entry under section 3 of the Enlarged Homestead act for the NE. ¼ SW. ¼, Sec. 24, T. 14 N., R. 28 E., M. M., Lewistown, Montana, land district.

It appears that Ingebo on June 25, 1902, made homestead entry at the Watertown, South Dakota, land office, for the SE. ¼ NW. ¼, Sec. 14, T. 127 N., R. 53 W., 5th P. M.; patent issued thereunder June 25, 1908. On December 22, 1910, at the Lewistown, Montana, land office he made an additional entry under section 6 of the act of March 2, 1889 (25 Stat., 854), for W. ½ SW. ¼ and SE. ¼ SW. ¼, Sec. 24, T. 14 N., R. 28 E., M. M. (120 acres); final proof was thereafter submitted and patent issued July 10, 1914.

The application in question was rejected because his original entry embracing land in Marshall County, South Dakota, could not be designated as of the character contemplated by the enlarged homestead act.

The order of December 21, 1916 (45 L. D., 585), to the effect that lands in Marshall County, South Dakota, and other counties named, would not be designated under the Enlarged Homestead act was issued after careful study of the controlling conditions, and nothing set forth in the appeal convinces the Department that the order was in any way erroneous.

The appeal requests that if the land in South Dakota cannot be designated his application be allowed under the act of February 20, 1917 (39 Stat., 925). Said act provides as follows:

> That any person otherwise qualified who has obtained title under the homestead laws to less than one quarter section of land may make entry and obtain title under the provisions of the act entitled "An act to provide for enlarged homesteads," approved February nineteenth, nineteen hundred and nine, and

an act of June seventeenth, nineteen hundred and ten, entitled "An act to provide for an enlarged homestead," for such an area of public land as will, when one-half of such area is added to the area of the lands to which he has already obtained title, not exceed one quarter section: * * *

If the additional entry had not been perfected there would be no question of Ingebo's right to have the character thereof changed to one under the Enlarged Homestead laws and to include the contiguous land sought in his present application. Congress unquestionably intended to grant additional rights to those who, like Ingebo, had obtained title under the general provisions of the Homestead law to less than a quarter section of land and did not intend to debar those who had made an additional entry under the act of 1889, supra, from obtaining the benefits thereof, even though such additional entry had been perfected as in the case under consideration. Accordingly, it is held that Ingebo is qualified to make entry under the act of February 20, 1917, supra, for such an area of designated land as when added to the 120 acres embraced in the additional entry will not exceed 240 acres, the entry being allowed as in the nature of an amendment of the additional entry.

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

ROBERT B. BABER.

Decided August 10, 1918.

ENLARGED HOMESTEAD—APPLICATION TO MAKE ADDITIONAL ENTRY—CULTIVABLE AREA KNOWN TO BE INSUFFICIENT.

Where, upon application made for additional entry under section 3 of the Enlarged Homestead act (35 Stat., 639), it is found that the cultivation requirements could not be fulfilled were entry permitted, the application will be rejected.

HOPKINS, *Assistant Secretary*:

This is an appeal by Robert B. Baber from a decision of the Commissioner of the General Land Office, dated November 30, 1917, rejecting his application, filed March 29, 1916, to make entry, under section 3 of the Enlarged Homestead act, for the SW. ¼ NE. ¼, S. ½ NW. ¼, and NE. ¼ SW. ¼, Sec. 2, T. 3 N., R. 72 W., 6th P. M., Denver, Colorado, land district, as additional to his original entry, made April 11, 1913, for Lots 2, 3 and 4, of Sec. 2, and Lot 1 of Sec. 3, said township.

Under date of September 24, 1917, the Department refused to approve a proposed order designating the lands involved, and the rejection of the application in question followed.

A Forest officer's report, which was the basis of the Department's action, sets forth that the original entry contained approximately 16½ acres of grass land and willow land that could be plowed and cultivated, the remainder being rocky and mostly quite steep and rough. The land applied for was described as entirely rough, rocky, mountain land, with steep slopes, loose rock, ridges and rock outcrops, and containing no plow land whatever.

If the application for additional entry were allowed, Baber could not perfect the entry unless the requirements as to cultivation were reduced. Under such circumstances the Department would not be warranted in designating the land as of the character contemplated by the Enlarged Homestead act. Accordingly the decision appealed from is affirmed.

CUMBERLAND MINING AND SMELTING CO. (ON PETITION).

Decided August 15, 1918.

REPAYMENT—ACT OF JUNE 16, 1880.

Where an application for repayment under the act of June 16, 1880, was properly denied under the rule then in force, and a later application is filed at a time when action in the Court of Claims is barred under Section 1069, Revised Statutes, the former adjudication will not be disturbed.

REPAYMENT—ACT OF MARCH 26, 1908.

In order to secure repayment under the act of March 26, 1908, the requirement that neither the applicant nor his legal representative shall have been guilty of any fraud or attempted fraud must be established.

HOPKINS, *Assistant Secretary.*

The Cumberland Mining and Smelting Company, assignee of Robert D. McLoud, has filed a petition requesting the exercise of the Department's supervisory authority in the matter of its application for the repayment of $1,600 paid in connection with coal land entry No. 41, Leadville, Colorado, made by Robert D. McLoud.

The entry was allowed by the register and receiver March 16, 1883, and embraced the S. ½ NE. ¼, W. ½ SE. ¼, Sec. 15, T. 14 S., R. 86 W. It was canceled October 3, 1884, as to the W. ½ SE. ¼, because the land was found to be noncoal in character. Repayment as to that portion of the purchase price has been made. On July 29, 1890, the Commissioner of the General Land Office required an affidavit by the entryman as prescribed by paragraph 32 of the Regulations of July 31, 1882 (1 L. D., 687), and evidence of the entryman's citizenship. The affidavit and evidence not having been furnished, the entry was canceled October 29, 1891. February 25, 1892, the Cumberland Mining and Smelting Company, claiming as transferee of McLoud,

applied for the return of the purchase price paid for the said S. ½ NE. ¼, under the act of June 16, 1880 (21 Stat., 287). This application was denied by the Commissioner March 28, 1892, upon the ground that while the entry was erroneously allowed by the register and receiver, still it could be confirmed by the submission of the required proof. No appeal was filed and the decision of the Commissioner became final.

The present application was filed December 20, 1912, and it has been denied by the previous departmental decisions of March 12, 1914 (43 L. D., 183), September 14, 1914, February 25, 1915, and April 26, 1915.

The present petition contends that repayment may properly be allowed under the act of June 16, 1880, *supra*, citing as authority the decision of the Court of Claims, dated January 5, 1903, in the case of Anthracite Mesa Coal-Mining Company *v.* The United States (38 Court of Claims, 56).

The application for repayment under the act of June 16, 1880, *supra*, was properly denied by the Commissioner under the rule then in force. No appeal was filed and the decision of the Commissioner became final. Under such circumstances the case of Thomas Hall (44 L. D., 113), is applicable. The Department there stated at page 114—

> It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Department's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L. D., 452; Mee *v.* Hughart *et al.*, 23 L. D., 455.)
>
> Inasmuch as Hall's application for repayment was finally rejected more than five years ago, after it had received full consideration, it is not believed good administration will, in the light of the authorities above cited, justify any further or different action thereon at this time; and for that reason, the application is herewith returned without approval.

Under the above facts any action in the Court of Claims under the act of June 16, 1880, is now barred by virtue of Section 1069 of the Revised Statutes, which provides in part as follows:

> Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues.

See the case of Michael Quinn *v.* United States (52 Court of Claims, 496). In view of the above considerations, the application for repayment, as far as the act of June 16, 1880, is concerned, must be denied.

As to the act of March 26, 1908 (35 Stat., 48), the Department in its decision of March 12, 1914 (43 L. D., 183), found that the facts

surrounding the entry gave rise to a strong suspicion of fraud and directed—

> * * * that a definite, specific, and satisfactory showing, as to the good faith of McLoud and Allen in the matter of the entry, be required of the applicant for repayment, or that the facts and circumstances surrounding the entry be ascertained and determined in some other appropriate manner, before final action is taken on the application.

The petition asserts that the entryman McLoud has disappeared, has not been heard of for many years, is presumably dead, and that, therefore, it is impossible for the applicant to comply with the Department's requirement.

The act of March 26, 1908, *supra*, in Section 1 authorizes repayment—

> * * * in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his lawful representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

The applicant for repayment must bring himself within the purview of the above provision and it is consequently incumbent upon him to establish the fact that the entryman has not been "guilty of any fraud or attempted fraud." The present applicant has failed to make this showing and accordingly the application for repayment can not be allowed.

The petition for the exercise of the Department's supervisory authority is denied.

CENTRAL PACIFIC RAILWAY COMPANY.

Decided August 24, 1918.

RAILROAD GRANT—PROCEDURE AT HEARING ON SPECIAL AGENT'S REPORT.

In a proceeding against a railroad selection alleging the existence of mineral upon the land embraced therein, the company is not required to introduce its evidence in advance of a showing by the Government in support of its charges.

DEPARTMENTAL DECISION DISTINGUISHED.

Central Pacific Ry. Co., 43 L. D., 545, distinguished.

HOPKINS, *Assistant Secretary.*

This is an appeal by the Central Pacific Railway Company from the decision of the Commissioner of the General Land Office of February 2, 1918, holding for cancellation its selection list No. 71 (serial 08082) to the extent of the SW. ¼ SE. ¼, SW. ¼ SW. ¼, Sec. 1; NW. ¼ NE. ¼, NE. ¼ NW. ¼, Sec. 13; N. ½ SW. ¼, NW. ¼ SE. ¼, Sec. 15; NW. ¼, W. ½ NE. ¼, NE. ¼ NE. ¼, W. ½ SW. ¼, NE. ¼ SW. ¼, Sec. 21; N. ½ NW. ¼, SW. ¼ NW. ¼, NW. ¼ NE. ¼, Sec. 29; NE. ¼

NW. ¼, NW. ¼ NE. ¼, Sec. 33, T. 23 N., R. 27 E., M. D. M., Carson City land district, Nevada.

It appears that by the Commissioner's letter of July 19, 1916, the local officers were directed to proceed against the selection as to the above-described tracts, on the charge:

* * * that said lands are mineral in character, other than coal and iron, containing valuable deposits of diatomaceous earth.

Notice of this charge was served upon the company which, on September 8, 1916, filed the affidavit of one of its employees and agents to the effect that he had made a careful examination of the lands for the purpose of ascertaining whether or not they contained minerals and that, "while the said lands contain deposits of diatomaceous earth, the said deposits are not of economic value; that consequently all of the above described lands are essentially nonmineral in character." The company accordingly applied for a hearing, which was ordered and set before a commissioner at Lovelocks, Nevada, January 23, 1917. At the time and place above named the parties appeared the Government being represented by a special agent and the company by its attorney. Thereupon the representative of the Government demanded that, under the construction placed by the Commissioner upon certain language used by the Department in Central Pacific Railway Company (43 L. D., 545), the company assume the burden of proof to establish the nonmineral character of the land and introduce its evidence before the introduction of any evidence on the part of the Government. This the company declined to do, urging that the nonmineral character of the land was *prima facie* established by the returns of the surveyor and further that the Government having initiated the proceeding, the burden of proof was upon it, under the rules of procedure of the Department, to sustain its charge and not upon the party denying the truth of the allegations. The representative of the Government thereupon asked that a decision be rendered in favor of the Government on an asserted default of the company. This motion was sustained by the local officers who held that the decision in Central Pacific Railway Company, *supra*, changed the procedure long established in contests of this kind and declared that "the contestant is entitled to a favorable decision for the reason that contestee has failed to establish the fact that the land in question is nonmineral in character, as required by the departmental decision above referred to." They therefore recommended that the list be rejected.

On appeal from that action, the Commissioner, in the decision here complained of, affirmed the same saying:

The decision in the case referred to by you (43 L. D., 545) is conclusive as to the position of the burden of proof, and the fact that the representative of

the Government declined, at that time, to introduce evidence formed no excuse for failure on the part of contestee to meet the charges by competent testimony and show that the land was of a character subject to selection.

The case cited arose on a protest filed by a special agent against a selection by the Central Pacific Railway Company, charging that certain tracts embraced therein were mineral in character. The hearing had on said protest was conducted according to the usual rules of procedure, the Government, as the plaintiff, introducing its evidence before the company, as defendant, placed any witnesses on the stand. From the evidence adduced, the local officers found certain tracts to be mineral in character. On appeal by the company, the Commissioner affirmed the finding of the local officers as to all but three of the forties there in question. In its decision the Department, after briefly setting forth the evidence as to the tracts found by the Commissioner to be nonmineral, said:

> From contentions made in the appeal and brief it is apparent, as already stated, that the railway company is under the impression that it is incumbent upon the Government to show that the lands do (not), as a present fact, expose mineral in paying quantities. As already indicated, this is not, in the opinion of the Department, in accordance with the law or the rulings of this Department, and if any evidence of mineral is found upon the land, and the showing is sufficient, in the opinion of prudent and qualified persons, to warrant further exploration and expenditure, with reasonable prospect of success, the land can not be classified as nonmineral, and is not subject to the grant to the railway company.
>
> To establish the right to a patent, it is incumbent upon the railway company, when the character of the land is called into issue, to furnish clear and convincing evidence that the lands are of the character subject to the grant. In my opinion, no such showing has been made in this case, but, on the contrary, the indications, as disclosed in the testimony, are that the three subdivisions described, as well as those found to be mineral by the Commissioner's decision, are not of the character subject to selection. Accordingly, the Commissioner's decision is modified, and selection list 42 held for cancellation to the extent of the SW. ¼ NW. ¼ and SW. ¼, Sec. 9, the N. ½ NW. ¼, Sec. 15, the N. ½ NE ¼, SW. ¼ NE. ¼, and SE. ¼, Sec. 17, T. 31 N., R. 51 E., M. D. M.

The question presented and decided in that case clearly had no reference or relation to any matter of procedure or to the sequence in which the Government and a railroad company, respectively, should present testimony at a hearing ordered upon charges made by a field officer. The hearing there, as before stated, had been conducted in strict accord with the rules governing proceedings upon the reports of special agents, and the question was merely as to the sufficiency of the evidence on behalf of the railroad company to overcome that regularly adduced on behalf of the Government. The effect of the first sentence of the concluding paragraph, although the language employed was somewhat broad, was, when considered in the light of the entire decision, simply to hold that in such cases

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where at a hearing the Government's evidence indicated the existence of mineral upon land included in a railroad selection, it is then incumbent upon the company in order to establish its right to a patent, to furnish clear and convincing evidence that the land is of the character subject to the grant.

The said decision, therefore, was not intended to, and did not, as held by the Commissioner and local officers, change the rules of procedure for the conduct of hearings in cases of this kind, so as to require a railroad company to introduce its evidence in advance of a showing by the Government to support its charges, and the ordinary rule still applies.

The decision appealed from is accordingly reversed and the case remanded for further appropriate proceedings.

MINNESOTA DRAINAGE—ACT OF MAY 20, 1908—PROCEEDINGS AFTER EXPIRATION OF PERIOD OF REDEMPTION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 13, 1918.

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

This office is in receipt of letters inquiring (a) as to the proper procedure to obtain patent, under the Act of May 20, 1908 (35 Stat., 169), to entered lands where the period of redemption has expired, and the entryman has failed to redeem his land from the tax judgment; (b) whether the patents in the case of entered lands will issue in the name of the entryman who has failed to redeem his land, or in the name of the purchaser under Sec. 6 of said act; and (c) whether such purchaser is required to have the qualifications of a homestead entryman.

Under authority of Sec. 7 of said act of May 20, 1908, and the drainage and tax laws found in the general statutes of Minnesota, compiled edition of 1913, and amendments thereof, the following regulations will govern in cases where purchasers of entered lands, sold for nonpayment of the drainage charges at a tax sale and not redeemed, desire to make entry of and secure patent to the lands under Sec. 6 of the Act of May 20, 1908, viz:

After the expiration of three years and not exceeding six years from the date of the tax judgment sale the person holding a tax certificate of sale must present such certificate to the county

auditor, who will prepare a notice, directed to the person in whose name the lands are assessed, specifying the lands, the amount for which they were sold, the amount required to redeem them, exclusive of costs, and the time when the redemption period will expire. The auditor will deliver the notice to the party applying therefor, who in turn will deliver the notice to the sheriff of the proper county, for service. Within twenty days after its receipt by him, the sheriff is required to serve the notice upon the party to whom it is directed, if to be found in the county, and if not so found, then upon the person in possession of the land; if the person to whom the notice is directed cannot be found in the county, and there is no one in possession of the land, the service shall be made by three weeks' publication. The sheriff is required to make his return to the county auditor, to whom evidence of publication, when made, should be furnished. The county officers are entitled to the customary fees for their services. The full period of redemption does not expire until sixty days shall have elapsed after the service of such notice, and proof thereof has been filed.

The certificate of the county auditor under his official seal, after the expiration of the sixty-day period mentioned above, that the entryman has been duly notified in accordance with the laws of the State of Minnesota, of the amount for which the lands which should be described were sold, the amount required to redeem the same, and the time when the redemption period expires, shall be deemed satisfactory evidence that proper service of notice was made, and upon receipt of such certificate in your office, you will cancel the entry upon the records of your office, as of the date of such receipt. Note the fact of such concellation upon the certificate of the auditor over the Register's signature, referring in each case to this letter as authority therefor, note the serial number of the entry on each certificate and forward said certificate with your monthly returns.

Within ninety days after the expiration of the sixty-day period, or after the full period of redemption has expired, the purchaser may make entry of the lands, upon furnishing the certificate of the county auditor mentioned above and affidavit as to the character of the land, and making the required payments. Should the purchaser fail to make entry of the lands within ninety days from the expiration of the full period of redemption mentioned, any other person, upon furnishing said certificate of the auditor of the county, may secure the cancellation of the entry, and be allowed to make entry in his own name upon making the payments specified in section six of the Act of May 20, 1908, showing his qualifications and furnishing an affidavit as to the character of the land. The price of the land to be paid by a purchaser of entered lands is $1.25 per acre, or such other price as may have been fixed by law for such lands, less so

much thereof as has already been paid by the entryman, in addition to the usual fees and commissions. In the case of subrogation, the applicant is also required to pay the sum at which the land was sold at the sale for drainage charges, with interest where chargeable.

If an entryman fails to redeem his land, and an entry thereof is made under the Act of May 20, 1908, patent in such case will issue in the name of the purchaser under the act last mentioned.

Section 6 of the Act of May 20, 1908, contains no requirement that a purchaser at a tax sale of entered lands shall have the qualifications of a homestead entryman, and no limitation as to the acreage which such purchaser may enter; and no such qualifications or limitation will be required where such purchaser makes entry at your office of the lands purchased. If such purchaser does not make entry, after giving notice to the entryman, a person who desires to become subrogated to the rights of said purchaser of entered lands must, under said Sec. 6, have the qualifications of a homestead entryman and the right of entry is limited to 160 acres.

CLAY TALLMAN,
Commissioner.

Approved:
S. G. HOPKINS,
Assistant Secretary.

RICHARD M. WILLIS.

Decided September 5, 1918.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

Where a desert land entry is allowed upon a showing as to the proposed plan of irrigation notwithstanding the fact that the Government had prior thereto appropriated the water supply in question because of which the entry is reliquished, repayment of the purchase money paid on such entry is warranted on the ground that it was erroneously allowed.

VOGELSANG, *First Assistant Secretary:*

Richard M. Willis has appealed from the decision of the Commissioner of the General Land Office, dated March 30, 1918, rejecting his application for return of the initial purchase money in connection with his desert land entry 021664, made October 10, 1914, for the NE ¼, Sec. 27, T. 25 N., R. 11 E., Santa Fe, New Mexico, land district.

Willis relinquished his entry February 4, 1918, and applied for repayment of the initial purchase price. The Commissioner of the General Land Office, in the decision appealed from, held that the laws providing for the return of moneys paid in connection with the public land entries, viz., section 2 of the act of June 16, 1880 (21

Stat., 287), and the act of March 26, 1908 (35 Stat., 48), do not authorize repayment in such cases, where, as found by him, the entry had not been canceled for conflict, had not been erroneously allowed, and had not been rejected.

In the appeal, it is stated:

> The land department was also aware at the time this application was filed that an appropriation of more than 1,000 acre-feet of water for this group of claims, which were under what is known as the Settlers Ditch and Reservoir Company, would be in conflict with the water rights heretofore appropriated for the Elephant Butte dam, but in spite of this fact allowed this claim, and these innocent claimants were never apprised of these fatal conditions until the application for a right of way of the Settlers Ditch and Reservoir Company was finally denied by the Secretary of the Interior, in 1908.

The Department is of opinion that appellant is right in the statement just quoted. When he made his entry, showing how he expected to obtain water to irrigate the land, he stated that it was from the "arroyo de Aquaje (or Petaca) by storing flood waters in the dam as per attached map."

It appears that the Commissioner, on April 6, 1917, rejected the application of the Settlers Ditch and Reservoir Company under the act of March 3, 1891 (26 Stat., 1095), for an easement or right of way for a reservoir system of canals over lands in a certain township in the Santa Fe, New Mexico, land district. On appeal, that action was affirmed by this Department, March 19, 1918, wherein departmental regulations approved April 25, 1907, were referred to. These regulations provide that:

> * * * no further rights of way be approved which involve the storage or diversion of the waters of the Upper Rio Grande and its tributaries, except applications of two kinds; first, those in connection with which there is a showing that the rights of the parties were initiated prior to the beginning of active operations by the Reclamation Service for the Rio Grande project, namely, March 1, 1903; second, applications which involve the diversion or storage of not exceeding 1,000 acre-feet of water per annum.

While Willis, on February 4, 1918, relinquished said entry, it is clear that he did so because he could not under this Department's instructions obtain water to irrigate the land. When the application herein was allowed, in 1914, the regulations above quoted were in full force and effect and the entry should not have been allowed, because of these regulations; in other words, the money was received and the entry allowed when the officers of the Land Department had knowledge, or were charged with knowledge, of the fact that the United States had appropriated for the Rio Grande project, being the Elephant Butte dam, the surplus and all available waters of the Rio Grande and its tributaries. Charged with this knowledge, it was the duty of the officers of the Land Department to have rejected the desert land application, and it is clearly error to have allowed the same. In

the opinion of this Department, the entryman did not forfeit the moneys paid when he subsequently relinquished the entry.

Indeed, the entry herein necessarily failed or was defeated by a cause which the entryman could not avoid. It is assumed that he had no knowledge of the regulations of the Department and, although he afterwards relinquished the entry, yet this entry failed for a cause short of the voluntary relinquishment of the applicant and because he did reliquish under those circumstances he did not thereby forfeit his rights to a return of the purchase money. Dorathy Ditmar (43 I. D., 104).

This case is in all essential respects similar to several already decided by this Department, among which is the case of William K. Shupe, decided August 8, 1918.

The action appealed from is reversed and the Commissioner of the General Land Office is authorized and directed to allow repayment on the ground that said desert-land entry was erroneously allowed.

OLOF GUSTAFSON.

Decided September 11, 1918.

RED LAKE INDIAN LANDS—ACT OF MAY 20, 1908.

Lands within the former Red Lake Indian Reservation in Minnesota opened to entry under the act of February 16, 1911, are subject to disposal under the provisions of the act of May 20, 1908.

RED LAKE INDIAN LANDS—SECOND HOMESTEAD ENTRY.

One who has exhausted his homestead right is not thereafter qualified to make a second homestead entry for land within the former Red Lake Indian Reservation under the provisions of the act of February 16, 1911, the act of February 20, 1904, which allowed such privilege having expired by limitation.

VOGELSANG, *First Assistant Secretary:*

By letter of March 17, 1917, the Commissioner of the General Land Office requested reconsideration of departmental decision of August 10, 1916 (45 L. D., 456), in the case of Olof Gustafson, with view to determining the following questions:

(1) Are lands in the former Red Lake Reservation in Minnesota opened to entry under the act of February 20, 1904 (33 Stat., 46), and the act of February 16, 1911 (36 Stat., 913), subject to disposal under the provisions of the act of May 20, 1908 (35 Stat., 169)?

(2) Can a second homestead entry be allowed for said Red Lake lands opened under the acts mentioned, where the applicant acquired title to a former homestead entry and relies upon the provisions of the said act of February 20, 1904, for authority to make second entry?

The said act of February 20, 1904, authorized sale of a described portion of the Red Lake Reservation in tracts not exceeding 160 acres to each individual at not less than $4 per acre, and subject to the homestead laws. Final proof conformable to the homestead laws was required to be made within six years from date of sale. The important provision in the act for present consideration reads as follows:

> That persons who may have heretofore exhausted their rights under the homestead law may become purchasers under this act.

A further provision was that all lands not sold within five years from date of the first sale should be offered for sale without any conditions except the payment of the purchase price. At the expiration of the said five-year period the Department directed that further entries under the homestead law be not allowed. This was with view to offering the lands for sale without conditions, but no such sales were made, because about that time the new act of February 16, 1911 was passed, which provided for allowance of homestead entries for said lands. Said act reads as follows:

> That hereafter all lands ceded under the Act entitled "An Act to authorize the sale of what is known as the Red Lake Indian Reservation, in Minnesota," approved February twentieth, nineteen hundred and four, and undisposed of, shall be subject to homestead entry at the price of four dollars per acre, payable as provided in section three of said Act, for all lands not heretofore entered; and for all lands embraced in canceled entries the price shall be the same as that at which they were originally entered: *Provided*, That where such entries have been or shall hereafter be canceled pursuant to contests, the contestant shall have a preference right to enter the land embraced in such canceled entry, as prescribed in the Act of July twenty-sixth, eighteen hundred and ninety-two: *Provided further*, That all lands entered under this Act shall, in addition to the payments herein provided for, be subject to drainage charges, if any, authorized under the Act entitled "An Act to authorize the drainage of certain lands in the State of Minnesota," approved May twentieth, nineteen hundred and eight. (Twenty-seventh Statutes, page two hundred and seventy.)

The instructions of March 3, 1911 (39 L. D., 540), under said act, stated in part as follows:

> Entrymen for these lands will be required to comply with the terms and conditions of the homestead laws of the United States as modified by said act of February 20, 1904, and an entry is subject to cancellation for failure to do so, or for failure to make the annual payments promptly.

The House Committee on Public Lands, with reference to the bill which became the said act of February 16, 1911, reported in part that—

> The bill requires that the purchasers pay not less than $4 per acre and that in addition thereto they make homestead entries and comply with the homestead laws. Its design is to prevent the land from passing into the hands of speculators. This is a remnant of certain Indian lands from which has been

eliminated nearly all of the lands of any value. Until within a year or two they have been considered too wet for settlement, but since the passage of the act referred to in the proposed amendment it has been possible to drain much of this land so as to make it desirable for homes.

The said act of May 20, 1908, provided in part that all lands in the State of Minnesota when subject to entry shall be subject to all of the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws; that all charges legally assessed may be enforced against any unentered lands by the sale of such lands subject to the same manner and under the same proceedings under which such charges would be enforced against lands held in private ownership; that at any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in said act, patent shall issue to the purchaser thereof upon payment to the receiver of the necessary charges therein specified; that unless the purchasers of unentered lands shall within ninety days after the sale provided for in the act, pay to the receiver the necessary specified charges, any person having the qualifications of a homestead entryman may make the necessary payment and shall thereupon become subrogated to the rights of such purchaser to receive a patent for said land; that with reference to entries on the ceded Red Lake Reservation, in addition to the other payments there shall be added the sum of three cents per acre to repay the cost of the drainage survey thereof.

Considering the last proviso to said act of February 16, 1911, and the House report thereon, and also the first and last sections of the said act of May 20, 1908, it must be concluded that the provisions of the latter act apply to these lands. The first question is therefore answered in the affirmative

The former departmental decision in this case requires some modification. The SW. ¼, Sec. 14 T. 154 N., R. 39 W., was on May 10, 1915, sold by the State of Minnesota for accrued drainage tax under the act of May 20, 1908, *supra*, Olof Gustafson was the purchaser and on May 15, 1915, made entry under said act, and on the same day was given final certificate, having paid the Indian price of $4 per acre to the receiver of the local land office.

By decision of May 16, 1916, the Commissioner of the General Land Office held the entry for cancellation for the assigned reason that Gustafson was not qualified to make the entry, because he had exhausted his homestead right by making a former entry. In the former decision in this case the Department did not consider the question of the qualifications of Gustafson to enter this tract, but discussed the case upon the theory that this entry was a sale under

the act of February 20, 1904, *supra*, and it was held that such sale was not authorized in view of the act of February 16, 1911. As above noted, this was not a sale under the act of February 20, 1904, but was a sale by the State for delinquent drainage tax, and entry was completed under the said act of May 20, 1908.

The objection to the entry was that such sale under the act of May 20, 1908, could be made only to a person qualified to make homestead entry. Gustafson was not so qualified because he had theretofore exhausted his homestead right. In the act of February 16, 1911, Congress did not provide, as in the former act of February 20, 1904, that persons who had exhausted their homestead rights may become purchasers of said lands. The provisions of the former act of February 20, 1904, in this respect are not applicable as that act had expired by limitation.

The second question submitted must be answered in the negative.

As herein modified, the former decision is adhered to, but the case is remanded for consideration under the remedial act of July 25, 1918 (Public No. 205), which validates entries erroneously allowed for such lands to persons who had exhausted their homestead rights.

EARL SNELGROVE.

Decided September 11, 1918.

STOCK-RAISING HOMESTEAD—COMPACTNESS OF AREA.

One who applies to make entry under the provisions of the Stock-raising Homestead act of December 29, 1916, is not required to embrace vacant lands within the two mile limit as to compactness, unless such tracts are of the character contemplated by the act and are free from valid adverse claim.

VOGELSANG, *First Assistant Secretary:*

Earl Snelgrove has appealed from a decision of the Commissioner of the General Land Office dated February 15, 1918, rejecting his application, filed January 20, 1917, to make an additional entry under the Stock-raising Homestead act for S. ½ N. ½, Sec. 12, S. ½ NE. ¼, and NW. ¼, Sec. 11 (exclusive of mining surveys Nos. 4934 and 6294, of about 40 acres), NE. ¼, Sec. 10, and S. ½ SE. ¼, Sec. 3, T. 3 S., R. 3 W., S. L. M., Salt Lake City, Utah, land district.

Snelgrove's original entry, made December 20, 1916, embraces NE. ¼ NE. ¼, Sec. 12, said township. The local officers rejected the application in question because it described a tract more than two miles long, and the decision appealed from affirmed the action of the local officers.

It appears that the N. ½ SE. ¼, and NE. ¼ SW. ¼, said Sec. 12 was vacant public land at the date of the rejected application, but was not applied for by Snelgrove because said subdivisions adjoined the homestead entry of Joseph M. Pratt, who claimed a preference right of entry therefor. The decision appealed from held, in effect, that as the preferential right of entry granted by section 8 of the act did not ripen prior to the designation of the land under the act, Snelgrove's reasons for omitting said subdivisons from his application could not be accepted as sufficient.

Section 1 of the Stock-raising Homestead act (39 Stat., 862) provides that entries thereunder must be "in reasonably compact form." The regulations of January 27, 1917 (45 L. D., 625), provide (paragraph 5) that no entry nor any claim comprising an original entry and an additional entry shall have an extreme length of more than two miles if there be available land of the character described in the act the inclusion of which in the claim would reduce such length.

To require Snelgrove to suffer the rejection of his application because he failed to include 120 acres in Sec. 12, and thus make the tract applied for more compact, would not be warranted unless it had been determined that the omitted subdivisions embraced land of the character contemplated by the act. None of the land has been designated under the act; in the absence of such designation it can not be determined whether its inclusion in the application should be insisted on. Moreover, the Department is of opinion that if Snelgrove had been advised by Pratt that he intended to claim the 120 acres under the first clause of section 8 of the act, he was warranted in recognizing such claim, rather than suffer the loss of that area after designation.

The records of the Land Department show that on March 29, 1918, said Pratt applied to make an additional entry for, with other lands, said N. ½ SE. ¼, and NE. ¼ SW. ¼, Sec. 12.

It does not appear from the record before the Department that the area Snelgrove appears entitled to enter could be applied for in more compact form. Hence, the fact that it is more than two miles in extreme length does not warrant the rejection of the application.

The proper practice, where it appears that the area applied for might be in more compact form, is to require the applicant to state why he omitted to apply for certain subdivisions, naming them.

The decision appealed from is reversed and the case remanded with directions to forward the petition for designation to the Director of the Geological Survey, and to require the applicant to file an amended application on the prescribed form (4-016a).

OREGON AND CALIFORNIA LANDS—SALE OF TIMBER ON ISOLATED TRACTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 15, 1917.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

In accordance with the provisions of the act of Congress approved June 9, 1916 (39 Stat., 218), revesting in the United States so much of the lands granted to the Oregon and California Railroad Company as were unsold July 1, 1915, the following instructions are issued:

In all cases where it is found that the timber on isolated tracts of lands classified as "timber lands" should be sold at an early date in order to obtain the estimated value of the timber, you will proceed as follows with as little delay as may be consistent with securing the notice herein provided:

1. Cause a notice to be published for at least 30 days in three newspapers of general circulation in the State of Oregon, one of which shall be in the county wherein the land is situated, announcing the intention to offer at public sale on a day specified at the district land office wherein the land is situated, the timber on the lands described therein; the cruiser's estimate of the timber on each 40-acres tract, and the value thereof to form a part of such notice.

2. The sale will be at public auction or outcry, at the district land office of the district within which the land is situated, and conducted by the register of such office.

3. The right of purchase at such sale will be limited, in accordance with the act, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory or district thereof.

4. The register before offering any portion of the timber advertised shall advise all intending purchasers that the patent for the timber purchased will contain a clause fixing the period within which said timber must be cut and removed by the purchaser, his heirs or assigns at ten years; and that no timber shall be removed until the issuance of a patent therefor. He shall also before the sale inquire whether any person present desires the timber on any legal subdivision advertised to be separately offered, before its inclusion in any offer of a larger unit, and if such request is made, the land thus designated may be so offered.

5. No timber shall be sold for less than the appraised price; the Secretary of the Interior having full authority to reject any and all bids where the price offered is by him deemed inadequate.

6. The timber shall be sold to the highest bidder, subject to the approval of the Secretary of the Interior, and the entire purchase price bid paid to the receiver in cash, currency, or certified checks, when drawn in the manner authorized, who will issue his receipt therefor and hold the same as other "unearned moneys," until notified of the approval of the sale, when it shall be deposited in the Treasury of the United States to the credit of the "Oregon and California Land Grant Fund," and a cash certificate issue to the purchaser.

7. Persons who purchase timber at such sale shall be required to pay in addition to the purchase price a commission of one-fifth of one per centum thereof, to be placed to the credit of said fund.

8. On the termination of the sale, the register will forthwith transmit to the General Land Office by special enclosure a report in duplicate of the proceedings thereunder, showing (1) the tract on which the timber was sold (2) the names of the purchasers and (3) the amounts received therefor together with such other details as may seem properly appropriate thereto.

9. The receiver of public moneys will, in addition to his regular abstracts, render monthly for each county in case of timber sales therein, a separate abstract of applied moneys, in duplicate, using form 4–103, reporting thereon the date of the application of the money, the receipt number and the name of the purchaser, together with a description of the land involved, using more than one line when necessary for each item. Notation should be made by the local officers upon the receipts and papers, of the county in which the land affected is situated.

HARVEY v. HORNE.

Decided September 25, 1918.

CONTEST—ABANDONMENT—ACT OF JULY 28, 1917.

The benefits of the act of July 28, 1917, are conferred upon bona fide settlers and homestead entrymen whose absence from the land is due to enlistment in the military or naval service of the United States, and those engaged in other war activities, however worthy, are not within the purview of that act.

VOGELSANG, *First Assistant Secretary:*

W. Hail Horne has appealed from the decision of the Commissioner of the General Land Office, dated May 29, 1918, holding for cancellation his homestead entry 023497, made September 10, 1917, for lots 1 and 2, SE. ¼ NE. ¼, Sec. 2, T. 2 N., R. 18 E., and SE. ¼ SE. ¼, Sec. 35, T. 3 N., R. 18 E., Hailey, Idaho. The entry contains 157.34 acres.

March 12, 1918, Charles H. Harvey filed contest against said entry, charging failure of residence, not due to the entryman's military or naval service. Notice was receipted for by the defendant and he

filed a sworn answer admitting his default but alleging that his absence from the claim was due to "governmental service."

The register and receiver asked for instructions as to the disposition to be made of the case, and the Commissioner, April 26, 1918, directed that the claimant be advised that the answer was insufficient, and allowed him thirty days from notification in which to amend his answer, showing that the default was due to military or naval employment; and holding that in case of failure to respond, the entry would be held for cancellation.

Claimant received a copy of this letter and filed another answer in which he specifically admitted that he never resided on the homestead and that his failure to do so was not occasioned by his military or naval employment; that he was actively engaged in work for his Government in support of both its Army and Navy.

In the decision appealed from the Commissioner held that, since the claimant had not resided upon the land within six months after making entry and that such default was not due to military or naval service but merely to his activities in supporting both Army and Navy, his answer was insufficient, and the entry was held for cancellation.

Claimant's appeal is supported by an affidavit wherein he states that he was and is: (1) Federal Food Administrator for Lincoln County, Idaho; (2) Chairman of Military Entertainment Council for Lincoln County; (3) Captain of Company "A" of American Red Cross Canteen Service, under direct supervision of the Government; (4) Chairman of Auditing Committee of the Lincoln County Chapter of the American Red Cross; (5) Local Cashier for the second Red Cross War Fund.

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

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

Since claimant was not in the military or naval service of the United States, the work he is alleged to have done for his Government is not within the purview of the statute which excuses residence. The benefits of the act do not extend to any persons not so engaged, notwithstanding the fact that their work may be highly commendable, as in this case, and calculated to aid the military and naval

forces of the United States in their offensive and defensive operations.

The action appealed from is accordingly affirmed.

ALASKA HOMESTEADS—SURVEYS WITHOUT EXPENSE TO CLAIMANTS—ACT OF JUNE 28, 1918 (PUBLIC 180).

INSTRUCTIONS.

[Circular No. 623.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 9, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES IN ALASKA.

Your attention is invited to the act of Congress of June 28, 1918 (Public No. 180), by which there is inserted in the Alaska homestead act of July 8, 1916 (39 Stat., 352), a provision for the survey of homesteads, without expense to the claimants. The section reads as follows:

SEC. 2. That if the system of public surveys has not been extended over the land included in a homestead entry, the entryman may, after due compliance with the terms of the homestead law in the matter of residence, cultivation, and improvement, submit to the register and receiver a showing as to such compliance, duly corroborated by two witnesses, and if such evidence satisfactorily shows that the homesteader is in a position to submit acceptable final proof the surveyor general of the Territory will be so advised and will, not later than the next succeeding surveying season, issue proper instructions for the survey of the land so entered, without expense to the entryman, who may thereafter submit final proof as in similar entries of surveyed lands. So far as practicable, such survey shall follow the general system of public-land surveys, and the entryman shall conform his boundaries thereto: *Provided*, That nothing herein shall prevent the homesteader from securing earlier action on his entry by a special survey at his own expense, if he so elects.

Accordingly, paragraph 12 of the regulations under the Alaska homestead law (45 L. D., 227) is hereby amended to read as follows:

SUBMISSION OF PROOF—UNSURVEYED LANDS.

12. Where the public system of surveys has not been extended over a duly located homestead and the settler has had such compliance with the terms of the homestead law in the matter of residence, cultivation, and improvements as to justify submission of three-year proof on his claim, he may file with the register and receiver his affidavit, corroborated by two witnesses, showing such compliance. If they find this satisfactory, they will so advise the surveyor general of the Territory and he will, not later than the next succeeding surveying season, issue instructions for the survey of the land involved, without expense to the entryman. So far as practicable such surveys must follow the general system of public-land surveys and the entryman must in all cases conform his boundaries thereto. After the survey has been duly made and the plat thereof filed, proof may be submitted on the entry as in case of ordinary entries for surveyed lands. (See par. 18.)

However, if the settler desires to obtain earlier action in the matter of the survey, or if he desires to avoid the necessity of conforming to a survey made under the provision of law above referred to, he may have a survey of the tract made at his own expense by a deputy surveyor, appointed by the United States surveyor general. After the survey has been completed and been approved by the surveyor general, certified copies of the field notes and plat must be filed at the local United States land office, together with the settler's notice of intention to submit proof upon his claim.

Paragraph 18, above referred to, reads as follows:

18. Where the public system of surveys has been extended over a tract and homestead entry made in accordance therewith, though the claim may have been iniated by a location, the procedure with regard to submission of proof is the same as in the United States. Where proper compliance with the law is shown, no adverse claim appears on the records, and no protest against the proof is filed, it will be accepted and final certificate issued pursuant thereto. The proof may be taken before the register and receiver or before any officer within the land district authorized to administer oaths and having a seal of office.

There is no change in the regulations governing cases where the homestead settler elects to apply for a survey at his own expense, and to submit proof pursuant thereto.

CLAY TALLMAN,
Commissioner.

Approved,
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SOLDIERS UNDER 21 YEARS OF AGE—SPECIAL PRIVILEGES UNDER PUBLIC-LAND LAWS—ACT OF AUGUST 31, 1918, AND RESOLUTION OF SEPTEMBER 13, 1918.

INSTRUCTIONS.

[Circular No. 622.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 9, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

Section 8 of the act of Congress of August 31, 1918 (Public 210) reads as follows:

SEC. 8. That any person, under the age of twenty-one, who has served or shall hereafter serve in the Army of the United States during the present emergency, shall be entitled to the same rights under the homestead and other land and mineral entry laws, general or special, as those over twenty-one years of age now possess under said laws: *Provided,* That any requirements as to establishment or residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service: *Provided further,* That applications for entry may

be verified before any officer in the United States, or any foreign country, authorized to administer oaths by the laws of the State or Territory in which the land may be situated.

The joint resolution of Congress (Public 41), approved September 13, 1918, and referring to the above provision, reads as follows:

That no relinquishment of any public-land entry made under or by authority of section eight of the act of the Sixty-fifth Congress, second session, entitled "An act amending the act entitled 'An act to authorize the President to increase temporarily the Military Establishment of the United Sates,' approved May eighteenth, nineteen hundred and seventeen," shall be valid or effective for any purpose unless executed after the entryman shall have actually resided upon and cultivated the land, in the case of a homestead entry, for at least six months, and in the case of an entry made under other than the homestead laws, after the entryman shall have complied with the provisions of the applicable law for at least one year.

Any person, firm, or corporation soliciting or dealing with the relinquishment of such claim or entry prior to the completion of compliance with the applicable law and with this resolution, and who or which solicits, demands, or receives or accepts any fee or compensation for locating, filing, or securing the claims or entries for persons entitled to the benefits of said section shall, upon conviction, be fined not to exceed $1,000 or imprisoned for not exceeding two years, or both.

2. Said section 8 of the act of August 31, 1918, confers the right of entry under any of the agricultural or mineral public-land laws upon persons under the age of 21 who have served, or shall hereafter serve, in the Army of the United States during the present war, in the same manner as they could have made entry if over that age. This right is conferred only upon persons who have been actually mustered into the service and who are under 21 years of age at the time their applications are executed.

A drafted man is regarded as serving in the Army from the time he reports for entrainment; a man in the Officers' Reserve Training Corps from the time of his admission.

This department is of the opinion that the expression "the Army of the United States," as used in section 8 of the act, includes the Navy and Marine Corps, and that construction will stand unless Congress shall otherwise direct.

3. An application for entry by a person coming within the meaning of the law may be executed at any place where he is located, whether it be in a State, Territory, or district of the United States, or in a foreign country. It may be executed before any officer whose authority to administer oaths is recognized by the laws of the State or Territory in which the land sought is situated. These laws differ, and it will not be attempted here to give a synopsis of all of them. An examination of the State laws leads to the conclusion that they all recognize affidavits executed in any part of the United States before a notary public or the clerk of a court of record, and those

executed outside of this country before a notary or before any diplomatic or consular officer of the United States.

4. An applicant claiming the benefits of said section must execute an application for entry on the ordinary prescribed form; but, where he has not examined the tract sought, there should be omitted from the form so much as refers to personal examination of, or acquaintance with, the tract, and recites the applicant's knowledge as to its character (nonmineral, nonirrigable, etc.). For example, there should be stricken from an application for entry under the enlarged homestead act all that part of the form beginning with the words "that I am well acquainted with the character of the land" and ending with "it is not susceptible of successful irrigation," etc.

In such cases there must accompany the application an affidavit setting forth the facts as to the character of the land, executed by some other person who states that he is himself familiar therewith; but this will not be received as sufficient unless the affiant deposes that his statement is made at the request of the applicant; that he has not solicited, demanded, received, accepted, or been promised, nor intends to receive, a fee or compensation of any nature for his assistance in securing allowance of the claim or entry.

5. The act does not exempt an applicant from payment of the regular fee and commissions chargeable to other applicants; as to that matter, you will treat the filings like other applications.

For the information of prospective applicants it may be stated that the fee and commissions on a 320-acre entry under the enlarged homestead act amount to $22 in most of the States, or to $34 where the lands are within the granted limits of Government-aided railroads; the amount due on a stock-raising homestead application for 640 acres is $34, or $58 under the circumstances last mentioned.

6. A person making a homestead entry under this act is entitled to the benefits of the act of Congress of July 28, 1917 (40 Stat., 248). That act provides that a homesteader shall have his military services construed as equivalent to residence and cultivation for the same length of time upon the tract entered, and that if he be discharged on account of wounds received or disability incurred in the line of duty the entire term of his enlistment shall be thus counted; also, that no patent shall issue to any homesteader who has not resided upon, improved, and cultivated the land for at least one year, but he is entitled to the five months' absence privilege like other homesteaders during each year's residence, which he may be required to show. It provides, further, that if a homesteader dies while actually engaged in the military or naval service of the United States his widow, if unmarried, or (if she be married) his minor orphan children, or his or their legal representatives may forthwith make proof upon his entry.

A person making a desert-land entry under this act is entitled to the benefits of the act of Congress of August 7, 1917 (40 Stat., 250). Therefore, such an entry will not be subject to cancellation for failure to expend $1 per acre in improvements upon the claim, or to effect its reclamation, during the period of his service and until six months thereafter, and the time for complying with the law is extended for a period equal to that of said service. This relief is conditioned, however, upon his filing in the local land office, within six months after he is mustered into the service, a notice of his muster in and of his desire to hold the desert claim under said act.

7. The soldier will not be required to establish residence upon the land in his homestead entry until six months after his discharge from military service. No contest against the entry will lie on the ground of failure to establish residence until the expiration of that period, and the time elapsing before such discharge from the service will not be counted on the statutory life of the entry.

8. The joint resolution above set forth provides for imposition of a fine of not exceeding $1,000 or imprisonment for not exceeding two years, or both, upon any person, firm, or corporation which solicits, demands, receives, or accepts any fee or compensation (whether it be in money or in other value) for locating, filing, or securing any claim or entry for any person entitled to the benefits of section 8 of the act of August 31, 1918. It is desired that if there be violations of this prohibition they be promptly brought to the attention of the General Land Office or the Chief of Field Division, to the end that immediate steps may be taken to stop such illegal practices and to bring the offenders to justice. Moreover, the attention of the soldiers is very strongly directed to the fact that any one of them who pays or promises compensation of any kind for securing an entry, even though it be merely by the grant of grazing privileges, will be conniving at the breach of a law which Congress enacted for the protection not only of the soldiers but of the general interests in the public domain. As above shown, it will frequently be necessary for some person to execute, on behalf of the applicant, an affidavit regarding the character of the land; but this must in all cases be done by a relative or by some other person who is willing to afford the service without compensation. The clear purpose of the act is to give soldiers under the age of 21 an opportunity to hold a homestead or other land claim for their own personal benefit, but not for speculation on the part either of themselves or of others.

9. The resolution provides that no relinquishment of an entry made under the act in question shall be valid unless executed after the entryman shall have resided upon and cultivated the land covered by a homestead entry for at least six months; or, as to other classes of claims, until he shall have complied with the provisions

of the applicable law for at least one year. Moreover, it provides that any person, firm, or corporation soliciting or dealing with the relinquishment of such claim or entry, prior to the completion of one year's compliance with the applicable law and with the resolution, shall be subject to the punishments above mentioned. Accordingly, the registers and receivers are instructed not to make on their records any notation regarding receipt of a relinquishment of an entry made under the act of August 31, 1918, unless it shall be made to appear through the affidavit of the entryman, corroborated by those of two witnesses, that the above conditions have been complied with; and soldiers are warned not to execute relinquishments of their entries prior to the arrival of the time indicated.

In case of death of the entryman the entry will be subject to relinquishment by his widow, heirs, or devisees, as the case may be, under the following conditions:

(*a*) If a homestead, not until after the expiration of six months from the date of his death, if he had not established residence on the land, or at any time after the expiration of six months from the date residence was established by him.

(*b*) If any other class of entry, not until after the applicable law has been complied with for at least one year.

As in the case of relinquishment by the entryman, such relinquishments must be supported by affidavit, duly corroborated, establishing the material facts.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

AMENDMENT OF ALASKA TOWNSITE REGULATIONS RELATIVE TO THE SURVEY AND DISPOSAL OF LANDS IN POSSESSION OF INDIANS WHO BECOME CITIZENS.

[Circular No. 580.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 8, 1918.

REGISTERS AND RECEIVERS, U. S. LAND OFFICES, SURVEYOR-GENERAL AND CHIEF OF FIELD DIVISION, ALASKA:

You are advised that on December 15, 1917, the Secretary of the Interior amended Section 6 of the Alaska townsite regulations, Cir-

cular 491, approved July 19, 1916 (45 L. D., 227, 243), so as to read in full as follows:

> Indian or native Alaskan occupants who have secured certificates of citizenship under the territorial laws of Alaska shall be treated in all respects like white citizen occupants; but all land occupied by other Indians or Alaskan natives shall not be assessed nor conveyed by the trustee. In making the subdivisional survey herein required, the surveyor will set apart the possessions occupied by the Indians who are not citizens and appropriately designate them as such upon the triplicate plats of his surveys, but he will not extend any street or alley upon or across such possessions.

In connection herewith, attention is called to Territorial Act of April 27, 1915 (Chap. 24, Session Laws of Alaska, 1915, page 52), providing a method whereby native Indians of Alaska may definitely establish the fact of their citizenship under Sec. 6, act of February 8, 1887 (24 Stat., 388). A certificate of such citizenship will therefore be required to enable "Indian or native Alaskan occupants" of lots in townsites to avail themselves of the privileges of such amended regulations.

CLAY TALLMAN,
Commissioner.

REINSTATEMENT OF SELECTION OR RETURN OF SELECTION PAPERS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 26, 1918.

The Department is in receipt of your [Commissioner of the General Land Office] letter of January 14, 1918, requesting to be advised whether cases of the character described below should be reopened upon application:

October 11, 1900, Allen M. Wheeler made homestead entry at the Rapid City, South Dakota, land office, for the SE. ¼ SE. ¼, Sec. 8; SW. ¼ SW. ¼, Sec. 9; NW. ¼ NW. ¼, Sec. 16; NE. ¼ NE. ¼, Sec. 17, T. 1 S., R. 3 E., within the limits of the Black Hills forest reserve. Final proof was submitted and final certificate of entry issued November 20, 1900. November 21, 1900, entryman conveyed the land to the United States under the provisions of the act of June 4, 1897 (30 Stat., 36), and subsequently, through attorneys in fact, applied to select other lands in lieu thereof.

Subsequently, pursuant to your office letter of May 26, 1903, charges were preferred against the entry on the ground that Wheeler had not complied with the requirements of the homestead law. Entryman failed to apply for a hearing and on September 12, 1904, the entry was canceled.

Upon consideration of all the facts in the case as now presented, the Department feels that the exchange should have been consummated and that the proceedings initiated under letter of May 26, 1903, should not have been taken. While the Department can not entertain a petition for the reinstatement of the original selection or selections, except in the absence of an intervening adverse right, no reason appears why the papers pertaining to the selection can not be returned to the parties entitled thereto, to be used in other selections under the provisions of the act of June 4, 1897, *supra*, as amended by the proviso to the act of March 3, 1905 (33 Stat., 1254).

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

KEUSCH v. LANE.[1]

INDIAN LANDS—HOMESTEAD ENTRY—RESIDENCE AND CULTIVATION—CANCELATION OF ENTRY—INJUNCTION.

1. A decision of the Secretary of the Interior construing the provisions of sec. 5 of the Act of Congress of April 27, 1904 (33 Stat. at L. 352, chap. 1624) for the disposal of lands ceded by the Indians of the Crow Reservation in Montana, to the effect that the provisions of the Homestead Laws with respect to residence and cultivation are applicable to an entry of such lands, is within the discretionary powers of the Secretary, and a cancellation of the entry in accordance therewith will not be prevented by an injunction.

2. The intention of Congress to make the provisions of the Homestead Law applicable to homestead entries under the Act of April 27, 1904, of lands ceded by the Crow Indians in Montana, is not disproved by the Act of February 20, 1917 (39 Stat. at L. 926, chap. 101), which provides that any person "who has heretofore entered under the Homestead Laws, and paid a price equivalent to or greater than $4 per acre, lands embraced in a ceded Indian Reservation, shall, upon proof of such fact, if otherwise qualified, be entitled to the benefits of the Homestead Law as though such former entry had not been made."

No. 3115. Submitted March 8, 1918. Decided April 1, 1918.

Hearing on an appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill to enjoin the Secretary of the Interior from cancellation of a homestead entry. *Affirmed.*

The facts are stated in the opinion.

Mr. James I. Parker and *Mr. Samuel V. Hayden*, for the appellant.

Mr. Charles D. Mahaffie and *Mr. C. Edward Wright* for the appellees.

[1] Reported in 47 App. D. C., p. 577, and printed through the courtesy of Burdett A. Rich, Reporter.

Mr. Justice Robb delivered the opinion of the Court:

This appeal is from a decree in the supreme court of the District dismissing appellant's bill to enjoin the cancellation of her homestead entry, the action of the Department having been based upon a finding that appellant, Meta Keusch, had failed to comply with the requirements of the law relating to residence and cultivation.

The Act of April 27, 1904 (33 Stat. at L. 352, chap. 1624), "To Ratify and Amend an Agreement with the Indians of the Crow Reservation, in Montana," contains the amended agreement with those Indians, article 2 of which providing (page 357) "that in consideration of the land ceded, granted, relinquished and conveyed by article 1 of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the Reclamation Act approved June 17th, 1902, the Homestead, Town-site, and Mineral-land Laws," etc. Section 5 of the act provides for the carrying out of the agreement with reference to the disposition of this land. In that section (p. 360), it is specified "that before any of the lands by this agreement ceded are opened to *settlement or entry*," certain things shall be done by the Commissioner of Indian Affairs. It is further specified that the lands not withdrawn for irrigation under said Reclamation Act, "which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the Homestead, Town-site, and Mineral-land Laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; * * * *And provided, further*, that the price of said lands shall be $4 per acre, when entered under the Homestead Laws."

Appellant's entry, according to the averments of her bill, was *a homestead entry*, and in due time she "submitted her final five-year proof on her said homestead entry, upon which proof final certificate was and still is withheld." One Erickson inaugurated a contest, alleging that appellant had failed to establish and maintain a residence on the land she had entered. Proof was taken, and, upon hearing before the register and receiver, the decision was in favor of the contestee. The commissioner, however, reversed the decision, and his action was affirmed by the Assistant Secretary. It is not denied that the final decision would defeat an ordinary homestead entry and require its concellation. But appellant contends that she was not required, under provisions of the Act of April 27, 1904, to do more than make the payments therein specified; in other words, that the provisions of the Homestead Law are not applicable to this entry.

Under the agreement with the Indians the United States undertook to dispose of these lands "under the provisions of the Reclamation Act approved June 17, 1902, the Homestead, Town-site, and Mineral-land Laws," and by sec. 5 of the act Congress undertook to provide for the fulfillment of that agreement, for by that section it is specified that lands open to settlement or entry "shall be disposed of under the Homestead, Town-site, and Mineral-land Laws of the United States." The Secretary of the Interior construed this provision as bringing within the scope of the act the laws relating to homestead entries. Not only was appellant's entry made in harmony with that construction, but her attitude, until she met with an adverse ruling by the commissioner, was consistent with the view of the Department. Certainly that view is reasonable, and does not involve a forced construction of the act before us. The case, therefore, falls within the rule laid down in *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356. Appellant relies upon *Lane* v. *Hoglund*, 244 U. S. 174, 61 L. ed. 1066, 37 Sup. Ct. Rep. 558, but there the duty of the Secretary was so plain that the court found it was ministerial. "If the law," said the court, "direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." Here, on the contrary, we have a statute which requires construction, and the construction placed upon it by the officer primarily charged with that duty is reasonable. We may not say, therefore, that he was required to perform nothing more than a ministerial duty in carrying out the provisions of this act. On the contrary, we think it quite apparent that it was the intent of Congress to clothe him with the same discretionary powers which he exercises in the disposition of lands "under the Homestead, Town-site, and Mineral-land Laws of the United States."

Our attention has been directed to the Act of February 20, 1917 (39 Stat. at L. 926, chap. 101), providing that any person "who has heretofore entered under the Homestead Laws, and paid a price equivalent to or greater than $4 per acre, lands embraced in a ceded Indian Reservation, shall, upon proof of such fact, if otherwise qualified, be entitled to the benefits of the homestead law as though such former entry had not been made." But we see nothing in this act inconsistent with the interpretation placed by the Secretary upon the Act of 1904. For reasons satisfactory to Congress, a homestead entry made under the Act of 1904 was not to exhaust the homestead rights of the entryman. This, however, falls far short of sustaining appellant's view that it was not intended by Congress to make the provi-

sions of the Homestead Law applicable to homestead entries under the Act of 1904. On the contrary, we think it was the view of Congress that further legislation was necessary to prevent the exhaustion of the homestead rights of an entryman under the early act, and by this additional legislation an exception was made in favor of such an entryman.

The decree must be affirmed, with costs. *Affirmed.*

AMENDMENT OF CIRCULAR NO. 491, RELATING TO TOWNSITES IN ALASKA.

[Circular No. 597.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1918.

REGISTERS AND RECEIVERS, AND CHIEF OF FIELD DIVISION, ALASKA:

Section 2 of Circular No. 491, dated July 19, 1916 (45 L. D., 242), is hereby amended to read as follows:

2. When the survey of the exterior lines has been approved, or if the townsite is on surveyed land, a petition to the Secretary of the Interior, signed by a majority of the occupants of the land, will be filed in the local office for transmittal to the General Land Office requesting the appointment of a trustee and the survey of the townsite into lots, blocks, and municipal reservations for public use, the expense thereof to be paid from assessments upon the lots occupied and improved on the date of the approval of final subdivisional townsite survey. If found sufficient the Secretary of the Interior will designate an officer of the field service of the General Land Office as a trustee to make entry of the townsite, payment for which must be made at rate of $1.25 per acre. If there are less than 100 inhabitants the area of the townsite is limited to 160 acres; if 100 and less than 200, to 320 acres; if more than 200, to 640 acres, this being the maximum area allowed by the statute.

Section 8 of said circular is hereby amended to read as follows:

8. On the approval of the plat by the General Land Office the trustee will publish a notice that he will, at the end of 30 days from the date thereof, proceed to award the lots applied for, and that all lots for which no applications are filed within 120 days from the date of said notice will be subject to disposition to the highest bidder at public sale. Only those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional townsite survey, or their assigns thereafter, are entitled to the allotments herein provided. Minority and coverture are not disabilities.

Section 11 of said circular is hereby amended to read as follows:

11. After deeds have been issued to the parties entitled thereto the trustee will publish notice that he will sell, at a designated place in the town and at a time named, to be not less than 30 days from date, at public outcry, for cash, to the highest bidder, all lots and tracts remaining unoccupied and unclaimed at the date of the approval of final subdivisional townsite survey, and all lots and

tracts claimed and awarded on which the assessments have not been paid at the date of such sale. The notice shall contain a description of the lots and tracts to be sold, made in two separate lists, one containing the lots and tracts unclaimed at the date of the approval of final subdivisional townsite survey and the other the lots and tracts claimed and awarded on which the assessments have not been paid. Should any delinquent allottee, prior to the sale of the lot claimed by him, pay the assessments thereon, together with the pro rata cost of the publication and the cost of acknowledging deed, a deed will be issued to him for such lot, and the lot will not be offered at public sale. The notice of public sale will be published for 30 days prior to the date of sale, and copies thereof shall be posted in three conspicuous places within the townsite. Each lot must be sold at a fair price to be determined by the trustee, and he is authorized to reject any and all bids. Lots remaining unsold at the close of the public sale in an unincorporated town may again be offered at a fair price if a sufficient demand appears therefor.

CLAY TALLMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

YUMA RECLAMATION PROJECT—LANDS FORMED BY ACCRETION—AUTHORITY GRANTED TO FURNISH CLAIMANTS UNDER STIPULATION TEMPORARILY WITH WATER FOR IRRIGATION—DIRECTIONS AS TO SURVEY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 17, 1918.

By your [Director of the Reclamation Service] letter of February 23, 1918, you present certain questions arising upon the applications of Thomas D. Molloy, Anna C. Molloy, and others, for irrigation water for the yearly season, January 1, 1918, to December 31, 1918, Yuma Project, Arizona.

The application of Thomas D. Molloy and Anna C. Molloy describes them as the owners of "two hundred acres or lots 2 and 3, mostly accretion, situate in Section 12, Township 10 South, Range 25 West, G. & S. R. B. & M., Yuma County, Arizona, consisting of 200 irrigable acres." You recommend that water be furnished with the stipulation that the United States does not recognize the validity of the title claimed and that the Commissioner of the General Land Office be directed to survey these so-called "accretion" lands, whether they be found to be public or private.

The plat of T. 10 S., R. 25 W., approved by the surveyor general April 18, 1874, discloses that the Colorado River ran through the township in a generally north and south direction. It was meandered,

lots 2 and 3 representing the western portion of the NE. ¼, Sec. 12, rendered fractional by the meander line. This area was withdrawn from entry January 9, 1875, to satisfy the Paso de los Algondones grant, which was rejected by the Supreme Court in United States v. Coe, 170 U. S., 681, decided May 23, 1898, and again withdrawn September 1, 1900, pending legislation (see instructions of January 29, 1901, 30 L. D., 455). It was opened to entry under the act of January 14, 1901 (31 Stat., 729), by the foregoing instructions.

After the public land survey and while the lands were so withdrawn, the river changed its course and there was formed by accretion a body of land contiguous to said lots 2 and 3. The river frequently changes its channel and, from the map accompanying your letter, it would appear that the American survey of the International Boundary Commission, in 1893, placed the stream at approximately 1.16 to 2.16 miles westward from the meander line of lots 2 and 3. A survey by the Geological Survey in 1903 places it somewhat to the east of the International survey. In 1908, it was again slightly farther to the east, while a survey by the Reclamation Service in 1914 crosses the International survey to the west of the 1903 and 1908 lines. The Yuma Valley levee, constructed by the United States under the reclamation laws beginning with the act of June 17, 1902 (32 Stat., 388), extends north and south, west of said lots 2 and 3 and east of the International Boundary survey of 1893–1894.

The land claimed by the Molloys lies between the levee and the meander line of lots 2 and 3. The area was again withdrawn under the second form of the reclamation act July 2, 1902, changed to the first form July 20, 1905.

Upon April 5, 1901, Laureston D. Johnson made homestead entry No. 3703, Tucson series, for the fractional NE. ¼, Sec. 12, T. 10 S., R. 25 W., or said lots 2 and 3, and the E. ½ NW. ¼, containing 142.42 acres, under section 2 of the act of January 14, 1901, *supra*. He settled upon the land so entered in September, 1900. Commutation proof was made December 31, 1903, cash certificate No. 1604, Tucson, issuing January 6, 1904, and the patent, February 10, 1905.

By an application, dated August 16, 1910, Edward P. Cleland requested that a survey be made of certain land which he claimed to be an unsurveyed part of the public domain and which he described as the N. ½ NE. ¼, SW. ¼ NE. ¼, Sec. 11, T. 10 S., R. 25 W., G. & S. R. M. Similar applications were at the same time presented by Arthur Harper for land described as the NE. ¼ NW. ¼, Sec. 12 and by John E. O'Malley for the S. ½ SW. ¼, Sec. 1, and S. ½ SE. ¼, Sec. 2. These applications were rejected by the Commissioner of the General Land Office October 28, 1910, upon the ground, as to Sec. 12, that the riparian lands in Secs. 1 and 12 had been disposed of, and as to Sec. 11, that the area was within the Republic of Mexico, citing Nebraska

v. Iowa, 143 U. S., 359. The action of the Commissioner was affirmed by the Department in its decision of February 28, 1911 (E–5188, Edward P. Cleland *et al.*), upon the ground that "other rights have intervened."

Another petition was filed by John E. O'Malley August 7, 1911, setting forth that the United States owned lot 7, Sec. 1, and lot 1, Sec. 12, upon which he asserted a settlement right initiated in December, 1907. (This settlement right would appear to be invalid in view of the previous withdrawal under the reclamation act.) He also alleged that lots 5 and 6, Sec. 1, were owned by Frank M. Vierra, and lots 2 and 3, Sec. 12, by the Fidelity Title Guaranty Company, which parties joined in the petition. The private owners claimed the accretion between the north and south boundaries of their tracts extending westward, and O'Malley desired to enter the land contiguous to the tracts upon which he was asserting a settlement.

Said lots 5 and 6, Sec. 1, were embraced in homestead entry No. 3879, Tucson, made May 24, 1901, by John Q. Morris under Sec. 2 of the act of January 14, 1901, *supra*, for the S. ½ SW. ¼, E. ½ NW. ¼ (lots 3, 5 and 6, SE. ½ NW. ¼), Sec. 1, containing 144 acres. Morris made settlement April 20, 1901, commutation proof was submitted December 28, 1901, cash certificate No. 1468 issuing January 28, 1902, and patent, April 18, 1902.

The petition was denied by the Commissioner October 9, 1911, upon the ground that the matter was *res judicata* under the Department's decision of February 28, 1911. Upon December 20, 1917, you requested the Commissioner to extend the public-land surveys to the area involved, which he, upon January 21, 1918, declined to do.

The area embraced in the Molloy water application, it should be noted, lies entirely to the east of the Colorado River as it existed at the time of the Mexican International Boundary survey of 1894 and to the east of its present situs. There is, accordingly, no question as to the International Boundary here present. The previous decision of this Department, dated February 18, 1911, was rendered without knowledge of all the facts as now disclosed.

From the present record, it appears that after the survey of 1874 and prior to the settlements and entries of Johnson and Morris in 1900 and 1901, a considerable body of land had been formed by accretion. The question presented, is whether such entries embrace the lands theretofore formed. Counsel for the Molloys assert that they do, relying upon the case of Jefferis v. East Omaha Land Company, 134 U. S., 178. The facts in that case are outlined in the first paragraph of its syllabus:

> A fractional section of land, on the left bank of the Missouri River, in Iowa, was surveyed by United States surveyors in 1851, and lot 4 therein was formed, and so designated on the plat filed, and as containing 37.24 acres, the

north boundary of it being on the Missouri River. In 1853 the lot was entered and paid for, and was patented in June, 1855, as lot 4. Afterwards, by ten mesne conveyances, made down to 1888, the lot was conveyed as lot 4, and became vested in the plaintiff. About 1853 new land was formed against the north line, and continued to form until 1870, so that then more than 40 acres had been formed by accretion by natural causes and in perceptible degrees within the lines running north and south on the east and west of the lot, and the course of the river ran far north of the original meander line. The defendant claimed to own a part of the new land by deed from one who had entered upon it. The plaintiff filed a bill to establish his title to the new land, claiming it as a part of lot 4.

The statement of facts (p. 180–181) points out that at the time of the entry, the meander line of the river was the same or nearly the same as shown by such field notes and plat.

About the time of the original entry of lot 4 by Edmund Jefferis, new land was formed along and against the whole length of the north line thereof, and from that time continued to form until 1870, so that in that year, at a distance of 20 chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of 40 acres and more had been formed by accretion to the lot, and ever since had been and now is a part thereof. * * *

The United States never claimed any interest in the land so formed by accretion (p. 182). The court, in its opinion, points out at page 189 that in the bill it is distinctly alleged that the new land "is an accretion to that originally purchased by the patentee from the United States." It is stated at page 191:

In the present case, the land in question is described in the bill as a tract of 40 acres and more. How much, if any, of it was formed between the date of the original survey in 1851 and the time of the entry in October, 1853, cannot be told; nor how much was formed between 1853 and 1856, while the patentee owned the lot; and so in regard to the time when it was owned by each successive owner. There can be, in the nature of things, no determinate record, as to time, of the steps of the changes. Human memory cannot be relied on to fix them. The very fact of the great changes in result, caused by imperceptible accretion, in the case of the Missouri River, makes even more imperative the application to that river of the law of accretion.

The bill must be held to state a fact, in stating that the land in question was formed by "imperceptible degrees," and that the process *begun in 1853* and continued until 1870, resulting in the production by accretion of the tract of 40 acres and more, "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." * * *

The facts in that case are widely different from those now under consideration. Here, the accretion was formed long before Johnson and Morris made their entries or claimed any interest in the land embraced therein. A considerable body of land had been formed and it cannot be doubted that the title to such accretion, prior to

the entries, vested in the United States. To extend such *entries* to all the lands formed by accretion would increase their area beyond the 160 acres limited by law. Further, at the time of settlement and entry, it was apparent that the meander line of the 1874 survey was no longer correct, due to the changed conditions. A similar situation was considered by Mr. Justice Miller, sitting upon the circuit, in Granger v. Swart, Federal Case No. 5685 (10 Fed. Case, p. 962), the syllabus of which reads (pars. 2 and 3):

2. If at the date of an entry of Government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterwards formed belong to the party holding title under the entry.

3. But if, at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp, or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry.

The justice charging the jury said:

The first and principal question to be determined by the jury is whether these patents cover the land in controversy. The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issued, the Rock River, where it is called a river, and Lake Koshkonong, where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the patents. In other words, if, between the meandered line which by the Government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock River and shore of Lake Koshkonong, there was at that time a body of swamp, or waste land, or flats, on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meandered line.

On the other hand, if, when the entries were made, the bank of the river and shore of the lake, at an ordinary stage of water, were where this meandered line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water, or by accretion to the shore and bank, then it became the land of the defendant, or of Walker, as the title might be in one or the other.

The Land Department, under existing legislation, has authority to survey public land but not lands held in private ownership. The present record shows that the area in controversy, having been formed by accretion prior to the entries of Johnson and Morris, is public land of the United States and should be surveyed as such. In the meantime, in view of the fact that the lands are shown to be productive with irrigation, in order that the present cultivation thereof may not be prevented, you are authorized to furnish the applicants temporarily with water for the present year, with the express stipulation, however, that the United States does not thereby recognize any title asserted by the applicants.

You state that the owners of the following lands in T. 9 S., R. 24 W., have also applied for water as to the area formed by accretion since the survey of 1874:

Lot 2, Sec. 17; lots 1, 2 and 3, Sec. 19; lots 1 and 2, Sec. 20; lots 6, 8, and 9, Sec. 30. The records of the General Land Office disclose that lot 6, Sec. 30, is vacant and was withdrawn by executive order of September 27, 1917, for the use and occupancy of the Cocopah Indians. The remaining lots are embraced in homestead entries made under section 2 of the act of January 14, 1901, *supra*, as follows:

Lot 2, Sec. 17; homestead entry 3628, made March 19, 1901, at Tucson, by Jesse C. Timmons, for the SW. ¼, Sec. 17, containing 158.99 acres. Timmons settled January 2, 1901. Final proof was made April 20, 1906, final certificate No. 02718, Phoenix, issuing October 12, 1910, and the patent, March 7, 1911.

Lots 1, 2 and 3, Sec. 19; these were applied for by Moses D. Hall, March 2, 1901, his homestead entry being allowed September 12, 1913, the area being 49.17 acres. Hall made settlement in March, 1900; final proof was made October 25, 1913, final certificate 08306, Phoenix, issuing April 8, 1914, and the patent, July 8, 1914.

Lots 1 and 2, Sec. 20; homestead entry No. 3626, Tucson, made March 21, 1901, by George E. Scott, for the NW. ¼, Sec. 20 (lots 1 and 2, E. ½ NW. ¼), containing 132.64 acres. Scott settled December 26, 1901. Commutation proof was made July 26, 1902, cash certificate 1507, Tucson, issuing July 20, 1902, and the patent, December 20, 1902.

Lots 8 and 9, Sec. 30; homestead entry 3756, Tucson, made April 12, 1901, by Newton S. Parks, for the S. ½ SW. ¼, Sec. 30; W. ½ NW. ¼, Sec. 31 (lots 8 and 9, Sec. 30; lots 1 and 2, Sec. 31), containing 138.06 acres. Parks did not claim any prior settlement. He made final proof September 12, 1906, and final certificate No. 68, Phoenix, issued September 25, 1906, and the patent, April 1, 1907.

The area here involved lies apparently between the levee of the United States and the meander line of 1874. The levee crosses the river as surveyed by the International Boundary Commission in 1893–1894, and the area, according to that survey, would lie almost entirely within Mexico, but is now to the east of the river and upon its American side.

By Article I of the treaty of December 30, 1853 (10 Stat., 1031), this boundary between the two countries was here fixed as "the middle of the said river Colorado." The convention of November 12, 1884 (24 Stat., 1011), provided:

> Article I. The dividing line shall forever be that described in the aforesaid Treaty and follow the centre of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and

gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

Article II. Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

Article III. No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid Commissions in 1852 or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

Articles I, II, and IV of the Convention of March 1, 1889 (26 Stat., 1512), provide:

Article I. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions.

Article II. The International Boundary Commission shall be composed of a Commissioner appointed by the President of the United States of America, and of another appointed by the President of the United States of Mexico, in accordance with the constitutional provisions of each country, of a Consulting Engineer, appointed in the same manner by each Government, and of such Secretaries and Interpreters as either Government may see fit to add to its Commission. Each Government separately shall fix the salaries and emoluments of the members of its Commission.

Article IV. When, owing to natural causes, any change shall take place in the bed of the Rio Grande or in that of the Colorado River in that portion thereof wherein those rivers form the boundary line between the two countries, which may affect the boundary line, notice of that fact shall be given by the proper loyal authorities on both sides to their respective Commissioners of the International Boundary Commission, on receiving which notice it shall be the duty of the said Commission to repair to the place where the change has taken place or the question has arisen, to make a personal examination of such change, to compare it with the bed of the river as it was before the change took place, as shown by the surveys, and to decide whether it has occurred through avulsion or erosion, for the effects of Articles I and II of the convention of November 12th, 1884; having done this, it shall make suitable annotations on the surveys of the boundary line,

This convention was indefinitely continued by that of November 21, 1900 (31 Stat., 1936). The American section of the International Boundary Commission is still extant (see 39 Stat., 1051).

The Department is inclined to concur in your view that the river having gradually receded and land formed on the American side by accretion, the title of the United States follows the river and its jurisdiction attaches to the area so formed. In fact, the United States and the State of Arizona appear to have exercised jurisdiction therein. However, under Article IV of the convention of March 1, 1889, *supra*, the attention of the International Boundary Commission must be called to this change in the bed of the Colorado River in order that suitable annotations in the survey of the boundary line may be made. You will accordingly prepare this matter for submission to the Commission. The submission should include the river as it extends from its intersection with the International Boundary line on the south, northward, at least to Sec. 18, T. 9 S., R. 24 W. After action by the International Boundary Commission, further consideration will be given to the survey of the land formed by the accretion. In the meantime water may be temporarily furnished for such lands to the present applicants under the same stipulation as required above in the case of the Molloys.

Instructions (copy herewith inclosed) along the above lines have been given the Commissioner of the General Land Office.

E. C. BRADLEY,
Assistant to the Secretary.

CONSOLIDATED ORES MINES COMPANY.

Decided October 15, 1918.

WITHDRAWAL ACT—METALLIFEROUS MINERALS—CARNOTITE.

The term "metalliferous minerals" in the act of August 24, 1912, amending the withdrawal act of June 25, 1910, was used to describe those minerals or ores of economic value from which the useful metals can be directly and advantageously extracted, and carnotite is not such a mineral.

PETROLEUM WITHDRAWAL—CARNOTITE CLAIM.

A mineral entry based on a mining claim located for carnotite upon land included in a petroleum withdrawal can not stand.

VOGELSANG, *First Assistant Secretary:*

In the matter of mineral entry 015971, made December 23, 1915, by the Consolidated Ores Mines Company, for the Sinbad No. 1 lode claim, survey No. 6324, situate in the SE. ¼, Sec. 22, T. 22 S., R. 14 E., S. L. B. & M., Salt Lake City, Utah, land district, the company has appealed from the decision of the Commissioner of the General Land Office dated May 25, 1917, holding the entry for cancellation for the stated reason that the deposit disclosed in the claim, namely, carnotite, was not a metalliferous mineral.

By Presidential order of March 14, 1912, pursuant to the Act of June 25, 1910 (36 Stat., 847), as amended August 24, 1912 (37 Stat., 497), the land was included in Petroleum Reserve No. 25, and still remains withdrawn. Lands so withdrawn are subject to the United States mining laws "so far as the same apply to metalliferous minerals." The claim in question was located January 1, 1914, some time after the withdrawal. The application for patent recited that the claim was one "bearing uranium and other valuable minerals * * *. The mineral found is carnotite ore, etc."

The precise question presented is whether carnotite is a metalliferous mineral within the purview of the statute mentioned. This appears to be the first occasion arising in the Land Department requiring a consideration of such question. Carnotite is essentially a vanadate of uranium and potassium but with other bases present also. It is found as a canary-yellow impregnation in sandstone in western Colorado and eastern Utah. See Clarke's Data of Geochemistry, U. S. Geological Survey Bulletin 491, p. 676 (1911), and Bulletin 616, p. 708 (1916).

By the reduction of carnotite ore, radium bromide or chloride, uranium oxide and vanadium oxide are obtained. The elemental substances radium, uranium and vanadium are generally classed as metals. However, they are not produced, marketed or utilized in their elemental or metallic state but as the compounds above mentioned. The radium salts are used for scientific and medical purposes. See pp. 57 and 58, Bulletin 70, of the Bureau of Mines, on Uranium, Radium and Vanadium, where also the following appears:

> The main use of vanadium is as an alloy in steels where great toughness and torsional strength are required, such as automobile parts, gears, piston rods, tubes, boiler plates, tires, transmission shafts, bolts, gun barrels, gun shields, and forgings of any kind which have to withstand heavy wear and tear. The vanadium content in such steels varies from 0.1 to 0.4 per cent. It is occasionally used in certain tungsten alloys for making high-speed tool steel. The introduction of a small proportion of vanadium decidedly reduces the proportion of tungsten required to give such alloys the desired hardness and toughness. * * *
>
> Uranium salts have been used for many years in glass manufacturing. Uranium colors glass yellow, and in sufficient proportion imparts to glass a beautiful fluorescent color known as "opalescent." Fifteen per cent. or more of the oxide may be required to give the desired effect. It is also used in ceramics for the purpose of obtaining brilliant fireproof tints of yellow, orange, and black. Uranium coloring powders may be obtained in black or in six shades of yellow.
>
> Uranium can be used as an alloy of steel, but alloys of other metals that have similar properties can be produced more cheaply. Owing to the increased supply of uranium, however, experiments are once more being tried with the object of getting some alloy with properties of a sufficiently distinctive character to make it a commercial product.

In "Geochemistry" *supra* (1911) p. 21, uranium is described as a heavy metal found chiefly in uraninite, carontite, samarskite, and a

few other rare minerals. Vanadium is mentioned as a rare element, both acid and base forming, found in vanadates and allied to phosphorus. It is stated that carnotite is an impure vanadate of potassium and uranium. In his work on "The Non-Metallic Minerals" (1905), Dr. George P. Merrill, Head Curator of Geology in the United States National Museum, includes the uranates and vanadates. As to the minerals belonging to the latter class he states, p. 304:

The uses thus far developed for these minerals are as a source for vanadium salts used as a pigment for porcelain and in the manufacture of ferrovanadium alloys to be used in steel-making. Vanadate of ammonium and vanadic oxide are used in the manufacture of ink and in textile dyeing and printing, imparting intense black colors with a slight greenish cast. * * *

With reference to uranium it is stated (p. 322):

Uranium is never used in the metallic state, but in the form of oxides, or as uranate of soda, potash, and ammonia, finds a limited application in the arts. The sesquioxide salt imparts to glass a gold-yellow color with a beautiful greenish tint, and which exhibits remarkable fluorescent properties. The protoxide gives a beautiful black to high-grade porcelains. The material has also a limited application in photography. Recently the material has been used to some extent in making steel in France and Germany, but the industry has not yet passed the experimental stage. It has been stated that the demand, all told, is for about 500 tons annually. Should larger and more constant sources of supply be found, it is probable its use could be considerably extended. According to Nordenskiold, 50,000 pounds worth of uranium minerals are consumed every year, the various salts produced being used in porcelain and glass manufacture, in photography, and as chemical reagents.

The second uranitic mineral described by Merrill is carnotite, which is there shown to be not a simple mineral but a mixture made up in large part of an impure uranyl-vanadate of potash and the alkaline earths.

The term "metalliferous" is not one admitting of precise definition. It means yielding or producing metals; as a metalliferous ore or deposit; a metalliferous district. But the metals and non-metals are not subject, chemically or scientifically, to a conclusive definition or classification.

No sharp line can be drawn between the metals and non-metals, and certain elements partake of both acid and basic qualities. * * *

Popularly, the name is applied to certain hard, fusible metals, as gold, silver, copper, iron, tin, lead, zinc, nickel, etc., and also to the mixed metals or metallic alloys, as brass, bronze, steel, bell metal, etc. (Webster's Dictionary.)

A division of the elements into metals and non-metals is recognized by chemists at the present time as being rather a matter of convenience from the popular point of view than as one capable of exact scientific definition. The words *metallic* and *metal*, however, cannot be dispensed with in common life and the arts, and their use can very rarely lead to any confusion. (Century Dictionary.)

From a strictly scientific point of view, the terms metallic ore and ore deposit have no clear significance. They are purely conventional expressions, used to describe those metalliferous minerals or bodies of mineral having

economic value, from which the useful metals can be advantageously extracted. In one sense, rock salt is an ore of sodium, and limestone an ore of calcium; but to term beds of these substances ore deposits would be quite outside of current usage. (Geochemistry, p. 599, 1911.)

The last quoted paragraph heads the chapter on "Metallic Ores" in which a subdivision devoted to vanadium and uranium appears on p. 672 et seq. Therein it is stated that the only uranium ores of any importance are uraninite or pitch blende and carnotite. Thus it appears that Dr. Merrill classes carnotite among the non-metallic minerals, while Clarke in Geochemistry places it in the category of metallic ores.

The realms of chemistry and scientific technology offer no satisfactory solution of the question.

Resort to ordinary usage and the popular and general understanding of the terms employed is required where they possess no clear and well established special or technical meaning.

Examples of metals possessing all these qualities (opacity, metallic luster, conductivity and plasticity), although in varying degree, are gold, silver, copper, iron, lead and tin, all of which have been known from remote antiquity; and on the characters which they possess the idea of a metal was, and mainly still is, founded. (Century Dictionary.)

It may well be that a deposit may be classified in accordance with the way the valuable elements are primarily and generally recovered and utilized. If the mineral deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal which is extracted and used in the trades as such, the deposit should be classed as metalliferous. On the other hand, where the metals contained in the deposit, or ore, are extracted and used mainly in the form of compounds with other elements, the classification should be nonmetalliferous. This will well comport with the dictionary definition of *metalliferous*, i. e., yielding or producing metal. Thus a limestone bed would be classed as nonmetalliferous although containing approximately 40% calcium, one of the most abundant metals in nature; likewise a gypsum deposit, although carrying about 23% of calcium, and a rock salt deposit even if consisting of 40% of the very abundant metal sodium, would be nonmetalliferous.

The elements radium, uranium, and vanadium are not dealt with in the metal market or the trades in their elemental forms, as metals, and are not so produced or recovered immediately in the reduction of carnotite ore. While the two substances last named appear in some forms of special steels, the percentage so used is very small. The compounds or oxides of the two elements are the forms used in the production of such steels. It follows therefore that carnotite is not a metalliferous mineral.

Considerable search has failed to disclose any legal precedents directly in point. The cases involving classifications under the tariff acts are suggestive. In the case of Hempstead v. Thomas (122 Fed., 538), it was held by the Court of Appeals for the third circuit that tungsten ore was aptly described by the term "minerals, crude" and did not answer the description "metallic mineral substances in a crude state." The court there said (p. 540):

> It is not a metal but an oxide, and the tungsten is mineralized. Tungsten metal is not found in it. It is two degrees or processes removed from metal. Its change thereto is not by grinding process, but by chemical effects on its particles. The proof is that "it undergoes a chemical process to decompose it." The process "is absolute transformation." "You change its character absolutely." It is "an expensive and intricate process." It is "brought from its oxide condition into a metallic condition by a process before it becomes a metal." In the case of ferro-tungsten, where it is compounded with iron, it first displays metallic characteristics; tungsten ore is first changed to tungstate of soda, then into tungstic acid, and then alloyed with iron to produce tungsten metal. * * *

The above case was cited and followed in U. S. *v.* Brewster (167 Fed., 122), where it was stated with respect to certain zinc ores that zinc as a metal was not found in the ores, nor were "they metallic mineral substances."

The argument of counsel in his brief on appeal has been considered with care. However, after a careful review of the matter, taking into consideration the statute as it was enacted in 1910 and the purpose of the amendment of 1912 to afford broader protection to withdrawals by a greater limitation on mineral exploitation, the Department is convinced that the terms "metalliferous minerals" was used to describe those minerals or ores of economic value from which the useful metals could be directly and advantageously extracted.

The judgment of the Commissioner announcing that carnotite, the deposit for which the land is sought, is not a metalliferous mineral, and that the entry should be canceled, is found to be correct and is hereby affirmed.

STOCK-RAISING HOMESTEAD ACT—AMENDMENT OF OCTOBER 25, 1918—ADDITIONAL ENTRIES.

[Circular No. 624.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 31, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The act of Congress of October 25, 1918 (40 Stat., 1016), amends the stock-raising homestead act. It provides that, even though an additional entry be made (under the first proviso to sect. 3 of the

act of Dec. 29, 1916, 39 Stat., 862), part or all of the land in which is incontiguous to claimant's original entry, he may nevertheless perform the required period of residence on the tract originally entered, if he continues to own it, it being still stipulated, however, that the additional land must be within 20 miles of the original.

2. Accordingly, the first sentence of paragraph 6 of the instructions of January 27, 1917 (Circular No. 523; 45 L. D., 625), is amended to read as follows: "Any person, otherwise qualified, who has a pending or perfected homestead entry for less than 640 acres of land which shall be designated as stock-raising land, is entitled under the first proviso to section 3 of the act, as amended, to make an additional entry for a tract of designated land within a radius of 20 miles from the tract originally entered, and making up therewith an area of not more than 640 acres."

3. The first sentence of the second subparagraph of paragraph 7 of said circular 523 is amended to read as follows: "As to residence, this must be continued for three years, subject to the privilege of a five months' absence in each year, divisible into two periods, if desired, but credit on the residence period on account of military service during time of war will be allowed as on other homestead entries; where an entry has been made, additional to a pending entry, or to a perfected entry for a tract still owned by the claimant, the residence may be had on either of the tracts involved for three years after the additional is allowed, or becomes allowable. In other cases such residence must be on the land additionally entered."

4. Where you have not taken final action, and forwarded the papers, in connection with applications which were filed before October 25, 1918, and which are allowable only by virtue of the provisions of the act of that date, you will take favorable action thereon (or make favorable recommendation, as the case may be) unless adverse claim or withdrawal intervened before the passage of the act.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

COBB v. CROWTHER ET AL. (ON REHEARING).

Decided November 1, 1918.

PRACTICE—REHEARING.

A motion for rehearing will not be granted where no new question of vital importance is presented; or where there is such conflict of evidence that fair minds might differ as to conclusion therefrom; or that does not affirmatively show that the decision complained of is clearly wrong and against the palpable preponderance of the evidence.

VOGELSANG, *First Assistant Secretary:*

Edward Lang Cobb has filed a motion for a rehearing in the above-entitled case in which this Department by its decision of August 10, 1918, affirmed the decision rendered by the General Land Office on November 15, 1917, sustaining the action of the local office recommending the dismissal of Cobb's application for an extension of time within which to begin the survey of the land embraced in his application, Juneau 01643, to make a soldier's additional homestead entry.

The controlling question presented by the appeal from the General Land Office was as to whether Cobb proved by a preponderance of the evidence that he had been diligent in his efforts to have the land surveyed within the prescribed time, a mere question of fact, and this Department, after a careful and exhaustive examination of all the testimony, found that he had not done so.

The motion for a rehearing cannot be granted for the following reasons: (1) because it does not present any vital or controlling question that was not fully and carefully considered at the time the decision complained of was prepared (Shields v. McDonald, 18 L. D., 478; Walk v. Beatty, 26 L. D., 377); (2) because the evidence is very conflicting and it is not shown that fair minds might not reasonably differ as to the correct conclusion to be drawn from it (Seitz v. Wallace, 6 L. D., 299; Dickinson v. Capen, 14 L. D., 426); and (3) because it has not been affirmatively shown that the decision complained of is clearly wrong, and against the palpable preponderance of the evidence (Guthrie Townsite v. Paine et al., 13 L. D., 562).

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

AMI C. BRIGGS.

Decided November 5, 1918.

PRACTICE—NOTICE—RULE 98.

Under Rule 98 of Practice (44 L. D., 395, 411), an incumbrancer who has filed due notice thereof is entitled to such notice of any proceedings affecting the land as is required to be given the original entryman or claimant.

VOGELSANG, *First Assistant Secretary:*

Ami C. Briggs has appealed from a decision of the Commissioner of the General Land Office dated July 8, 1918, wherein his coal land entry 037484, made August 2, 1917, for NE. ¼ NE. ¼, Sec. 29, T. 25 N., R. 56 E., M. M., Glasgow, Montana, land district, was held for cancellation because the tract appeared to be subject to inclusion by the Northern Pacific Railway Company in a supplemental list.

The tract involved is within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indian Reservation opened

to entry pursuant to the act of May 1, 1888 (25 Stat., 113, 133). It was included in the Northern Pacific Railway Company's indemnity selection list No. 8, serial 04815, filed May 3, 1909. This list was rejected by the local officers and the company appealed. See the case of Trott v. Northern Pacific Railway Company (45 L. D., 193), which involved lands in the township next west for further history relating to said list.

The township mentioned was on April 23, 1910, withdrawn by the Department from coal filing or entry, and on July 9, 1910, was by Presidential order included within a coal withdrawal. June 16, 1910, James A. Lyon filed his coal declaratory statement 012996 for the N. ½ NE. ¼, said Sec. 29. This filing was rejected by the local officers and Lyon appealed. This filing was declared finally rejected by the Commissioner in 1914.

Pursuant to instructions issued by the Commissioner on September 30, 1913, the entered tract, together with others, was included by the railway company in its supplemental list "B", 04815, as being a tract for which other claims had been asserted. Said list "B" was rejected by the local officers and the company appealed. As to this tract such appeal is apparently still pending before the General Land Office.

The land in question was classified as coal land and appraised at $10 per acre in December, 1915, and thereupon, by Presidential order of December 28, 1915, was restored. January 20, 1916, Briggs filed his coal declaratory statement for the N. ½ NE. ¼, said Sec. 29, which was first suspended by the local officers and later allowed as to NE. ¼ NE. ¼, said Sec. 29. May 10, 1917, Briggs filed his application to purchase. This application was held for rejection July 10, 1917, because no proof had been submitted or payment made thereon. Later the proofs came in and payment was made and the local officers allowed the entry on August 2, 1917.

There is found with the record a notice of incumbrance filed in the local office March 13, 1917, by the Bank of Fairview, Montana, as mortgagee, in support of which the cashier alleges that said bank has an interest in the land as mortgagee thereof to secure an indebtedness of $400 for improvements and purchase price. There is not found in the case any evidence that the bank has received notice of the adverse action affecting the land, and particularly there is no evidence of service upon the bank of a copy of the Commissioner's adverse decision herein. Under Rule 98 of Practice (44 L. D., 395, 411), an incumbrancer who has filed a proper notice is entitled to receive and to be given the same notice of any proceedings affecting the land as is required to be given the original entryman or claimant. Before any conclusive adverse adjudication can be made the mortgagee bank must be given due notice.

In connection with this matter the Department entertains the view that the railway company's appeal from the rejection of its said list "B", still pending before the Commissioner and involving the tract in question, should be taken up and considered with a view to determining the rights of the company under its list. Should it be finally adjudged that the company's claim is not well founded the Department, as now advised, perceives no reason why Briggs's entry may not be sustained.

Other action pursuant to the present appeal is at this time postponed. The case is remanded to the Commissioner of the General Land Office for further appropriate proceedings not inconsistent with the views above set forth, and at the proper time, if final action is adverse to this entry, the record will be resubmitted to the Department pursuant to the claimant's appeal.

HALES ET AL. v. CENTRAL PACIFIC RY. CO. AND POWER TIMBER CO., TRANSFEREE.

Decided November 14, 1918.

RAILROAD GRANT—LANDS EXCEPTED.

Under the excepting clause in the grant to the Central Pacific by the act of July 1, 1862, as amended by the act of July 2, 1864, the term *iron land* will be construed in its ordinary meaning; that is, land not only valuable for iron, but as between iron and other mineral content, chiefly valuable for iron.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by the Power Timber Company, claiming a transferee, from a decision of the Commissioner of the General Land Office dated June 29, 1918, holding for cancellation list No. 50, serial 03570, filed January 19, 1911, at Sacramento, California, by the Central Pacific Railway Company, including the SW. ¼, Sec. 19, T. 15 N., R. 11 E., M. D. M., in so far as it conflicted with the Iowa Hill Chrome Ore Mines Nos. 1, 2, 3 and 4. The land is within the place limits of the grant to the railway company made by the act of July 1, 1852 (12 Stat., 489), as amended by the act of July 2, 1864 (13 Stat., 356).

June 30, 1917, a protest against the railway list was filed by William Hales, O. S. Williamson and W. S. Macy, which alleged that they had discovered "Chrome Ore or rock in place bearing Chromium in value of from 45% to 55%," and that "Chrome Ore" was being mined in other portions of Sec. 19. The railway company did not appear at the hearing but the Power Timber Company, claiming the land under conveyance from it, intervened. The location notice

described the material as "Chrome Ore or rock in place bearing Chrome Iron." After a hearing, the register and receiver found in favor of the protestant. In their decision of December 20, 1917, they stated:

The evidence offered by protestant shows conclusively that the chromite in the land in issue is far more valuable than its iron content. In fact, protestants aver that the element of iron in the land is a negligible factor. This is not controverted by intervener, who rests on the assumption that chromite is an element of iron ore and not a distinct element, that it is not distinguished from iron ore but rather a part of it, and being a part of it, all lands of the odd sections granted the railway company containing chromite, regardless of the quality or quantity, passed with the grant.

* * * * * * *

Intervener further contends, and endeavored to prove, that iron stripped of these various elements would be bare and the intention of Congress in reserving to the railway company coal and iron lands would be divested of its real meaning and purport, if the same were segregated therefrom. The assertion is made that even if the ore should contain large quantities of chromite and but little of iron it would still be iron ore within the meaning of the act of July 2, 1864, and should pass to the railway company.

The register and receiver declined to accept this contention, stating:

Where elements are found in the same rock or fissure the greater should prevail. If land contains 50% of the chromite and only 10% of iron ore, in our judgment the land is more valuable for chromite and should be classed as mineral land if chromite comes within the excepting clause of the act of July 1, 1862, as amended by the act of July 2, 1864. * * *

In examining the various definitions of what chromite is we find that it differs vastly from the definitions of what iron ore is, and its uses are altogether different. In our opinion the mere fact that it is found associated with iron does not make it an element of iron.

One of the witnesses testified that chromite is used as a pigment in the manufacture of paints, for coloring calicoes, in the lining of furnaces, and as an alloy in the manufacture of steel. It is also used in the manufacture of delicate china and for other purposes entirely separate and apart from the uses to which iron ore is devoted. The register and receiver quoted the following definition by distinguished authority:

Chromium is a *distinct* element easily distinguished from iron, and chromite, the ore from which chromium is obtained and called by the miners simply "chrome," is distinct from and easily distinguished from iron ore. Neither the metal chromium or chromite, the "chrome" of the miners, is a constituent of the ordinarily used iron ores, except in mere traces. However it may vary in composition it does not become an iron ore, but is universally regarded as an ore of chromium and is utilized only for the chromium it contains.

In conclusion, the register and receiver made the following observations:

What is iron land? Intervener claims that it includes all lands containing any element of iron ore. If this contention were accepted it would allow the

railway company to appropriate large bodies of land chiefly valuable for minerals within the excepting clause of the grant but which contained small elements of iron. In our opinion it is a construction not borne out by common interpretation or common use. It is far-reaching in its effect and if accepted or allowed would be a perversion of the intention of Congress at the time the grant was made.

By the act of July 2, 1864, Congress evidently intended to permit the railway company to use the iron ore within the limits of the grant to aid in the construction of its road, but it was not, in our opinion, the intent of Congress to allow the railway company to appropriate a mineral like chromite which has invariably been used, as we have already pointed out, in arts, science and industries entirely distinguished from and apart from the construction of a railroad. While it is true that chromium is today being used as an alloy in the hardening of steel, this fact does not impress it with the character of iron ore or make it such a mineral as the railway company may appropriate under the terms of its grant.

The Commissioner, in the decision now under review, pointed out that a sample from all four claims assayed 45.38 per cent chromic oxide, and 11.6 per cent iron. The Commissioner then stated:

> Defendant contended that this ore should be held to be an iron ore, because always found associated with iron in occurrence; because "it has always been classified as such;" because used largely in iron manufacture; because commonly termed "chromic iron ore," and because described by Dana and other geologists under the heading of iron ore.
>
> Even if chrome and iron are found together in the earth, it does not necessarily follow that they are the same thing or should be similarly considered; they have widely different uses. Nor is this office favorably impressed with the other contentions just mentioned; the name is not so important as the value of the constituent minerals. And all that enters into manufacture of iron is not iron ore. Like chrome, some compounds entering into the manufacture of iron have other important uses, and when found in public lands are subject to mineral entry and patent; for example, lime, used as a flux, vanadium, etc. * * *
>
> Here the chrome deposits possess value and the iron does not; to hold that such worthless deposits of iron shall control the disposition of the containing lands would be to permit the less important—here one of no importance—to control the more important—here the only valuable mineral.

The act of July 1, 1862, in section 3 excepted all mineral lands from the operation of the grant. Section 4 of the act of July 2, 1864, *supra*, provides that:

> The term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and *iron land*.

There can be no question that the material here presented is mineral and the lands containing it would be excepted from the grant under the provisions of the act of July 1, 1862, *supra*, unless saved to the grantee by the amendment contained in the latter act. The term "iron land," as contained in the grant by Congress to the railway company, should be interpreted in its ordinary meaning, that is, land

not only valuable for iron, but as between its iron and other mineral content, chiefly valuable for iron.

The Department concurs in the position of the register and receiver and the Commissioner to the effect that this land is not "iron land" within the meaning of section 4 of the act of July 2, 1864, *supra*.

The decision of the Commissioner is accordingly affirmed.

HAMMOND LUMBER CO.

Decided November 14, 1918.

CONFIRMATION—PROVISO TO SECTION 7 ACT OF MARCH 3, 1891—FICTITIOUS PERSON.

The proviso to section 7 of the act of March 3, 1891, does not operate to confirm an entry made in the name of a fictitious person; and neither the issuance of the final receipt nor even the patent on such an entry would convey any title out of the United States.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

As the right to select public land in lieu of lands within a forest reserve under the exchange provisions of the act of June 4, 1897, is not assignable, an application for the return of papers relating to such a selection with the right to select other land, filed by the transferee of the selected land and not by the alleged owner of the base land, can not be granted.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by the Hammond Lumber Company from a decision of the Commissioner of the General Land Office dated July 23, 1918, denying its request for the return of the papers relating to a forest reserve lieu selection with the right to select other land.

January 21, 1899, homestead entry 7487 (now serial 04815), was made in the name of George E. Taylor at Roseburg, Oregon, for the E. ½ SE. ¼, NW. ¼ SE. ¼, NE. ¼ SW. ¼, Sec. 36, T. 21 S., R. 1 E., W. M. Receiver's final receipt and final certificate No. 5189 issued May 22, 1901. December 24, 1901, Clyde D. Lloyd, claiming to be the transferee of the homestead entry, filed at Roseburg his application No. 02837 to select in lieu NE. ¼ SE. ¼ Sec. 2, T. 4 N., R. 10 W., W. M.

April 17, 1908, the Commissioner directed proceedings against the homestead entry upon the following charges:

1. That the entry was made in the name of a fictitious person at the instance of Marie L. Ware.
2. That the alleged entryman never established and maintained a residence on said land.
3. That he neither cultivated nor improved said land.

October 17, 1910, the Hammond Lumber Company, which had purchased the selected land from Lloyd, filed a denial of the charges upon information and belief, and November 18, 1910, its withdrawal

of the selection, stating that it feared that it could not successfully defend the charges and requesting that it be given the privilege of substituting other base. It defaulted at the hearing. The Commissioner, as to the company's request, upon June 17, 1911, required the selector and all parties in interest to relinquish and waive all right and claim under the selection "and all right or claim of any character whatsoever in or to the forest reserve lands heretofore relinquished to the United States, so that the title to the said relinquished land, as well as to the selected land, will be in the future entirely free from any claim, right or interest of any kind or character by the selector or by any person claiming, or who may hereafter seek to claim under the selector."

In accordance with the Commissioner's ruling there was filed a waiver by Lloyd and the Hammond Lumber Company of "all of our right, title, and claim of any character whatsoever in and to the Forest Reserve lands * * * which form the basis for the lieu selection * * *," and their quit claim deeds to the United States. The selection by Lloyd was canceled November 9, 1911, the Commissioner also directing that a reselection by Charles E. Hays, through the Hammond Lumber Co., his attorney in fact, embracing the same land but in lieu of certain other tracts, be allowed. The homestead entry was canceled December 26, 1911, the default being "taken as an admission of the truth of the charges."

The appeal contends that the proceedings against the homestead entry having been instituted more than two years after the issuance of the final receipt, the entryman was entitled to a patent under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), as construed by the Supreme Court in the case of Hoglund v. Lane (244 U. S., 174), and that therefore under the Department's instructions of January 26, 1918, in the case of Allen M. Wheeler (46 L. D. 456), the papers should be returned with the privilege of now selecting other land.

In the Wheeler case the charge against the homestead entry made more than two years after the issuance of the final receipt was of noncompliance with the requirements of the homestead laws, there being no question of a fictitious entryman involved. Here one of the charges, which under the rules governing the proceedings and the course of action of the present appellant must be taken as admitted, was that the entryman was fictitious. Being fictitious, neither the final receipt nor even a patent, if issued, would convey any title out of the United States (see Sampeyreac and Stewart v. The United States, 7 Peters, 222; Moffat v. United States, 112 U. S., 24; Hyde v. Shine, 199 U. S., 62; The United States v. The Southern Colorado Coal and Town Company, 2 L. D., 790), and therefore the

entry would not afford a valid basis for a forest reserve lieu selection.

The application here is by the transferee of the selected land and not by the alleged owner of the base land. Under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), the selection of lands in lieu of other lands within a National Forest relinquished to the United States with a view to such selection can only be made by or in behalf of the owner of the lands relinquished (John K. McCornack, 32 L. D., 578). The right to select public land in lieu of lands within a forest reserve under the act of June 4, 1897, supra, is not assignable. (See Albert L. Bishop et al., 33 L. D., 139; Heirs of George Liebes, 33 L. D., 458). The present application, therefore, is also defective in that it is not presented by the proper party.

Furthermore, the appellant, in consideration of the privilege of substituting other base and retaining the selected land, waived any further claim to the base land and conveyed it by quit claim deed to the United States.

The decision of the Commissioner is accordingly affirmed.

MONCHAMP v. HALSEY-BANDEY.

Decided November 14, 1918.

INTERMARRIAGE OF HOMESTEADERS—ELECTION AS TO RESIDENCE—ACT OF APRIL 6, 1914.

The provisions of the act of April 6, 1914, relating to the rights of homesteaders who intermarry, does not require that the parties must have fulfilled the requirements of the homestead law for one year after making entry, but "for one year next preceding such marriage," and credit may properly be claimed for residence and cultivation performed prior to date of entry where the land was subject to settlement.

DEPARTMENTAL DECISION DISTINGUISHED.

Ex parte Teter, 46 L. D., 167, distinguished.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Raphael Monchamp from a decision of the Commissioner of the General Land Office dated May 29, 1918, dismissing his contest against the homestead entry of Alice L. Halsey, now Bandey, made April 1, 1915, for S. ½, Sec. 17, T. 37 N., R. 15 E., M. M., Havre, Montana, land district.

The tract described was designated as of the character contemplated by the enlarged homestead act on July 15, 1909. The plat of survey of the township was filed in the local office on October 1, 1914. The entrywoman was married to Frederick W. Bandey, a homestead entryman, on July 4, 1915, and on July 22 following the husband elected to make the family home on the land embraced in his entry. The contest, initiated August 14, 1916, charged, in effect, that

entrywoman was not entitled to the benefits of the act of April 6, 1914 (38 Stat., 312), relating to the rights of homesteaders who intermarry. The hearing was had before the local officers, who by decision of February 11, 1918, found from the testimony, "which is conflicting in every issue involved herein," that entrywoman settled on the land and established residence thereon between March 23 and April 15, 1914; that there "is absolutely no showing that contestee ever abandoned her said homestead;" that she continued her residence thereon until June, 1916, and that twenty acres had been broken and planted to flax.

Careful consideration of the record convinces the Department that the concurring decisions below reached the correct conclusion as to the extent entrywoman had complied with the law prior to her marriage. As repeatedly held by the Department, the finding of the local officers, with the witnesses before them, is entitled to special consideration in matters of fact.

Counsel contends that the departmental decision in Ex parte Teter (46 L. D., 167) forbids the acceptance of the husband's election. In the case cited, the husband had no entry of record, but was a settler on unsurveyed lands not subject to entry. Such is not the situation in the case now before the Department.

The third section of the act of May 14, 1880 (21 Stat., 140), provides that the rights of one who, after settlement, makes entry, "shall relate back to the date of settlement." The act of April 6, 1914, *supra*, does not require that the parties must have fulfilled the requirements of the homestead law for one year after making entry, but "for one year next preceding such marriage," and the right of a homesteader to claim credit for residence and cultivation performed prior to the date of his entry, where the land was subject to settlement, has not been questioned since the enactment of the law of 1880, *supra*. (See James McCourt, 33 L. D., 386, and cases there cited.)

The decision appealed from is affirmed.

JOHN H. PAGE ET AL. (ON REHEARING).

Decided November 18, 1918.

SETTLEMENT—UNSURVEYED LAND—ENLARGED HOMESTEAD.

The notice of settlement claim for unsurveyed land filed in the office of the county recorder under a State law is not determinative of a settler's rights, but in order to maintain such a claim for a tract embracing more than a technical quarter section under the provisions of the act of August 9, 1912, it is necessary that the exterior boundaries of all lands claimed be plainly marked.

VOGELSANG, *First Assistant Secretary:*

By decision of September 14, 1918, the Department modified a decision of the Commissioner of the General Land Office dated May

27, 1918, and directed that Jose M. Orosco's application to make an additional homestead entry for lot 1 of Sec. 4, T. 20, S., R. 12 E., G. & S. R. M., Arizona, be suspended until the plat of survey of T. 19 S., R. 12 E., G. & S. R. M., is filed and Orosco applies to make additional entry for a portion of said township on which he claims to have maintained settlement. Said Orosco, on September 25, 1915, applied to make homestead entry for lots 1, 2, and 3 of said Sec. 4, but because lot 1 was separated from lots 2 and 3 by the meandering of the Sopori Wash, his application was allowed only to the extent of lots 2 and 3.

A motion for rehearing has been filed on behalf of John H. Page, assignee of the heirs of James K. Rolfe, who on February 28, 1917, applied to make a soldier's additional homestead entry for said lot 1.

It is contended in the motion that lot 1 of Sec. 4 is not mentioned in Orosco's notice of settlement claim filed in the office of the county recorder on February 5, 1917; that by making entry of lots 2 and 3 of Sec. 4 his claim to lot 1 was ended, and that it was error to suspend action until the plat of survey of the adjoining township is filed.

The original of Orosco's notice of settlement claim, bearing an indorsement by the county recorder as to the date it was filed, is with the record. It is apparent that in copying the notice onto the county records the copyist omitted that portion of the notice relating to said lot 1. However, Orosco's rights will not be determined by what he filed in the recorder's office. The question to be determined, if and when Orosco applies to make entry for contiguous lands in the adjoining township, is whether he complied with the act of August 9, 1912 (37 Stat., 267), and plainly marked the exterior boundaries of the land claimed.

Under the circumstances, Orosco did not, by making entry for lots 2 and 3, waive his claim to lot 1. Said subdivision is incontiguous to the lots entered, but it is contiguous to the lands in the adjoining township which he claims by settlement, and which lands are contiguous to the two lots entered by him. The fact that his application was rejected as to lot 1, and that he did not appeal, did not render the lot subject to the soldier's additional application of Page, if Orosco had, as heretofore stated, complied with the act of August 9, 1912, *supra*. To hold otherwise would make it possible to defeat a *bona fide* settlement claim by invoking a rule which has no application when a settler is diligently asserting, in every proper way, his claim to the land.

The showing made by Page, when called upon to show cause why his application should not be rejected because of the adverse claim of Orosco, bears no evidence of service on Orosco. It follows that the latter's failure to make denial of the allegations of Page in no way prejudices his rights.

The motion is denied.

WILLIAM H. KENNER AND EMMA S. MASON.

Decided November 22, 1918.

INTERMARRIAGE OF HOMESTEADERS—ACT OF APRIL 6, 1914—EXECUTION OF AFFIDAVITS.

The affidavits required by the departmental regulations issued under the provisions of the act of April 6, 1914, relative to the privilege of election as to residence of homesteaders who intermarry, may be executed before a notary public.

VOGELSANG, *First Assistant Secretary:*

William H. Kenner has filed an informal appeal from the requirement made by the General Land Office on May 18, 1918, that he and his wife, formerly Emma S. Mason, appear before a United States commissioner or a judge or clerk of a court of record and swear to affidavits filed in support of his election to continue his residence on the W. ½, Sec. 32, T. 31 S., R. 54 W., 6th P. M. embraced in his wife's homestead entry, Pueblo 022946, allowed October 4, 1915, instead of on the W. ½, Sec. 29, same township, covered by his homestead entry, Pueblo 022947, allowed on the same day.

The election mentioned, filed on March 13, 1918, was supported by affidavits of Kenner and his wife, which were found to be satisfactory in all respects except in the fact that they were sworn to before a notary public, instead of before one of the officers specified above.

The requirement made in that decision was evidently based on section 2294, Revised Statutes, which provides that "all proofs, oaths and affidavits of any kind whatever required to be made by applicants or entrymen under the homestead * * * act" shall be made before an officer of one of the classes mentioned in that section, which does not include notaries public. This is the only statute upon which such a requirement could possibly be based, and it is believed that statute relates only to such oaths or affidavits as are either specifically or by necessary implication required by the law to which they relate.

The act of April 6, 1914 (38 Stat., 312), under which the election here involved was presented, does not in terms require the execution of affidavits or oaths of any kind whatever; and while the regulations issued under that act (43 L. D., 272) call for such affidavits as have been furnished, they are silent as to the officers before whom they may be executed.

The affidavits here in question are in some respects akin to the oaths required of homestead entrymen in support of their applications for leaves of absence, and in the regulations of March 8, 1889 (8 L. D., 314), and Leola Farlow's case (35 L. D., 269), it was held that such oaths could be executed before a notary public.

The decision appealed from is, accordingly, reversed and the affidavits involved will be accepted.

MINNIE L. MARTIN.

Decided November 22, 1918.

STOCK-RAISING HOMESTEAD—AMENDMENT OF OCTOBER 25, 1918—ADDITIONAL ENTRY.

Under the provisions of the act of October 25, 1918, amending the stock-raising homestead act of December 29, 1916, an additional entry may be made for land which is incontiguous but within a radius of twenty miles from the land originally entered, and the entryman may perform the required period of residence on the latter tract if then the owner thereof.

VOGELSANG, *First Assistant Secretary:*

Minnie L. Martin has appealed from a decision of the Commissioner of the General Land Office dated April 10, 1918, rejecting her application, filed January 2, 1917, to make entry under the stock-raising homestead act for E. ½ NW. ¼, Sec. 28, T. 34 S., R. 60 W., 6th P. M., Pueblo, Colorado, land district.

The application was rejected because the land described was not contiguous to applicant's original entry, made December 1, 1915, under the enlarged homestead act, for S. ½ SE. ¼, Sec. 17, NE. ¼ and N. ½ SE. ¼, Sec. 20, said township, and it did not appear that applicant had completed the term of residence required or would have completed it within six months from the date of the filing of her application.

Inasmuch as section 3 of the act of December 29, 1916 (39 Stat., 862), under which the application in question was filed, provides that entries allowed thereunder are "subject to the requirements of law as to residence and improvements," the decision appealed from, which followed paragraph 6 of the regulations of January 27, 1917 (45 L. D., 625), was correct. However, the act of October 25, 1918 (40 Stat., 1016), amended the act of December 29, 1916, *supra*, by providing that if an additional entry be made for land which is incontiguous to the original entry, the entryman may perform the required period of residence on the tract originally entered if he continues to own it. It is still stipulated, however, that the additional land must be within twenty miles of the original. By instructions approved October 31, 1918 (46 L. D. 472), the first sentence of paragraph 6 of the regulations of January 27, 1917, *supra*, was amended to read as follows:

> Any person, otherwise qualified, who has a pending or perfected homestead entry for less than 640 acres of land which shall be designated as stock-raising land, is entitled under the first proviso to section 3 of the act, as amended, to make an additional entry for a tract of designated land within a radius of twenty miles from the tract originally entered, and making up therewith an area of not more than 640 acres.

Said instructions contain directions as to the disposition of pending applications such as the one here in question.

The case is accordingly remanded for further consideration under the amended regulations.

HENRIETTA P. PRESCOTT.

Decided November 22, 1918.

SOLDIERS' ADDITIONAL RIGHT—ASSIGNMENT—ADMINISTRATIVE RULING OF FEBRUARY 15, 1917.

Where one of two heirs of a deceased soldier assigned in writing to the other for a valuable consideration her interest in a soldiers' additional right prior to the promulgation of the administrative ruling of February 15, 1917, it will be recognized, even though assigned by the latter subsequent thereto; but the remaining part of the alleged right also embraced in such latter assignment is not within the terms of said administrative ruling and can not therefore be recognized.

DEPARTMENTAL DECISION DISTINGUISHED.

Edgar A. Coffin, 33 L. D., 245, distinguished.

VOGELSANG, *First Assistant Secretary:*

This case is now before this Department for consideration on Henrietta P. Prescott's appeal from the rejection on July 1, 1918, by the General Land Office of her application to make soldiers' additional homestead entry for N. ½ NE. ¼, Sec. 10, T. 11 S., R. 14 E., S. B. M., under an 80 acre right assigned to her by an adult heir of the deceased soldier after the promulgation of the administrative order of February 16, 1917 (46 L. D., 32), which declared that no entries should be allowed on rights of that kind assigned after that date by the adult heirs of the soldiers under whom they are claimed.

The controlling facts of this case are that all the property of the soldier remaining after the administration and settlement of his estate and after the death of his wife on February 28, 1898, passed to his two daughters and only children, Ada and Adelaide, then aged twenty-five and thirty-one years respectively.

The soldier's right to make an additional entry was not mentioned as a part of his property in his will, which was executed July 6, 1894, and duly proved and admitted to probate on November 26th of the same year, nor was it included as one of the items of his property in the inventory of the assets of his estate filed by his executor.

On November 18, 1915, Adelaide, who was then forty-six years old, as "one of the heirs" of the soldier, assigned in writing her interest in the right for "the sum of one dollar and other valuable considerations" to her sister, Ada, who on December 29, 1917, at the age of

forty-two years, assigned the right in due form and for a sufficient consideration to the present claimant and applicant.

The administrative order referred to declared that—

> No soldier's additional right assigned by the heirs generally or by the administrator of the estate of a deceased soldier or of his widow, or of his minor children, or directly by such "minor children" after they shall have reached majority—

should be recognized as the basis of a valid entry of public lands, if such assignments were not made before the date of that order.

Under the plain terms of this order this application to enter is clearly without basis in so far as it rests in that part of the interest in the soldiers' additional right which the assignor claims either as the heir or the devisee of the soldier, but a more difficult question arises as to that part assigned to her by her sister before the date of the order.

While this Department has recognized the right of an assignee of a part of a soldiers' additional right to make entry in cases where the assignment specified the acreage of the right conveyed (Edward O'Keefe, 29 L. D., 643; William C. Carrington, 32 L. D., 203; Guy A. Eaton, 32 L. D., 644), it has also been held that this Department "does not and can not deal with or recognize undivided interests" embraced in assignments where no acreage is specified (Edgar A. Coffin, 33 L. D., 245, 247), or in other words, that it would not recognize the assignment of an undivided interest of one of the heirs as the basis of a separate entry. It is not believed, however, that that rule should be applied in this case to the extent of holding that that part of the right assigned before the promulgation of the order can not be used as the basis of an entry for 40 acres.

The facts in the Coffin case differ materially from the facts in the present case. In that case one of the heirs of the soldier ignored the existence of his coheirs and undertook to assign the entire right, which he could not do. In this case the present claimant holds under an assignment of one-half of the soldier's right which came to her assignor by assignment, and the other half which came to her as the daughter of the soldier. Prior to the promulgation of the order no question would have been raised as to the sufficiency of her assignment as a basis for an entry, and while the promulgation of that order took away from her the right to assign the interest claimed by inheritance or as devisee, it expressly recognized the interest assigned before its promulgation.

The decision appealed from is accordingly modified and the case is remanded for further adjudication along the lines here indicated.

WAREHIME v. FORSYTH.

Decided November 22, 1918.

SOLDIERS' AND SAILORS' RIGHTS—ACT OF MARCH 8, 1918.

The provisions of the act of March 8, 1918, relieving public land claimants from the penalty of forfeiture for failure to do any act required by the law under which their claims were made, during the period of their military service, do not accord protection in cases where the failure to comply with law occurred prior to entry into the military service and was established at a hearing at which claimant appeared and was afforded due opportunity to offer defense.

VOGELSANG, *First Assistant Secretary:*

Edmund Q. Forsyth has appealed from decision of the Commissioner of the General Land Office dated May 17, 1918, holding for cancellation upon contest filed by Jacob Warehime his homestead entry for the W. ½ SW. ¼, Sec. 26, W. ½ NW. ¼, N. ½ SW. ¼, Sec. 35, N. ½ SE. ¼, Sec. 34, T. 28 N., R. 6 E., M. M., Great Falls, Montana.

The facts of the case are fully set out in the Commissioner's decision. In departmental decision of October 25, 1917, it was found that the charges of the contest affidavit, alleging in substance that Forsyth had failed to establish and maintain residence on the land, were fully sustained at a hearing originally set for September 25, 1916, but the date of which was changed to August 25, 1916. Forsyth was present at this hearing with witnesses and submitted testimony. December 26, 1917, the Department remanded the case for rehearing upon the allegation that the mortgagees of Forsyth, who had filed notice of the encumbrance, were not notified of the changed date of the hearing and were not represented thereat. The Department on March 1, 1918, limited the scope of the rehearing to "such supplemental evidence as the mortgagees may desire to introduce and such rebuttal as the contestant may wish to submit," it appearing that Forsyth was then in the army. It was said—

> The entryman, Forsyth, appeared at the former trial and made his defense and there would seem to be no occasion for reproducing his testimony or for postponing the rehearing so that he may be present in person. No good purpose would be served and no necessity is seen for trying the case entirely de novo.

The Commissioner in his decision of May 17, 1918, held Forsyth's entry for cancellation as hereinbefore stated, on the ground that the testimony offered at the hearing did not materially alter the situation as shown at the former hearing. Upon consideration of the record as now presented the Department finds no valid reason for changing the views expressed in its decision on appeal rendered October 25, 1917.

In the meantime Congress passed the act of March 8, 1918 (Public No. 103), and that act is invoked in behalf of Forsyth for an indefinite continuance of the case. It provides—

> That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws * * * shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service.

In circular of May 16, 1918 (46 L. D., 383), under the act it was said:

> The general purpose of the act is to relieve claimants, under the conditions stated, from the penalty of forfeiture on the ground of their failure to do any act required by the law under which their claims are made *during the period of their military service.*

The case of Forsyth clearly does not come within the operation of the act of March 8, 1918. The purpose of the act was to save homestead and other claimants from the penalty of forfeiture on account of failure to perform the requirements of law during the period of their military service, and was not intended to cover cases of failure to comply with law occurring prior thereto. In this case the failure of Forsyth was at a time prior to his entering the military service. He was given full opportunity to appear and make defense, which in fact he exercised, and it was found from the record of the hearing that he had failed to perform the requirements of law. As this failure had reference to a time prior to his entering the military service, he in fact under the record showing had no right either to save or forfeit at the time of the passage of the act of March 8, 1918. The original hearing, the order for rehearing, the instructions confining the rehearing to the submission of testimony in behalf of the mortgagees and to rebuttal testimony by the contestant, as well as the holding that there was no occasion for postponing the rehearing so that Forsyth might be present in person, were all prior to the act of March 8, 1918. The order for rehearing on the ground that Forsyth's mortgagees were not notified of the advanced date of the original hearing was purely of a technical nature, and he was in nowise prejudiced by not being present in person at the new trial, as he already had been afforded full opportunity to make his defense and was in fact represented at the rehearing.

The action of the Commissioner herein is affirmed.

MOSES C. TINGLEY.

Decided November 23, 1918.

INDIAN ALLOTMENT TRUST PATENT—RELINQUISHMENT.

A trust patent issued upon an Indian allotment selected by a parent on behalf of his minor child may be canceled upon relinquishment without recourse to the act of April 23, 1904, it appearing that the child subsequently abandoned his tribal relations and adopted the habits of civilized life, receiving no benefit from such allotment; and when as a citizen he applies for and is allowed to make homestead entry the same will be held intact subject to compliance with law.

VOGELSANG, *First Assistant Secretary:*

The Department has received your [Commissioner of the General Land Office] communication of November 5, 1918, asking reconsideration of the action taken in letter of December 24, 1914, addressed to the Commissioner of Indian Affairs, in the matter of the relinquishment by Moses C. Tingley of an allotment made to him under section 4 of the act of February 8, 1887 (24 Stat., 388), for the SE. ¼ NE. ¼, Sec. 17, T. 28 N., R. 13 E., M. M., Glasgow, Montana.

The facts are that Tingley is the son of a white man and an eighth-blood Indian woman, and that when he was but 10 years of age an allotment covering the above land was selected for him on the public domain under the act of 1887. This allotment was approved June 28, 1892, and trust patent issued thereon April 16, 1897. It appears that as early as 1914 he was a married man, the head of a family, and that he never associated with Indians but has lived wholly separate and apart from them.

In September, 1909, Tingley settled upon unsurveyed lands in the Glasgow, Montana, land district. He made homestead entry February 16, 1914, for lot 4, E. ½ SW. ¼, NW. ¼ SE ¼, Sec. 19, T. 36 N., R. 48 E., and additional homestead entry August 8, 1914, for the SE. ¼, Sec. 24, T. 36 N., R. 47 E. He also made desert-land entry for the E. ½ SE. ¼, Sec. 19, and E. ½ NE. ¼, Sec. 30, T. 36 N., R. 48 E. In 1914 he had erected a house and other buildings on his homestead claim and cultivated 80 acres, the total value of the improvements being about $2,500.

March 18, 1914, your office held the homestead entries for cancellation because of the prior allotment made to Tingley under the act of 1887. Nevertheless final certificate issued on these entries January 28, 1915. In a letter received by you August 16, 1918, Tingley states that he has lived on the land for 10 years and asks that a patent issue to him.

In departmental letter of December 24, 1914, above referred to, it was held that Tingley's relinquishment could not be accepted and his trust patent canceled for the reason that his case does not come

within any of the classes specified in the act of April 23, 1904 (33 Stat., 297), authorizing the Secretary of the Interior to cancel trust patents. The opinion was expressed, however, that the facts warranted submission of the matter to Congress in order to obtain the necessary authority for the cancellation of the allotment as provided for in the above act. Instructions were accordingly given that pending action by Congress "you will take no action adverse to the homestead entries of Mr. Tingley as far as any alleged disqualification by virtue of his prior Indian allotment is concerned."

Upon reconsideration the Department concludes that recourse need not be had to the act of April 23, 1904, for authority to accept Tingley's voluntary relinquishment and to cancel the trust patent issued in his name. That act was in the interest and for the protection of Indian allottees and was not intended to prevent an election where the facts are such as in this case. At the time the allotment in question was made Tingley was a child and therefore had no volition in the matter. He subsequently applied for and was allowed to make entries under the general homestead laws, which he was qualified to do. He never used nor occupied the land embraced in the allotment and, so far as shown, never derived any benefit whatever therefrom. Furthermore, the act of 1904 has reference to Indians over whom the Government still exercises guardianship as distinguished from Indians who are citizens of the United States. As stated, Tingley's father was a white man and his mother an eighth-blood Indian. The record does not show what tribal relations, if any, the mother had, but the facts as to Tingley himself show that he had completely abandoned his tribal relations and adopted the habits and customs of civilized life, by reason of which, under the provisions of the act of 1887, he became a citizen entitled to all the rights and privileges of other citizens, including the right to make homestead entry. In his homestead affidavit he declared that he was a citizen of the United States.

As was said in the case of Feeley v. Hensley (27 L. D., 502, 504):

> The Indian entryman did not attempt to secure an allotment to him of nonreservation lands, whereby he would become a citizen, but relied upon his citizenship as one who had separated from his tribe and had adopted the habits of civilized life. By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by law upon other citizens, in filing his declaratory statement and making homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the Government toward him, as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists.

The departmental letter of December 24, 1914, is modified accordingly, the relinquishment of Tingley will be accepted, the trust patent issued in his name canceled, and appropriate action taken on his homestead entries if otherwise regular.

McGUILVERY v. STAATS.

Decided November 26, 1918.

HOMESTEAD ENTRY—GOOD FAITH.

The element of good faith is the essential foundation of all valid claims under the homestead law, and as the Government is a party in interest it is the duty of the Department to see that a claimant thereunder is not permitted by collusion and fraud to do indirectly that which the law forbids.

HOMESTEAD ENTRY—QUALIFICATION—DIVORCED WOMAN.

While the Department does not attempt to attack collaterally the judgment of a court in issuing a decree of divorce, yet it is not precluded from determining whether a claimant is qualified to make homestead entry merely because in another jurisdiction she was given the status of one so qualified, and if it be found that for the purpose of acquiring title to public lands, such judgment was procured by fraud and collusion the entry will be canceled.

CONFLICTING DECISION OVERRULED.

Departmental decision in Cline v. Urban, 29 L. D., 96, overruled.

VOGELSANG, *First Assistant Secretary:*

Mavis McGuilvery has appealed from a decision of the Commissioner of the General Land Office dated May 11, 1918, dismissing her contest against the homestead entry of Emma V. Staats for the W. ½ NW. ¼, SE. ¼ NW. ¼, S. ½ NE. ¼, N. ½ SE. ¼, NE. ¼ SW. ¼, Sec. 12, T. 1 N., R. 59 E., M. M., within the Miles City, Montana, land district. The entry was made July 21, 1916, by entrywoman as a widow and head of a family.

April 24, 1917, Mavis McGuilvery filed contest against said entry, charging that entrywoman was a married woman and living with her husband on his homestead; that just prior to filing upon said land she secured a divorce from her husband on the ground of desertion and assumed her maiden name in order to make the entry, and that they have resided together ever since. Answer was filed by contestee, denying the charges, and hearing ordered, which was duly had before a United States Commissioner, and upon the evidence adduced the local officers recommended that the contest be dismissed, and their action was affirmed by the Commissioner on appeal.

The record discloses that on March 28, 1916, contestee filed her petition against Bruce U. Haven for divorce, alleging failure to

provide her with the common necessities of life, he having the ability so to do. May 11, 1916, a decree of divorce was entered.

A fair and comprehensive statement of the testimony is contained in the Commissioner's decision, and the Department will not again discuss it at length, but will adopt the review thereof made by the Commissioner. The relations and acts of the parties both before and after the divorce was procured, and the attendant circumstances clearly show that the divorce was procured through collusion for the express purpose of qualifying entrywoman to make the entry.

In view of such finding, the fact that a divorce had been granted and entrywoman occupied a qualified status to make the entry, does not estop the Department from making inquiry into the bona fides of the divorce. The Government is a party in interest and it is the duty of the Department to see that a claimant by collusion and fraud is not permitted to do indirectly that which the law forbids. As said by the Supreme Court in the case of Lee v. Johnson (116 U. S., 48, 52); "The element of good faith is the essential foundation of all valid claims under the homestead law."

The Department does not attempt to attack collaterally the judgment of the court in issuing the decree of divorce, but recognizes said decree as having effectually divorced the parties under the laws of Montana, but the question whether fraud was practiced upon the United States for the purpose of procuring public land, which the party was not otherwise qualified to procure, is an entirely different question. The case at bar is not an attack upon said decree but upon the entry.

The Department does not deem itself precluded from deciding in this proceeding whether or not entrywoman was qualified to make the entry merely because in another jurisdiction she was given the status of a qualified entrywoman, but may inquire into the bona fides of such judgment, and if it is found that, for the purpose of acquiring title to public lands, such judgment was procured by fraud and collusion, the entry may be canceled. Smith v. Drake (36 L. D., 133), Roberts v. Seymour (36 L. D., 258), Leonard v. Goodwin (14 L. D., 570), Tustin v. Adams (22 L. D., 266).

The case of Glick v. Wiberg [not reported], decided by the Department February 8, 1917, is directly in point. In that case Wiberg made a homestead entry and before establishing residence she was adjudged insane by the Board of Insanity of Wells County, North Dakota, and committed to the State Hospital for the Insane. While so confined, Glick filed contest alleging failure to establish residence upon and abandonment of the land. Such other proceedings were had that upon the case reaching the Department, it decided in favor of Glick. Thereafter Wiberg petitioned the Department to reopen

her case alleging that she was not insane at the time she was adjudged so to be. The proceedings had upon such petition resulted in the Department reinstating her entry, finding that she was not insane at the time of her apprehension. In said decision it was held:

The Department will not lightly disregard the finding of a duly constituted tribunal acting within the scope of its authority despite the fact (as in this case) that such finding is not conclusive upon it.

See also case of Hette v. Forister (D. 35247), decided February 23, 1918.

The same questions herein presented were raised in the case of Cline v. Urban (29 L. D. 96), which case is relied upon by entrywoman, but the rule herein announced is considered by the Department to be the better doctrine and the decision in said case wherein it conflicts with this decision is overruled.

The decision appealed from is reversed.

McGUILVERY v. STAATS.

Motion for rehearing of departmental decision of November 26, 1918, 46 L. D., 492, denied by First Assistant Secretary Vogelsang, January 4, 1919.

TILLIE BUTH.

Decided November 26, 1918.

SCHOOL INDEMNITY SELECTION—SETTLEMENT ABANDONED.

Where at the date of filing a school indemnity selection it appears that the tract involved is subject thereto, a prior settlement long abandoned, even though because of erroneous advice, is not such an appropriation as will prevent the selection from attaching, nor afford any valid ground for the former settler's relief under a homestead application subsequently filed.

DECISION DISTINGUISHED.

Case of St. Paul, Minneapolis and Manitoba Railway Company v. Donohue (210 U. S., 21), cited and distinguished.

VOGELSANG, *First Assistant Secretary:*

Tillie Buth, formerly Tillie Smith, has appealed from a decision of the Commissioner of the General Land Office dated April 30, 1918, rejecting her application to make homestead entry for the SW. ¼, Sec. 7, and NW. ¼, Sec. 18, T. 34 N., R. 47 E., M. M., within the Glasgow, Montana, land district.

It appears from the record that the land involved was withdrawn under the act of August 18, 1894 (28 Stat., 394), from March 10,

1910, until sixty days from the date of filing the official plat of survey in the proper local land office. Survey in the field was made in October, 1912. The plat was approved in September, 1913, and filed in January, 1914. The land was designated under the enlarged homestead act by the Department on March 3, 1909. February 13, 1914, the State of Montana filed school indemnity selections for said SW. ¼, Sec. 7, and NW. ¼, Sec. 18.

The homestead application of Mrs. Buth was filed August 13, 1917, together with her corroborated affidavit in which she stated that she settled upon said lands prior to survey and built a house thereon in the fall of 1909, and established residence in May, 1910, and soon thereafter was informed that the lands belonged to the State of Montana and that settlers thereon were trespassers; that she remained upon the land a year and then left, believing that she could not hold the land on account of such information.

The local officers rejected said application and upon appeal before the Commissioner applicant filed an uncorroborated affidavit in which she stated that she left the land during the fall of 1910 for the purpose of seeking employment and subsequently thereto she was informed by persons who claimed to know the facts that said land had been withdrawn for the benefit of the State of Montana; that she never intentionally abandoned the land.

Applicant contends upon this appeal that as it is shown she was a bona fide settler at the date of the withdrawal of March 10, 1910, such withdrawal did not affect the land in question and it did not become subject to selection by the State of Montana, even though the settler had subsequently abandoned the tract. The case of St. Paul, Minneapolis and Manitoba Railway Company v. Donohue (210 U. S., 21) is cited in support of her contention. Said decision, however, is not in point, as it presents no question of abandonment as in the instant case. The case presented by applicant prima facie shows abandonment of the land in the fall of 1910. At the date of the filing of the State selection it affirmatively appeared that the land was subject to such selection. The alleged settlement rights of Mrs. Buth had been abandoned by her for a period of more than three years prior to such selection and same did not constitute a valid adverse appropriation at the date thereof. In order to have maintained her claim it was incumbent upon her to comply with the homesteam law and to seasonably assert her rights.

In view of the fact that no valid adverse appropriation existed at the date of such selection it becomes immaterial that applicant may have settled upon said land and established residence thereon prior to such withdrawal, it being admitted that any rights acquired thereby had long since been abandoned. Her laches and the inter-

vening adverse claim of the State bar the allowance of her application. As held by the Commissioner, the fact that her abandonment of the land was caused by erroneous advice affords no ground for relief.

The decision appealed from is affirmed.

VEATCH, HEIR OF NATTER (ON REHEARING).

Decided November 26, 1918.

CONFIRMATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

The two-year period fixed by the proviso to section 7 of the act of March 3, 1891, which begins to run from the date of the issuance of the "receiver's receipt upon the final entry" has no application to an original homestead entry which has never ripened into a *final entry* through offer of proof, payment, and the judicial determination of the register that the requirements of law have been met, of which his certificate is the formal expression.

VOGELSANG, *First Assistant Secretary:*

Estella Veatch, heir of Frank Natter, has filed motion for rehearing of the decision of the Department, dated December 31, 1917, in the above-entitled case, denying reinstatement of the canceled homestead entry of Frank Natter and holding that said entry was not confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), because no receiver's receipt was issued for the commissions which were paid upon submission of final proof.

It is contended that payment itself, and not the mere issuance of receipt, brings the case within the purview of the statute, and in support of this contention the instructions of the Department dated June 4, 1914 (43 L. D., 323), are cited. In those instructions the Department said:

> These departmental decisions call attention to the fact that time under the statute of limitation created by the proviso to section 7 of the act of March 3, 1891, runs from the date of the issuance of the receiver's receipt upon final entry. There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made.

The language quoted, as does the law with reference to which it was used, deals with *final entries*, not with original homestead entries

which have never ripened into final entries through proof, payment, and the judicial determination of the register that the requirements of law have been met, of which his certificate is the formal expression.

It is too much to say that the mere offering of final proof by an entryman, together with the final commissions or the price of the land constitutes a final entry. As stated, final entry presupposes an adjudication and acceptance by the register of the proof submitted, and the final certificate thereupon issued constitutes a formal declaration that the claimant is entitled to patent. It can not be contended that the proviso to the act of 1891 relieved the register of his adjudicating power, and final entry is in no case allowed by him until and unless from the showing submitted he is satisfied that the law has been complied with.

In the case at bar proof was submitted in 1905, but suspended for proper cause, and the final fees and commissions which were tendered remained in the custody of the receiver, as unearned moneys. Proceedings were instituted against the entry in 1909, resulting in its cancellation on March 12, 1912. On appeal from the Commissioner's decision, denying reinstatement, discussing the confirmatory effect of the statute invoked, the Department said:

> Where, as here, there was no "receiver's receipt upon the final entry," the proviso above quoted does not apply, nor does the decision of the Supreme Court of the United States in the case of Svan Hoglund, rendered May 21, 1917, on which the heir relies.

In the case of Fred B. Garrett et al., decided May 4, 1915 (44 L. D., 115), the Department said (syllabus):

> The two-year period fixed by the proviso to section 7 of the act of March 3, 1891, begins to run from the date of the issuance of the "receiver's receipt upon the final entry"; and the mere offering of final proof by an entryman is not sufficient in and of itself to bring the entry within the operation of the statute.

The question as to whether the date of final payment or that of the receipt therefor, if different, would control in a case involving a final entry, is moot in this proceeding, which involves an original entry.

Under the practice prevailing at the time Natter's entry was made, moneys tendered with proofs which were defective, insufficient, or which for sufficient reasons were suspended, were frequently carried for indefinite periods as unearned fees and unofficial moneys and eventually either returned to the applicant or applied and receipt issued, as the facts and circumstances warranted.

In the opinion of the Department, neither the letter nor the spirit of the law justifies a ruling that the mere payment of moneys in connection with a final proof which was never accepted and which is

totally inadequate to establish any right in a public-land claimant is sufficient to start the running of the statute. Manifestly, in such case, there is nothing upon which the confirmatory provisions of the statute could operate, because there is no final entry.

The motion for rehearing is denied.

ADDITIONAL ENTRY—STOCK-RAISING HOMESTEAD ACT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 3, 1918.

REGISTER AND RECEIVER, TUCUMCARI, NEW MEXICO:

In reply to your letter of September 20, 1918, you are informed that some part of every legal subdivision in the additional entry under the stock-raising act must be within 20 miles of the nearest point on the boundary of the original entry. If it is impossible to tell from the map whether the lands come within this limit, the application should be suspended and the case referred to this office with request for instructions.

CLAY TALLMAN, *Commissioner.*

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EDWIN M. BEELER.[1]

Decided September 11, 1918.

POTASH—SECTION 2, ACT OF OCTOBER 2, 1917.

Under section 2 of the act of October 2, 1917, a lease may issue for deposits of potash in public lands in Sweetwater County, Wyoming, also containing coal, on condition that the coal be reserved to the United States, but said section does not contemplate or authorize the granting of a prospecting permit.

VOGELSANG, *First Assistant Secretary:*

Edwin M. Beeler, who on December 24, 1917, filed an application, 06502, for a permit to prospect for potash upon sections 13, 14, 15 and 24, T. 21 N., R. 102 W., 6th P. M., Evanston, Wyoming, land district, pursuant to the act of October 2, 1917 (40 Stat., 297), has appealed from the decision of the Commissioner of the General Land Office, dated April 27, 1918, rejecting his application.

The tracts mentioned are in Sweetwater County, Wyoming. The odd-numbered sections have been patented to the railroad company.

[1] See decision on motion for rehearing, p. 499.

The other tracts were, long prior to the above application, classified and appraised as coal lands. The act of October 2, 1917, *supra*, in section 2, provides:

> That the Secretary of the Interior may issue leases under the provisions of this act for deposits of potash in public lands in Sweetwater County, Wyoming, also containing deposits of coal, on condition that the coal be reserved to the United States.

The patented odd-numbered sections are not public lands of the United States and the act has no application to them, the railroad patent containing no reservation of potassium deposits. Obviously, the Department has no jurisdiction or authority to grant a permit covering this land.

With respect to the even-numbered sections containing coal, it would appear that Congress, by the particular legislation above quoted, in plain terms provided only for the issuance of a lease with a reservation of the coal deposits. The granting of a prospecting permit was not contemplated or authorized. Prospecting upon these lands is not called for and would subserve no practical purpose, for the reason that the existence of the potash-bearing igneous rock upon these lands has been known for some time. See Bulletin No. 512, issued by the Geological Survey in 1912, entitled "Potassium-Bearing Rocks of the Leucite Hills, Sweetwater County, Wyoming."

Section 12 of the act, in part, reads as follows:

> That the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this act, except as to valid claims." * * *

The portion of the act applicable to Sweetwater County coal lands provides for leasing only and not for the prospecting or for the patenting of such lands. In this regard, its provisions are very similar to those specifically applicable to the Searles Lake potash lands, in California, which expressly state that such lands may be operated by the Government or may be leased.

The decision of the Commissioner rejecting the application for a prospecting permit is found to be correct and is affirmed.

EDWIN M. BEELER (ON REHEARING).

Decided December 6, 1918.

POTASH—SWEETWATER COUNTY, WYOMING.

No right will be regarded as initiated by the filing of an application under the regulations of December 1, 1917, for a permit to prospect for potash on public lands in Sweetwater County, Wyoming, which by section 2 of the act of October 2, 1917, are subject only to lease, and relative to which said regulations have no application.

VOGELSANG, *First Assistant Secretary:*

This is a motion for rehearing filed by Edwin M. Beeler in the matter of what on its face is an application by him for a permit to prospect for potash upon Secs. 13, 14, 15 and 24, T. 21 N., R. 102 W., 6th P. M., Evanston, Wyoming, land district, wherein the Department by decision of September 11, 1918 (46 L. D., 498), affirmed the decision of the Commissioner of the General Land Office of April 27, 1918, rejecting said application.

The application was filed December 24, 1917, under the provisions of the act of October 2, 1917 (40 Stat., 297), and purports also to have been made "under and by virtue of the rules and regulations issued pursuant to said act by the Secretary of the Interior, by Alexander T. Vogelsang, First Assistant Secretary, dated at Washington, D. C., December 1, 1917" (46 L. D., 245).

The action of the Department complained of was based on the grounds (1) that the odd-numbered sections described in the application having been patented to a railroad company without reservation of the potash deposits are not within the jurisdiction of the Department, and (2) that the even-numbered sections described having been classified and appraised as coal land are by the express terms of the provisions of section 2 of the act of 1917 made subject only to lease under the provisions of the act, on condition that the coal be reserved to the United States.

It is urged in the motion that the Department erred in treating the application as one merely for a prospecting permit. It is contended, in substance, that, viewed in the light of the purpose and intent of Congress, under which rights were by the application sought to be initiated, the application should be regarded as one for whatever rights could be acquired as to potash in and upon all of the lands described, and that in any event the applicant should at least have been accorded the first opportunity to lease the leasable portion of the area or given a permit "which would reserve his right to priority of development."

The lands in question are situate in Sweetwater County, Wyoming, and, as before stated, they have been classified and appraised as coal lands. Attached to and made a part of the regulations of December 1, 1917, under which the application purports to have been filed, is a copy of the said act of October 2, 1917. That act authorizes but one form of disposition of potash lands situated in said county, namely, by lease, the second proviso to section 2 of the act providing that:

> The Secretary of the Interior may issue leases under the provisions of this act for deposits of potash in public lands in Sweetwater County, Wyoming, also containing deposits of coal, on condition that the coal is reserved to the United States.

The said regulations related solely and exclusively to the issuance of permits authorizing the exploration of public lands for potassium and therefore could have had application only to lands lying outside Sweetwater County.

The act itself did not prescribe any specific method for the leasing of potash lands, but provided merely that all such lands not therein made subject to other forms of disposition under the act "may be leased by the Secretary of the Interior, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres." No regulations for the leasing of such lands were adopted by the Secretary until March 21, 1918 (46 L. D. 323), which was long after the application of Beeler was presented.

Under all the circumstances therefore the Department is unable to perceive any ground for the contention that the instrument in question can be regarded as anything other than what it purports on its face to be, namely, an application under the regulations of December 1, 1917, for a permit to prospect for potash deposits on the public lands described, which lands, as before stated, were subject only to lease pursuant to regulations which at the date of presentation of the application had not been adopted.

The decision complained of is accordingly adhered to and the motion for rehearing denied.

CADDELL v. MYERS.

Decided December 11, 1918.

PRACTICE—CONTEST—QUALIFICATIONS OF CONTESTANT—APPORTIONMENT OF COSTS.

One who is a junior applicant, and thus claims an interest in a tract of public land, is qualified under Rule 1 of Practice to initiate a contest or protest against a prior suspended application which segregates the land, where the allegations relate to matters not shown by the records of the Land Department; and the costs of the hearing thereon should be apportioned as directed by the second sentence of Rule 53 of Practice.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by John W. Caddell from a decision of the Commissioner of the General Land Office dated July 8, 1918, dismissing his contest against the application of Frank C. Myers, filed January 12, 1917, to make entry under the stock-raising homestead act for lots 5, 6, and 7, NW. ¼ SE. ¼, SW. ¼, Sec. 13, SE. ¼ SE. ¼, Sec. 14, lots 1 and 7, Sec. 23, lots 1, 2, and 3, W. ½ NW. ¼, NE. ¼ NW. ¼, Sec. 24, T. 2 S., R. 3 W., M. M., Helena, Montana, land district.

Said Caddell on February 5, 1917, filed a similar application for the same land, and on March 5, 1917, filed an application to contest

the application of Myers, charging that said applicant was the owner of more than 160 acres of land in the United States at the date of his application and at the date of the contest affidavit, and hence not qualified to make the entry applied for. Notice was served March 13, 1917, and on April 10, 1917, Myers filed answer, denying the charges. Testimony was submitted before a designated officer near the land on May 11, 1917.

When the first witness was called, Myers objected to the introduction of any testimony and moved for dismissal of the contest because an application to make entry, and not an entry, was involved. The local officers, in their decision of November 21, 1917, overruled the motion to dismiss, and on consideration of the testimony reached the conclusion that Myers was disqualified as alleged by Caddell, and recommended that the application in question be rejected. The decision appealed from held that the local officers should have sustained the motion to dismiss, and reversed the decision below without considering the testimony.

It appears that on June 19 and 23, 1908, there were filed in the county recorder's office two deeds conveying to Myers 1,160 acres of land, and on December 3, 1912, there was filed for recording a patent from the United States to Myers, describing 40 acres which he had purchased as an isolated tract. With the exception of 560 acres which had been conveyed by Meyers and his wife on May 13, 1908, to one Dawes, all the remainder of the land (640 acres) was shown by the county records to be owned by Myers. It was developed at the hearing that on April 24, 1917, four deeds had been filed in the county recorder's office, wherein Myers conveyed to his wife the 640 acres above referred to and other lands. The deeds were executed January 2, 1908; June 19, 1908; September 30, 1910, and December 24, 1912; three alleged a consideration of $1 and love and affection, while the fourth alleged, in addition to the foregoing, "together with other good consideration."

Mrs. Myers testified that the four deeds were delivered to her shortly after their execution, and that she gave them to one Adkins, who was associated with her husband in the conduct of the Isdell Mercantile Company at Pony, Montana. Said Adkins testified that he kept the deeds in a drawer of the safe of said company, to which drawer he alone had the key, and to which Myers did not have access, although he used the safe.

It is admitted that Myers farmed the 640 acres, and until the proceedings were instituted usually referred to the place as "my ranch." He deposited the proceeds from his farming operations—during the year prior to the hearing they amounted to between $8,000 and $9,000—in a bank to his own credit, but Mrs. Myers was

authorized to issue checks against the account. No contract or agreement appeared to have been made by the husband and wife as to the disposition of the proceeds of the ranch. The husband each year prior to contest listed the property for assessment of taxes, and the taxes were assessed in his name.

It appears from the records of the Land Department that on April 21, 1910, Myers applied for the offering of NE. ¼ NE. ¼, Sec. 29, T. 2 S., R. 1 W., M. M., as an isolated tract. In answer to Question 1 of the form used in making the application—

> Are you the owner of land adjoining the tracts above described? If so, describe the land by section, township, and range.

Myers answered:

> Yes. S. ½ SE. ¼, Sec. 20, W. ½ NE. ¼, SE. ¼ NE. ¼, Sec. 29, T. 2 S., R. 1 W., adjoining said land on three sides.

The 200 acres mentioned in the quoted answer were described in deeds to Mrs. Myers, executed January 2, 1908, and June 19, 1908, and said deeds were two of the four filed in the recorder's office on April 24, 1917.

Although there may have been a manual delivery of the deeds to Mrs. Myers, the Department is convinced that there must have been a secret understanding between husband and wife that the deeds were not to become operative unless the exigencies of his business rendered such action expedient, or until his death, when she could by recording the deeds relieve the property from the claims of creditors, or escape the payment of inheritance taxes. It was clearly established that he never, prior to contest, treated the property as owned by his wife, but the proceeds were deposited to the credit of his own account in a bank, and the privilege of the wife to draw checks against the account was revocable at will, and was, of course, revoked by his sudden death on April 22, 1918.

In the application for the sale of the isolated tract above referred to, Myers stated under oath that he owned 200 acres of land contiguous to the tract applied for. It was necessary, under the regulations, to make some showing of that character, to make it appear that he desired to purchase the tract for his own individual use and actual occupation, and not for speculative purposes. The 200 acres were described in the deeds to his wife executed in 1908. That he did not in 1910 consider that he had divested himself of the ownership of the land is evident. To allow him, in 1917, to adopt a different conclusion, so as to qualify him to make a homestead entry, is not believed warranted.

The proviso to section 2 of the stock-raising homestead act (39 Stat., 862), under which the application in question was filed, provides that an application to make entry for a tract of undesignated

land, filed by a person qualified to make entry, shall, if accompanied by a petition for designation, segregate the land from other disposition to await action on the petition, and that if the land applied for shall be designated as stock-raising land the application shall be allowed.

Rule of Practice 1 permits the initiation of contests "against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department."

That the application of Myers was a "filing" or "claim" within the meaning of said Rule 1 is too evident to warrant discussion. The charges made by Caddell related to matters not shown by the records of the Land Department, and being made by a party in interest, it follows that the contest was properly entertained. One who is a junior applicant, and thus claims an interest in a tract of land, is at liberty to initiate proceedings, by contest or protest, against a prior suspended application which segregates the land, and the costs of the hearing should be apportioned as directed by the second sentence of Rule of Practice 53.

For the reasons aforesaid the decision appealed from is reversed and the application of Myers rejected.

REGULATIONS GOVERNING APPLICATIONS FOR RESURVEYS UNDER THE ACT OF SEPTEMBER 21, 1918.

[CIRCULAR No. 629.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 20, 1918.

The act of Congress approved September 21, 1918 (40 Stat., 965), provides authority for the resurvey by the Government of townships heretofore held to be ineligible for resurvey under existing departmental regulations by reason of disposals in excess of 50 per cent of the total area thereof.

Briefly, the act provides that upon the application of the owners of three-fourths of the privately-owned lands [1] in any township previously surveyed, or upon the application of a court of competent jurisdiction, accompanied by a deposit of funds sufficient to cover

[1] For the purpose of the administration of this act, lands embraced in school sections, in approved State and railroad selections, and in entries upon which final certificate or patent has issued are regarded as alienated lands.

the estimated cost, inclusive of the necessary office work, of the resurvey of *all* of the privately-owned lands in such township, the Commissioner of the General Land Office shall be authorized, in his discretion, subject to the supervisory authority of the Secretary of the Interior, to cause to be made a resurvey of the township in question in accordance with the laws and regulations governing surveys and resurveys of the public lands; the cost of the resurvey of the residue of the public lands in such township to be paid by the Government from the current annual appropriation for the survey and resurvey of the public lands in addition to the portion thereof made available for resurveys and retracements by the provisions of the act of March 3, 1909 (35 Stat., 845), as amended by joint resolution of June 25, 1910 (36 Stat., 884). The total cost of the resurvey of the township is thus divided between the Government and the petitioners in proportion to the extent of their respective holdings.

It is further provided that any portion of such deposit in excess of the actual cost of the field and office work incident to such resurvey of privately-owned lands shall be repaid pro rata to the applicants for resurvey or to their legal representatives.

Attention is directed to the fact that the legislation contained in this act is supplemental to, and is in no sense a repeal or a modification of, similar legislation heretofore enacted, and, consequently, applications for resurvey under the provisions of the act of March 3, 1909, will, when submitted in accordance with the regulations (Circular No. 520) of January 13, 1917 (45 L. D., 603), be received and acted upon as usual.

Applications for resurvey based upon the provisions of the act of September 21, 1918, should, when perfected under the following requirements, be submitted to the United States surveyor general for the district in which the lands are situated, or in case the United States surveyor general's office for that district has been abolished, the petition may be transmitted to the Commissioner of the General Land Office at Washington, D. C. An exception to the foregoing rule occurs in the case of the State of Nebraska, where applications should be filed with the Assistant Supervisor of Surveys at Neligh, Nebr. Prior to filing formal application, however, the interested parties should obtain from the proper officer, as above designated, an estimate of the cost of the proposed resurvey. (See sec. 4.)

In general, all preliminary correspondence and all requests for information as to status and progress should be addressed to the proper surveyor general, and such inquiries should not be referred to the Commissioner of the General Land Office unless the district is one in which the office of the United States surveyor general or its equivalent is no longer maintained.

The regulations are as follows:

SECTION 1. The applicants for resurvey are required to preface their petition by the statement that the extent of privately owned lands within the township is in excess of 50 per cent of the total area thereof. If necessary, information in this connection may be obtained by the petitioners from the register and receiver of the district land office having local jurisdiction.

Failure to comply with the foregoing condition, or material error in the showing made, will not only result in delaying action upon the petition, but may require its rejection if it is found that the township is not properly subject to resurvey under the terms of the governing act.

SEC. 2. The applicants for the resurvey of any township are required to present satisfactory prima facie evidence of the necessity for such action. In general, it must be shown that the evidences of the original survey are so widely obliterated or that the prevailing survey conditions are so grossly defective as to preclude the satisfactory identification of the subdivisions of the subsisting survey, or that the evidences of the original survey are in such an advanced state of deterioration that action looking to their preservation and perpetuation is expedient as in the public interest.

SEC. 3. The owners of three-fourths of the privately owned lands within the township are required to join in the application, and all petitioners in whom ownership is vested, either individuals, the State, or corporations such as railroad companies whose interests are involved, are further required to supply, following their respective signatures, an accurate description by legal subdivision, section, township and range, of the lands to which title is claimed. Moreover, it must appear that notice of the proposed resurvey has been served upon all owners who have for any reason failed to join in the petition, and in addition, it is highly desirable that all record entrymen who, under the terms of the act, are not required to become parties to the petition, be similarly informed to the end that their objections, if any, may be heard and subsequent protests based upon the plea of ignorance may, in so far as possible, be avoided.

SEC. 4. The deposit required of the petitioners by law must accompany the application and must be made in the amount, at the place and in the manner prescribed by the instructions which will accompany the estimate previously secured from the surveyor general or other appropriate officer.

Upon receipt by the proper district officer of an application conforming to the foregoing requirements, he will, after due consideration, transmit the same to the General Land Office with such recommendations as he may deem appropriate. In general, a preliminary

field examination will be authorized by the Commissioner in order to verify the correctness of the allegations upon which the resurvey petition rests and for the further purpose of determining the technical procedure which should properly be adopted under the existing field conditions, and the probable effect thereof upon the rights involved, unless the showing made by the petitioners, when considered in connection with the information made available by the records of this office, is such as to indicate that field examination may properly be waived. Inasmuch, however, as the purpose of such investigations is largely administrative, the expense thereof, when authorized, will be defrayed from the current annual appropriation for surveying the public lands, and no portion thereof will be charged against the deposit made by the applicants.

GENERAL.

The cost of resurvey procedure is as a rule considerably in excess of that incident to the execution of original surveys, and may range between rather wide limits. Where the obliteration is not excessive and the evidences of the original survey are harmoniously related, extensive verifying retracements will be unnecessary and ordinary dependent methods of resurvey can usually be applied. In such cases, the expense involved will probably not exceed $1,200 per township. If, however, the obliteration is general or total, many miles of preliminary retracement may be required in order to obtain technical control, and where, by reason of errors in the original survey, the existing evidences thereof are discordant and conflicting locations have resulted, the procedure required may, in the case of densely entered townships, involve an expense of $3,000 or more per township.

The applicants for resurvey should understand, therefore, that although the estimate supplied by the surveyor general will be as nearly correct as the available information will permit, its accuracy can not be guaranteed, and, consequently, all such estimates are subject to revision, if necessary, as the work proceeds and the field conditions are more fully developed. Any deposit in excess of actual cost will be returned to the applicants as provided by law, but in cases where the cost exceeds the deposit made in accordance with the estimate, an additional deposit will be required, failing which, operations will be suspended.

In the application of the terms of this act it is not intended that there shall be undertaken any work involving the mere reestablishment of lost or obliterated or misplaced corners in a limited area of a township—such work being within the province of the local surveyor—and the authority of the surveyor general's office will be restricted to the giving of advice in accordance with the circular for the restoration of lost or obliterated corners. Employees of the

Government are prohibited from participating in the resurvey of a township or the reestablishment of lost corners or in the subdivision of sections for private parties, even if the expense is borne by the county or State authorities or by individuals, except as such action is specifically authorized by the Commissioner of the General Land Office in accordance with the provisions of the existing statutes.

Attention is directed to the fact that whereas the expressed purpose of the resurveys authorized by the act of March 3, 1909, *supra*, is primarily "to properly mark the boundaries of the public lands remaining undisposed of," the evident intent of the legislation now enacted is to reestablish the boundaries of those lands title to which has passed from the United States. The technical process and the results attained are substantially identical under either act, but the administrative procedure and the regulations necessary to safeguard the interests of the Government and those of the petitioners are dissimilar, and, consequently, it is important that the foregoing distinction should be clearly recognized by the applicants for resurvey to the end that the petition may be based upon the legislation under which the township is eligible.

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOSELSANG,
First Assistant Secretary.

AN ACT Authorizing the resurvey or retracement of lands heretofore returned as surveyed public lands of the United States under certain conditions.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the application of the owners of three-fourths of the privately owned lands in any township covered by public-land surveys, more than fifty per centum of the area of which townships is privately owned, accompanied by a deposit with the United States surveyor general for the proper State, or if there be no surveyor general of such State, then with the Commissioner of the General Land Office, of the proportionate estimated cost, inclusive of the necessary [office] work, of the resurvey or retracement of all the privately owned lands in said township, the Commissioner of the General Land Office, subject to the supervisory authority of the Secretary of the Interior, shall be authorized in his discretion to cause to be made a resurvey or retracement of the lines of said township and to set permanent corners and monuments in accordance with the laws and regulations governing surveys and resurveys of public lands; that the sum so deposited shall be held by the surveyor general or commissioner when ex officio surveyor general and may be expended in payment of the cost of such survey, including field and office work, and any excess over the cost of such survey and the expenses incident thereto shall be repaid pro rata to the persons making said deposits or their legal representatives; that the proportionate cost of the field and office work for the resurvey or retracement of any public-lands in such township shall be paid from the current appropriation for the survey and

resurvey of public lands, in addition to the portion of such appropriation otherwise allowed by law for resurveys and retracements; that similar resurveys and retracements may be made on the application, accompanied by the requisite deposit, of any court of competent jurisdiction, the returns of such resurvey or retracement to be submitted to the court; that the Secretary of the Interior is authorized to make all necessary rules and regulations to carry this Act into full force and effect.

Approved, September 21, 1918. (40 Stat., 965.)

THE THREE-YEAR HOMESTEAD LAW—CIRCULAR 278, APPROVED NOVEMBER 1, 1913, AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Dec. 24, 1918.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The second section of paragraph 5 relating to reduction of cultivation of homestead entries made under the act of June 5, 1912 (37 Stat., 123), as set forth in Circular No. 278, dated November 1, 1913 (42 L. D., 511, 514), is amended to read as follows:

No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. If lands are so heavily timbered that the entryman cannot reasonably clear and cultivate the area prescribed by the statute, such entries will be considered speculative and not made in good faith for the purpose of obtaining a home. The foregoing applies to lands containing valuable or merchantable timber and will not preclude the reduction of area of cultivation on proper showing in cases where the presence of stumps, brush, lodge-pole pine or other valueless or non-merchantable timber prevents the clearing and cultivation of the prescribed area.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

CHARLES MAKELA.

Decided December 27, 1918.

STOCK-RAISING HOMESTEAD—QUALIFICATION—AREA.

One qualified to make entry under other homestead laws for approximately 40 acres is qualified to make an original entry under the provisions of section 1 of the stock-raising homestead act of December 29, 1916, for such an area of land designated thereunder as when added to the area of the prior perfected entry or entries will not exceed 640 acres, even though the latter area be not designated.

STOCK-RAISING HOMESTEAD—AMENDMENT.

If the area embraced in an unperfected entry under the provisions of the enlarged homestead act be designted as "stock-raising land," such entry may upon application be changed to an original entry under section 1 of the stock-raising homestead act of December 29, 1916, and amended to embrace such an area of contiguous designated land as when added to the former, and also prior perfected entry if there be any, will not exceed approximately 640 acres.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Charles Makela from a decision of the Commissioner of the General Land Office, dated April 18, 1918, rejecting his application, filed January 8, 1917, to make entry under the act of December 29, 1916 (39 Stat., 862), for W. ½ NE. ¼, NE. ¼ NE. ¼, NW. ¼ SE. ¼, and N. ½ SW. ¼, Sec. 25, T. 17 N., R. 3 E., B. H. M., lot 1, and NE. ¼ NW. ¼, Sec. 30, T. 17 N., R. 4 E., B. H. M., (319.75 acres), Bellefourche, South Dakota, land district.

It appears that on October 6, 1897, said Makela made homestead entry at the Rapid City, South Dakota, land office for W. ½ SW. ¼, Sec. 5, and E. ½ SE. ¼, Sec. 6, T. 7 N., R. 4 E., B. H. M. (160 acres), under which final certificate issued January 22, 1903, followed by patent. The land last described being designated as of the character contemplated by the act of February 19, 1909 (35 Stat., 639), said Makela on October 18, 1916, made an additional entry under section 7 of said act for NW. ¼, Sec. 25, T. 17 N., R. 3 E., B. H. M.

The decision appeal from held that as the land applied for is not within twenty miles of the tract originally entered, its allowance was not provided for by the stock-raising act.

Consideration of the appeal makes it apparent that some misunderstanding exists as to what persons may make entries under the stock-raising homestead law. Section 1 of the act provides:

> That from and after the passage of this act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding 640 acres of unappropriated unreserved public land in reasonably compact form: Provided, however, That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

The principal laws in force prior to the enactment of the stock-raising law under which homestead entries could be made were section 2289, Revised Statutes; section 6 of the act of March 2, 1889 (25 Stat., 854); section 2 of the act of April 28, 1904 (33 Stat., 527); the so-called Kinkaid Act (33 Stat., 547); section 2 of the act of June 5, 1900 (31 Stat., 267); section 2 of the act of May 22, 1902 (32 Stat., 203); the enlarged homestead acts of February 19, 1909 (35 Stat., 639), and June 17, 1910 (36 Stat., 531), and the act of June 11, 1906 (34 Stat., 233).

In the instructions of January 27, 1917 (45 L. D., 625), believing that Congress acted with full knowledge of the various homestead laws then in force when it used the language "any person qualified to make entry under the homestead laws of the United States," paragraph 4b, under "Qualifications for entrymen," stated:

> In other words, a person who was qualified to make an original or an additional homstead entry under other laws for as much as approximately 40 acres can enter hereunder such an amount of land as will, with the area theretofore entered under the homestead laws, not exceed 640 acres, but the total of all entries under the agricultural public-land laws (i. e., timber and stone, desert land, preemption, and homestead) must not exceed 800 acres.

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, *supra*, 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*. But it does limit the making of entries to land within 20 miles of the land embraced in former *unperfected* homestead entries under this or other laws, and to *perfected* entries under this law. The reason for the latter limitation was doubtless based on the fact that it would not be practicable for a stock raiser to operate two stock ranches separated by a greater distance than 20 miles; and the preceding limitation was necessary because of the fact that entries for land incontiguous to prior entries can not be perfected without residence on the land, and credit for constructive residence is not allowed unless the entry on which residence is maintained is within 20 miles of the former entry. It was not until the first proviso to section 3 of the act was amended by the act of October 25, 1918 (Public No.

229), that it was allowable to make an entry under the law by one holding an unperfected entry under other laws unless he had completed the period of residence required on such former entry or would have completed it within six months. The amendment referred to allows residence to be maintained on the land embraced in the prior entry, provided it is designated as stock-raising lands, whether or not such prior entry has been perfected, but if perfected it must appear that entryman still owns that portion on which he resides—not necessarily the entire area of the entry.

While it is necessary that the land embraced in a prior entry must be designated as stock-raising land if an entryman desires to continue to reside thereon while perfecting a stock-raising homestead for land incontiguous to the former entry but within twenty miles thereof, or if such entry is made under sections 4, 5, or 6 of the act, it is not necessary that the land embraced in a perfected entry made under other laws shall be designated as stock-raising land, because the right to make a stock-raising entry by one who has but partially exhausted his homestead right under other laws is not contingent on such designation, as hereinabove stated.

When Makela perfected his first entry for 160 acres he exhausted his homestead right under all the laws then in force. Upon the designation of that tract as of the character contemplated by the enlarged homestead act, he became qualified to make an entry thereunder for 160 acres. When, on October 18, 1916, he made such an entry, he again exhausted his homestead right, but the entry being unperfected, and it being alleged that the land now applied for and that embraced in the unperfected entry is of the character contemplated by the stock-raising homestead act, it is considered proper to treat the pending application as being for the change in character of the entry to one under the stock-raising act and for its amendment to embrace the 319.75 acres additional described. If the entire tract is designated under the stock-raising act, the amended entry would become an original entry under the law—not an additional entry within the meaning of the act—and can be perfected only as provided by the last proviso to section 3. The allowance thereof would not be contingent on the designation under the stock-raising act of the tract embraced in the perfected entry, for the reason that, eliminating the unperfected entry which he seeks to enlarge, he will become qualified, upon the designation of the land, to make an entry under the stock-raising act for 480 acres.

For the reasons aforesaid, the decision appealed from is reversed, and the application remanded for further consideration.

METHODS OF KEEPING RECORDS AND ACCOUNTS RELATING TO THE PUBLIC LANDS.

[Circular No. 616.[1]]

RETURNS.

General Instructions.

1. The following instructions will take effect on and after January 1, 1919.

2. All orders, circulars, and instructions in conflict herewith are hereby canceled and revoked.

SERIAL NUMBERS.

3. *Use only one series.*—Each office will maintain but one series of numbers, and all kinds of applications, entries, selections, locations, etc., for the use, segregation, purchase, or disposition of a part of the public domain, will be numbered with this one series, such numbers to be preceded by 0. The "0" is used to prevent conflict with any number of the various series in use prior to July 1, 1908.

4. *When to be used.*—Each declaration, application, or other initial paper required in any entry, sale of land, selection, location, etc., will be numbered AT THE TIME AND IN THE ORDER in which it is presented or received at the district land office, without regard to whether it is subsequently allowed or rejected, as required by circular of June 10, 1908.

5. *Merely for identification.*—The giving of a serial number to an application, entry, selection, location, etc., does not mean that same is allowed or approved, or will be allowed or approved. It is merely an identification number of the case, as it were, by which it will always in the future be identified.

6. Fractional serial numbers are not to be used.

7. *All subsequent papers bear same number.*—After the initial declaration, application, or other paper required in any entry, sale of land, selection, location, etc., is once numbered, all subsequent papers filed or issued in connection therewith must bear the same number as is given the initial paper.

8. *Where no money is tendered.*—Applications, declarations, etc., which are not accompanied by the proper remittances in form or in amount required by law or regulations to be tendered at the same time they are filed will be assigned current serial numbers. You should note such applications, etc., on the "Serial Number Register,"

[1] Approved Aug. 9, 1918, see p. 617.

hereinafter referred to. Where no money is tendered, the application etc., will be rejected. On such rejection, the applicant, of course, has the right of appeal within 30 days, under the "Rules of Practice," merely against rejection of the application, however, for the reason that no money was received therewith, unless, of course, there are additional causes for rejection at the time the application is received by you. You will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered. If the applicant should transmit the money, and the land has not in the meantime been segregated, the application should retain the same serial number as was given it at the time of filing, and action thereon may be taken in accordance with the regulations. A new application need not be filed, but it must be plainly noted in the upper left-hand corner of the application that it was received without the money, and that the money was subsequently tendered. The exact time and date of the tender of the money should also be noted on the application. In the remarks column of the general "Schedule of Serial Numbers," required under paragraph 40, opposite report of the serial number of the application, you must note "No money." However, if the money is tendered before the returns for the month in which the application is filed are transmitted, the notation "No money" need not be made on the general schedule, but the number of the receipt which issued for the money will be noted in the receipt number column of said schedule. Where any form of remittance other than those specified in paragraph 72 hereof is tendered or where an insufficient amount is tendered in any form, you will merely suspend the application, etc., and allow the party 30 days in which to tender the required amount. You will not issue receipts for remittances tendered in any form other than those mentioned in paragraph 72 hereof.

9. *S. D. S. and application take same number.*—Where a soldier's declaratory statement has been filed, a homestead application by the same applicant, or his widow or heirs, for the same land or any part thereof, must take the same serial number as given to the declaratory statement, without regard to whether it is subsequently allowed or rejected.

ADVERSE MINERAL CLAIMS.

10. *Numbering and noting on general schedule.*—An adverse mineral claim must be given current number when filed, and not the same serial number as assigned to the mineral application involved. On the general Schedule of Serial Numbers, opposite report of the separate number assigned to an adverse claim, always note in the re-

marks column "Adv. to (giving serial number of the mineral application involved)." Such notation must also appear, under the separate number involved, on each paper pertaining to an adverse claim. If the mineral application involved is filed during the same month as the adverse claim, note "See Adv. (giving serial number)" in the remarks column, opposite report of the serial number of the mineral application.

MINERAL APPLICATIONS.

11. *General Land Office to be notified.—Immediately* upon filing and acting upon a mineral application, you will notify the General Land Office on Form 4–024b, and *immediately* upon the filing of an adverse claim against a mineral application, you will notify the General Land Office on Form 4–024a.

12. *To be forwarded with monthly returns.*—Mineral applications against which no adverse claims are filed within the statutory period of publication will be forwarded to the General Land Office with your monthly returns for the month in which such publication ended.

13. *Must be held certain period.*—Mineral applications against which adverse claims are filed within the statutory period will be held until the expiration of the period of publication, and for 30 days after the last adverse claim is filed, and then forwarded to the General Land Office, together with the adverse papers, with your first monthly returns thereafter.

ASSIGNMENTS.

14. *How to number and note on general schedule.*—If all the land embraced in a desert-land or a reclamation homestead entry is assigned, the serial number of the entry will not be changed. If a part of the land is assigned, the first paper filed in connection with the partial assignment will be given current number. After a partial assignment, if the remainder of the original entry is assigned, the first paper filed in connection with the assignment of the remainder of the original entry will take the same number as given to the original entry, and not a separate number, because such assignment would be a total assignment of all the land that remained in the original entry. When reporting on the general schedule of serial numbers the separate number given to a partial assignment of a desert-land or reclamation homestead entry, always note in the remarks column "Par. assmnt. (giving serial number of the original entry)." Such notation must also appear, under the separate serial number involved, on all application and entry papers pertaining to a partial assignment.

ISOLATED TRACTS.

15. *How to number applications and sales, etc.*—An application for sale of isolated tract is, of course, to be given current serial number when filed. Should the land involved, or part thereof, be purchased by the original applicant, the final papers which issue in connection therewith should take the same number as the original application. Should the land, or part thereof, be purchased by a bidder other than the applicant, the final papers which issue to him should be given current serial number, and not the same number as the original application, but there should be noted on each certificate which issues under the original application to any other person than the original applicant, in the upper right-hand corner, under the separate serial number assigned to such final papers, "Sold under (giving serial number of the original application)." This reference must also be shown in the remarks column of the general Schedule of Serial Numbers, opposite report of the separate number assigned to such final papers, in the remarks column of the classified "Schedule of Final Certificates Issued," required under paragraph 44, and upon the receipt which issues to such purchaser.

16. *Numbering additional and second entries.*—Applications to make additional and second homestead entries must be given current numbers, and not the same serial numbers given to the applications for the original entries.

SOLDIERS' ADDITIONAL HOMESTEAD APPLICATIONS.

17. *Numbering and action to be taken.*—Where an application to locate soldiers' additional rights under sections 2306 and 2307, Revised Statutes, is held for rejection by the General Land Office, and the applicant accepts the holding and files a substitute soldier's additional right, such substitute right should be accompanied by a formal application (Form 4–008a) duly executed. As the substitution amounts to a waiver of all rights under the rejected application, the substituted right should be given a new serial number. Publication and posting must be made as required by the circular of February 21, 1908 (36 L. D., 278), and a copy of the notice of publication must be forwarded to the Chief of Field Division for his indorsement in accordance with the circular of April 24, 1907 (35 L. D., 681), except in Alaska, where publication and posting must be made in accordance with section 10, act of May 14, 1898 (30 Stat., 409), and instructions of January 13, 1904 (32 L. D., 424–38–42), and Circular No. 197 (41 L. D., 356). The above covers cases in which the entire right has been held to be invalid, and has no bearing whatever on the so-called "combination" cases. Where a part of a combination

of rights is held to be invalid and new rights substituted therefor, a formal application (Form 4–008a) should not be filed, and a new serial number should not be assigned. Applications to locate soldiers' additional rights, whether certified or uncertified, must in no instance be considered by registers and receivers for allowance, but must be transmitted with the returns for the month in which filed. Publication and posting should be started within 20 days from the date of filing, and when completed should be transmitted by separate letter and not with the monthly returns. The register must date and sign his certificate to such applications. In every case the applicant must be designated as assignee of the soldier, or soldiers, and care observed to give the soldier's full name. Fees and commissions in connection with soldiers' additional applications are not required to be tendered at the time of filing. If tendered the receiver must, of course, issue receipts therefor.

No such application should be received by the district officers unless accompanied by evidence of the right, or by a reference to the case by land office serial number and description of the land, containing such evidence.

CAREY ACT.

18. *How to number and act upon applications filed.*—Each application under the Carey Act must be given a separate serial number, notwithstanding that the same tracts may successively be included in the three kinds of such applications, viz: 1. An application for temporary withdrawal. 2. A segregation list. 3. A list for patent. All three classes must be transmitted by separate letters during the month, and not with the monthly returns. A list for patent shall be transmitted as soon as noted on the local records without holding for publication and without reference to the Chief of Field Division. When reporting applications under the Carey Act on the general Schedule of Serial Numbers, always distinguish between applications for temporary withdrawal, segregation lists, and lists for patent, and note the dates of transmittal in the remarks column. All subsequent papers filed in any Carey Act case will be transmitted special without holding for the monthly returns.

19. *Applications under act of August 11, 1916.*—An application filed by an irrigation district under the act of August 11, 1916 (39 Stat., 506), will be given a separate serial number and will be transmitted by separate letter during the month, and not with the monthly returns and in the general Schedule of Serial Numbers the date of transmittal will be noted in the remarks column. All subsequent papers filed will be transmitted special without holding for the monthly returns.

RIGHTS OF WAY.

20. *How to number.*—Each railway map or plat for right of way, whether for a portion of the line of road or for station grounds, must be assigned a separate serial number. An amended map must also be given a separate number and not the same number assigned to the original right-of-way application to which it is an amendment.

21. *Must be forwarded special.*—Upon the filing of an application for right of way on or over the public lands the local officers will not hold such application for transmittal with the monthly returns, but at once make proper notations upon their records and transmit it to the General Land Office by special letter.

RESERVOIR SITES AND CANAL LOCATIONS.

22. *How to number.*—Each application for reservoir site or canal location must be given a separate serial number. An application for an amended reservoir site or an amended canal location should be given the same number as the original application, for the reason that such application is generally based on the same water-right and other data, which accompanies the original application and is filed therewith. In this connection it should be noted that a right-of-way application for the irrigation system for a project under the Carey Act or of an irrigation district, must be given a separate serial number and not the same number given to the application under the Carey Act or the act of August 11, 1916.

AMENDED ENTRIES AND SELECTIONS.

23. *Retain original numbers.*—Applications to amend entries and selections will take the same serial numbers as given the original entries or selections.

RAILROAD AND STATE SELECTIONS.

24. *Do not hold when publication is required.*—All railroad and State selection lists in which publication is required should not be retained in the local office pending publication, but should be forwarded with the returns at the end of the month when filed and accepted; the publication, when received, to be transmitted by special letter.

25. *When to number pending applications, etc., made prior to July 1, 1908.*—Any declaratory statements, applications, selections, entries, etc., made before July 1, 1908, and which may be still pending, if not given serial numbers, will retain the numbers given them under the system of numbering in use prior to July 1, 1908, UNTIL the first letter, paper, or action of any kind or character is received or taken by

YOU in connection therewith, when you will IMMEDIATELY give the case, as it were, a current serial number. When reporting the serial number on the general Schedule of Serial Numbers assigned to an application, entry, etc., which bore a number under the system of numbering in use prior to July 1, 1908, always refer to such old number in the remarks column.

REPAYMENT APPLICATIONS.

26. *Filed in connection with entries, etc., made prior to July 1, 1908.*—If an application for repayment should be filed in connection with an application, entry, etc., made before July 1, 1908, which has not been given a serial number, or you receive any letter from this office or elsewhere, or take action of any kind or character in connection with such application for repayment, you should assign current serial number to the application or entry involved. When reporting the serial number on the general Schedule of Serial Numbers, always refer in the remarks column to the number, if any, involved under the system of numbering in use prior to July 1, 1908.

REINSTATED AND AMENDED ENTRIES.

27. *Canceled and patented under system used prior to July 1, 1908.*—Should an application to reinstate a canceled entry or to amend a patented entry be filed, and the entry involved has not been given a new serial number, but was canceled or patented under the series of numbering in use prior to July 1, 1908, current number should be assigned thereto. Observe care to refer in the remarks column of the general schedule to the old number involved.

NEW SERIAL NUMBERS.

28. *Notations to be made on records.*—When giving an application, entry, proof, etc., which was made prior to July 1, 1908, a new serial number, make notation, on the proper record book which was kept prior to July 1, 1908, of the new serial number given it. It is advisable to make similar notation of the new serial number on the tract books at the same time it is made on the old numerical record, such as the homestead, desert land, and cash registers. It is not necessary to copy the entire old record in the Serial Number Register, but the kind, name and address, description of the land, and all future notations (except a contest record) in regard thereto must be entered in the Serial Number Register. Such notations as are required to be made in the tract books will continue to be made there, as well as in the serial number register. All that is necessary to note on the old record books is the new serial number, as "0567," the "0" signifying that it is the new number. The date it is given that number is determined from the Serial Number Register, which bears the date of the first notation made under the new number.

OLD AND NEW NUMBERS.

29. *To be shown in all notices in connection with entries, etc., made prior to July 1, 1908.*—In all notices to be served, posted, or published in connection with applications, entries, etc., made prior to July 1, 1908, you MUST include both the old and the new numbers, as follows: "Homestead entry, No. 4137 (serial No. 056)." All notices served, posted, or published, and all notations made in connection with any declaration, application, entry, proof, etc., filed or initiated on July 1, 1908, or thereafter, will of course refer to only the new serial number which was given the initial paper, as that will be the only number given it for identification. In all notices to be served, posted, or published, the KIND of application, entry, etc., must also appear. In all correspondence with the General Land Office, AFTER the serial numbers have been reported each month, it will be sufficient to identify the case by giving the serial number only. This MUST always be given.

SERIAL NUMBERS NOT TO BE ASSIGNED.

30. *To transcripts of records, or plats.*—Requests for transcripts of records, or plats, will not be given serial numbers, because they are not applications or papers applying for the use, segregation, purchase, or disposition of a part of the public domain.

31. *To notices of restoration and applications for survey.*—Notices of restoration of lands to entry and applications for survey of lands must not be assigned serial numbers. Applications to enter such lands, when filed, will of course be given separate serial numbers.

CONTESTS.

32. *Not to be given serial numbers.*—Contests must not be given serial numbers. A series of numbers for contests arising in district land offices will be maintained, entirely distinct from the series used for applications, entries, etc., and said contest numbers will not be preceded by "0." The records of contests will be kept in the "Contest Docket" (Form 4–051a). Reference must be made in the contest docket to the serial numbers of the applications or entries involved. Notation should also be made in the Serial Number Register of the initiation and close of a contest, as follows:

July 1, 1912, contest affidavit filed. (See Contest Docket, p. 261.) December 4, 1912, contest closed.

33. *Which papers to be forwarded with returns.*—The only papers pertaining to contests which should be transmitted with the monthly returns are those relating to cases which have abated or been withdrawn prior to hearing. Attached to such papers should be a short report which readily reveals the status of the case to which

the papers relate. The records of cases in which decisions have been rendered should be transmitted by separate letters, using Form 4–330. If, after the record is transmitted a relinquishment of the entry is filed, such relinquishment should be immediately transmitted by separate letter, entitled as of the case, and report made as to the disposition, if any, of the land. If a waiver of contestant's preference right is filed with the relinquishment, such waiver should be forwarded therewith. The serial number of the relinquishment must be reported on the classified "Schedule of relinquishments," required under paragraph 44, for the month transmitted, with date of transmittal in the remarks column. Rejected contest affidavits, if appealed, should be transmitted by special letters and the serial numbers thereof reported on the classified "Schedule of rejected and closed cases," required under paragraph 44, for the month when transmitted, with dates of transmittal in the remarks column.

SERIAL NUMBER REGISTER.

34. *Complete record required.*—A record, in consecutive, numerical order of all declarations, applications, entries, purchases of land, selections, locations, etc., will be kept in the Serial Number Register (Form 4–051), and all notations in regard thereto, except a contest record thereof, will be made in the Serial Number Register under the proper number. Such notations as are required to be made in the tract books will continue to be made there, as well as in the Serial Number Register. When application or entry papers are transmitted to the General Land Office, such fact must be noted in the Serial Number Register, each notation showing the date of transmittal and whether with the monthly returns or by special letter.

35. *Notations to be made therein.*—Notations of all letters received from, or written to the General Land Office or elsewhere, all papers filed or issued, and all actions taken (except in a contest record), which relate in any manner to an application, entry, selection, proof, etc., will be made in the Serial Number Register under the number given to the application, proof, etc., to which it relates. This notation should always include the date, and be as brief as possible—merely sufficient to identify the letter, paper, or action.

ALPHABETICAL INDEX.

36. The alphabetical index will be a card index. A separate card must be made for each person and must contain the name and address and the number and kind of the application, entry, etc., as follows:

Crawford, Samuel H.,
148 Pine Street,
The Dalles, Oregon.
05 Hd.

37. *Same card for all entries, etc., by same person.*—The same card should be used to note the number and kind of all applications, entries, etc., made by the same person, as follows:

Crawford, Samuel H.,
148 Pine Street,
The Dalles, Oregon.
05 Hd.
0467 T. and S.

38. *When to be made where papers were filed prior to July 1, 1908.*—Cards will be made for all applicants, entrymen, purchasers, selectors, etc., whose papers were filed prior to July 1, 1908, WHEN their cases are given new serial numbers. The alphabetical index must be kept from day to day and the cards properly filed each day.

RECORD RIBBONS.

39. Record ribbons should always be used when preparing schedules and abstracts herein required.

GENERAL SCHEDULE.

40. *How to prepare.*—Registers will submit, in duplicate, with monthly returns (on Form 4–115) a General Schedule of Serial Numbers, listing in numerical order all numbers assigned during the month shown at the top of such schedule, without regard to whether the application and entry papers involved are forwarded to the General Land Office. When applications, etc., are necessarily held, proper notation should be made in the remarks column, as "Suspended, held;" "Rejected, held;" etc. If transmitted with the returns for the month for which the schedule is rendered notation of such transmittal must not be made. The date of filing in each instance must be shown in the first column.

41. *How to report additional homesteads.*—When reporting the serial number of an application for additional homestead entry on the General Schedule of Serial Numbers, always refer in the remarks column to the serial number of the original entry involved, as "See orig. (giving number)."

SCHEDULE OF ALLOWANCES.

42. *How to prepare.*—Registers will also submit, with the returns each month, a "Schedule of Allowances" (Form 4–115d), reporting in numerical order and without regard to class all applications, declarations, selections, locations, original and final entries, etc., which are allowed, and private and public sales held, upon which final certificates have issued during the month shown at the top of the schedule. In the first column note the day of allowance of each

application, declaration, original entry, etc., or issuance of final certificate in connection with each entry or sale. The second column is for the report of serial numbers. The Receipt Number column must show the numbers of all receipts issued in connection with the allowance of each application, etc. Where yearly installments are required and separate receipts issue for such payments, do not report the numbers of the receipts or the amounts involved. In the column "Kind of application, etc.," always show class of each application, etc., and the date or dates of acts of Congress under which authorized. *Do not use ditto marks in this column.* Use more than one line if necessary. Use the "Remarks" column only for letter references, explanatory remarks, cross references for originals and additionals, etc. Do not use this column for notation of acts. Distinguish between original, additional, stock-raising, commuted, and final homestead entries; original, second, and final desert-land entries, etc., and between indemnity school land selections and selections in satisfaction of grants in quantity for specific purposes (normal schools, etc.). Area and amount involved must in each instance be shown in the respective columns provided therefor, except entries perfected by residence under the desert-land relief act of March 4, 1915, and timber and stone applications reported same month with the final entry. Circular 471 directs the proper manner of reporting entries completed in the manner required of a homestead entryman. Timber and stone applications will be reported month the final proof is submitted and under date fee is applied. In all such cases where final certificates issue same month the $10 fee is earned, do not report area in connection with the applications. Soldiers' additional homestead applications should not be reported on this schedule. Upon issuance of final certificate in connection with applications of this character report thereof, designated as "Sol. addl. (final)," should appear on the schedule, showing area, and in one item the total of the fee, original and final commissions. Do not report final or commuted proofs or sales hereon unless final certificates issue in connection therewith, or applications, etc., unless allowed during the month. In other words, this schedule must include all applications, adverse mineral claims, declarations, entries, etc., allowed during the month, whether the papers pertaining thereto are held in the district land office, transmitted with the returns for the month, or have been forwarded by special letters. All application and entry papers must be transmitted with the monthly returns, unless specific authorization is given to forward special. When transmitted by special letters (such as Carey Act segregation lists), report thereof should, of course, be made, with the necessary data as to dates of allowance, etc., and dates of special transmittal. Upon the amendment of an entry by this office, where addi-

tional fee and commissions, or commissions, are required, the amended entry must be reported on this schedule under date such money is applied, designated by kind and act or acts of Congress involved. If additional area is also involved the same must be shown. The totals of amended entries, segregated by kind and act or acts must be shown in separate items of the "Summary." Additional payments required by this office must also be shown on this schedule, designated as "Addl. payt." showing kind of entry, act or acts involved and additional area, if any, etc., as above directed for amended entries. In each instance when reporting amended entries and additional payments, show only the area affected by amendment or involved in the additional payment. At the bottom of this schedule there must appear a summary showing the total of each class of applications, entries, etc., allowed during the month, together with the area and amount involved. The body of this schedule must be totaled as to number of applications, entries, etc., area and amount. The items in the "Summary" must also be totaled as to number, area, and amount, which totals must of course agree with the grand totals of the items reported in the body of the schedule.

All moneys earned in connection with the allowance of an application, entry, etc., except excess purchase money and cancellation fees in the case of originals, and interest payments and testimony fees in connection with finals, must be shown on this schedule. Purchase money must always be listed separately from fees and commissions.

43. Clerks who prepare schedules of serial numbers and schedules of allowances must place their initials in the upper left-hand corner thereof.

CLASSIFIED SCHEDULES.

44. Separate classified schedules of serial numbers are required, in duplicate, covering in numerical order the following classes of papers:

(*a*) Rejected applications, proofs, etc. (on Form 4–115), which are appealed or unappealed; withdrawn or otherwise closed applications, etc.; notices of intention to make proof where proof is not made within the time prescribed; withdrawn and closed contest cases, etc. When a withdrawn application, etc., and withdrawal thereof are transmitted during the same month, such papers should be assembled together, and notation made in the remarks column "Withdrawn." If a withdrawal alone is transmitted, the application, etc., involved having been previously forwarded, observe care to note "withdrawal" in the remarks column when reporting such withdrawal on the schedule. That is, the column Kind of Application or Entry must show the kind, and the Remarks Column must specifically show the status of the paper transmitted.

(*b*) Desert-land yearly proofs (on Form 4–115). Distinguish between first, second, and third year.

(*c*) Applications for sale of isolated tracts, showing names of applicants (on Form 4–115). If an application is not returned by the Chief of Field Division in time to be forwarded with the returns for the month during which filed, note "To C. F. D. (giving date)" in the Remarks Column of the general Schedule of Serial Numbers and forward a report on Form 4–030 with your returns for that month, observing care to show all the information called for by the form.

(*d*) Relinquishments (on Form 4–115) including, in numerical order, all classes of applications, entries, etc., on the same schedule showing names of entrymen in the remarks column. Partial relinquishments must be so designated. Should a withdrawal in the form of a relinquishment be filed in connection with an application, etc., which has not been allowed, notation must be made upon the paper that the same is intended as a withdrawal. Withdrawals must not be included hereon, but reported on the classified schedule of Rejected and Closed Cases (*a*).

(*e*) Indian allotment applications, fourth section, act February 8, 1887 (24 Stat., 388), as amended (on Form 4–115).

(*f*) Right-of-way applications (on Form 4–115), showing names of corporations or individual applicants and dates of special transmittal.

(*g*) Applications to amend entries (on Form 4–115).

(*h*) Proofs protested by Forest Service and Chief of Field Division (on Form 4–115). In the remarks column distinguish between protests by forest and field service.

(*i*) Final certificates issued (on Form 4–115) including, in numerical order, all classes of entries, on the same schedule.

45. *Proper dates to be shown in first columns.*—The date shown in the first column of the above classified schedules of serial numbers, required under paragraph 44, except (*i*) must, in each instance, be the date the paper reported thereon was filed in the district land office. The date in the first column of (*i*) to be the date of issuance of the certificate. Observe care to show in the first column of (*a*) date of the last action taken or paper filed; also instructions contained in paragraph 47 when preparing this schedule.

46. *Papers to be reported.*—Items must not be reported on the above classified schedules of serial numbers, required under paragraph 44, unless the papers pertaining thereto are transmitted with the monthly returns, or have been forwarded special during the month. When transmitted special the date of transmittal must always be noted in the remarks column.

47. *Rejected applications, etc., should in certain instances be reported on more than one schedule.*—Whenever a rejected application,

etc., is transmitted for which a separate classified schedule of serial numbers is required always report such application on the separate schedule provided therefor, with notation "Rejected," as well as on the classified schedule of rejected and closed cases; that is, a rejected application for sale of isolated tract, when transmitted, must be reported on the classified schedule of applications for sale of isolated tracts, and on the classified schedule of rejected and closed cases, etc.

48. *Serials to be reported in numerical order, except on schedule furnished foresters.*—Serial numbers must be reported on all schedules in numerical order, except the classified schedule reporting change of status of entries within National Forests, required under paragraph 52. On the classified schedules of serial numbers, when reporting papers transmitted in connection with an original homestead entry and an additional thereto, after report of the original entry note "See add'l (giving number)," and report the serial number of the additional entry, *in its numerical order*, with notation "See orig. (giving number)."

49. *How to arrange schedules.*—The original schedules of serial numbers must be arranged in the order listed in paragraphs 40, 42, and 44; the duplicates must be arranged in similar order separately from the originals. The blank spaces at the top of each sheet of the schedules must have the name of the land office and the month and year inserted. Each sheet of the classified schedules (required under paragraph 44) must be properly designated at the top, as "Rejected and closed cases," "Desert Land Yearly Proofs," "Applications for sale of isolated tracts," etc.

50. *Numbers must not be abbreviated; sheets to be numbered.*—Do not abbreviate serial and receipt numbers on abstracts and schedules of serial numbers. If a schedule or abstract consists of more than one sheet the sheets must be numbered at the bottom.

51. *Schedules to be sent to C.F.D.*—At the same time the returns are forwarded to this office, each month, you will transmit to the Chief of Field Division copies of the classified schedules of rejected and closed cases and relinquishments.

DISTRICT FORESTERS.

52. *Schedule to be furnished.*—A classified Schedule of Serial Numbers (on Form 4–115), reporting in chronological order all applications, final certificates, relinquishments, and cancellations of entries within the limits of National Forests must be forwarded direct each month to the district foresters. Such schedule should not be furnished the General Land Office, or the Forester, Forest Service, Washington, D. C. On request the district foresters should be fur-

nished the status of unperfected entries, as may be called for by them on forms to accompany their requests. When any excessive amount of data is required by the Forest Service that bureau will detail a clerk to obtain the information, and relieve the local land office of any burdensome requirement. Prompt attention should be given to all requests from the district foresters.

CERTAIN PAPERS TO BE TRANSMITTED SPECIAL.

53. The following, for which separate classified Schedules of Serial Numbers are not required, must be transmitted special during the month, and not with the returns:

(*a*) Entrymen's elections under circular March 25, 1909 (37 L. D., 528).

(*b*) Suspended cases of special nature, concerning the action on which the local officers are in doubt, which may be submitted to the General Land Office for consideration. There must be attached to each case so transmitted a note of explanation briefly setting forth the facts. The date of transmittal must be noted opposite report of the serial number involved in each instance on the classified Schedule of Serial Numbers, if a classified schedule is provided; or, if the application, etc., involved was assigned its serial number during the month when the paper is transmitted, the date of transmittal must be noted in the remarks column of the general Schedule of Serial Numbers.

(*c*) Applications to contest and protests against State, railroad, forest reserve, and individual claimant's selections.

(*d*) Copy of each application to contest allowed by the local officers with the words "For G. L. O. files" plainly written in the margin.

54. *Letters, reports, etc., must not accompany accounts and returns.*—Letters relating to accounts and returns must always be sent separately from the accounts and returns, in order that they may receive prompt attention and not become lost or overlooked among the entry or other papers. Additional evidence, reports, etc., called for by the General Land Office must be transmitted by special letters when received in the district land office, and proper notation made on your records. Care must be observed to give the serial number of the application or entry involved in all such special transmittal of evidence and reports. With every such special transmittal, either a formal letter report, provided in particular cases, or, in special instances, a short letter report should accompany the same.

TIMBER AND STONE APPLICATIONS.

55. *Method of transmitting and reporting.*—One copy of each timber and stone application must be transmitted with the returns for the month during which the same is accepted, with the status plainly

shown thereon. The other copy should be forwarded to the Chief of Field Division for appraisal, after complete notation on the Serial Number Register, which will suffice for the record thereof until return of the appraisement made by the Chief of Field Division, with which appraisement the duplicate copy should be retransmitted to the district land office and acted on in accordance with the regulations of November 30, 1908, as revised January 2, 1914. Where applicants to purchase under the timber and stone law fail to make proof and payment within the time provided therefor under the law and regulations, there should be forwarded to the General Land Office, with the returns for the month within which the time for making payment or filing of proof expires, all papers relating to the application, with a short letter report attached thereto of the fact that no proof or payment has been made thereon, observing paragraph 63. Notation should be made on the Serial Number Register and on the Tract Book " (date) payment not made, closed," or " (date) no proof filed, closed." On the Serial Number Register should appear the additional notation " all papers forwarded to G. L. O. (date of transmittal and month's returns)." A line should be drawn through the notation on the plats. The serial number of the closed timber and stone application must be reported on the classified Schedule of Rejected and Closed Cases, for the month transmitted, with notation in the remarks column " Payment not made, closed," or " No proof filed, closed." Upon suspension or rejection of a timber and stone application, both copies thereof should be retained in the district land office during the period allowed for perfection of same or for appeal. If appeal is filed or the application is finally rejected, both copies should be transmitted with the returns for the month during which appealed or finally rejected.

NOTICE OF ALLOWANCE.

56. *Must be given promptly.*—Every applicant and entryman shall be given prompt and due notice of the allowance of an application, entry, proof, etc., as required by circular of August 7, 1908 (37 L. D., 60). In the case of original applications, there is a form letter provided (Form 4-279) which must be immediately delivered or mailed to the applicant upon the allowance of the application in order that there may be no justifiable excuse for failure to comply with the law as to the establishing of residence, etc. The receipt issued is not in any case to be treated as a notice of allowance of the application, entry, proof, etc. In the case of a final entry, the notice of allowance is a duplicate of the register's certificate, which duplicate copy must be plainly marked across its face " Duplicate."

FINAL CERTIFICATES.

57. *Must show all receipt numbers.*—Final certificates in connection with all entries must show the numbers of all receipts issued in connection with the entries beginning with the receipt in connection with the original application to enter, in the upper right-hand corner, in numerical order. These numbers can readily be obtained from the Serial Number Register, which, of course, should show the numbers of all receipts issued in connection with an entry.

58. *One certificate covering two or more applications or proofs.*—In the case of an original and additional homestead entry by the same person on which one final proof covers both entries, separate final certificates must not be issued. One final certificate should be issued, showing thereon both serial numbers, with the abbreviations "Orig." and "Addl." after the respective numbers. Likewise, in cases where an applicant for an isolated tract sale purchases noncontiguous tracts, the sale of which was made under one application, one certificate should issue covering all the tracts purchased by the same person, showing thereon the same serial number as the application, if the applicant is the purchaser. If purchased by one other than the applicant, current number should be given the certificate, as directed by paragraph 15.

REJECTED APPLICATIONS, ETC.

59. *Final disposition must be noted.*—Rejected applications, proofs, etc., must be held for appeal, and transmitted to the General Land Office with the returns for the month during which the appeal is filed, or for the month in which the time allowed for appeal expires. There must be attached to each rejected application, proof, etc., a "rejection slip" (Form 4–659), or copy of notice of rejection, *and the final disposition must be plainly noted on such rejection slip, or copy of notice of rejection, before the papers are transmitted with the monthly returns.*

RELINQUISHMENTS.

60. *Notations by register.*—The register will note on each relinquishment, over his signature, the day and hour of its receipt, and will write the words "Canceled by relinquishment" (giving date) opposite the record of the entry in the serial number register and tract book and draw a line through the notation on the township plat. Whenever a relinquishment is filed on any other form except the relinquishment blank (Form 4–621) the register will immediately attach such instrument to the regular blank form either by staples or

paste, preferably the latter, in order to enable persons handling same to readily recognize nature of the paper.

ENTRY PAPERS AND ABSTRACTS.

61. *Must not be folded.*—All application and entry papers and all abstracts and accounts, with the monthly returns, must be transmitted FLAT, not folded.

ENTRY PAPERS.

62. *Must not be transmitted with accounts.*—Application or entry papers, with the monthly returns, must be transmitted FLAT, in a separate package or packages from the receiver's accounts. Where the returns consist of more than one package, registers will note on each package the number of packages transmitted, and the number of each particular package, as "5 packages, No. 2." Such information will enable this office to determine without examining the returns when same have been received complete. The name of the local office should, of course, be shown on all envelopes and packages forwarded. The general Schedule of Serial Numbers and the classified schedules of serial numbers must accompany the application or entry papers. Observe care to arrange such schedules as directed in paragraph 49.

63. *Must be fastened together at the top.*—All papers belonging to the same application, entry, proof, etc., EXCEPT THE CARBON COPIES OF RECEIPTS, sent with your monthly returns, must be fastened together with the stapling machine provided therefor. (Adjust guide on machine so that the papers will be fastened not more than one-fourth inch from the top.) All papers must be fastened at the top, in the center. Do not use more than one staple.

ARRANGEMENT OF PAPERS.

64. *Must be arranged numerically.*—Arrange all applications and entry papers submitted with your monthly returns numerically, without regard to the kind or class of application or entry. There is no objection to arranging leaves of absence under the acts of June 6, 1912, and December 20, 1917 (farm labor), in separate packages with your returns.

65. Arrange the papers in each case according to their dates, with the latest dated, or issued, paper on the top. Arrange papers with the top and left edges even.

NOTATIONS ON PAPERS.

66. *Exact time of receipt must be shown.*—Application and entry papers should not be briefed. The date and hour of receipt of ALL

papers must be noted in the upper RIGHT-hand corner. Observe instructions contained in circular 512.

67. *Serial, receipt, and old numbers.*—The serial and receipt numbers must always appear on the upper RIGHT-hand corner of EACH application or entry paper. If a number under the series of numbering in use prior to July 1, 1908, is involved, such old number and KIND of application or entry must be noted under the serial number, as "HE 3926," "DLE 4630," etc.

68. *Acts of Congress and area.*—The date, or dates, of any acts under which an application, entry, etc., is made must be noted on such papers, together with the area embraced thereby. Type and type holders have been furnished the local offices for this purpose.

69. Additional entries should always bear the notation of the serial number of the original entry in the space provided therefor on the application blank.

70. *Moneys earned to be shown on papers.*—Receivers have been furnished hand stamps for stamping on papers the amount of money "earned" in connection therewith. This notation should be made in the upper LEFT-hand corner of the paper. It is of utmost importance that the stamp should be used in all cases and that the amounts be accurately noted, as the triplicate abstracts have been dispensed with and the receipts are forwarded to the Auditor for the Interior Department with the accounts of receivers.

71. *Dates moneys are applied to be shown on papers.*—Excepting only the initial and any intermediate payments which may be shown on final certificates, you will indicate on all applications, selections, etc., and final certificates immediately beneath or following the receipt number, or numbers, shown thereon, date the amounts represented by them were *applied.* This notation may be made either by pencil or band dater. Original fees, commissions, first payments, etc., and final commissions, coal-land purchase money, etc., must, of course, be applied upon allowance of applications and issuance of final certificates, respectively.

RECEIVERS' ACCOUNTS.

72. *Forms of remittances.*—Receivers of public moneys may accept cash, currency, and certified checks when drawn in favor of the receiver on national and State banks and trust companies located in the same city as the depository with which the deposits are to be made, and such "out of town" certified checks as can be cashed by them without cost to the Government. United States postal money orders may be received and accounted for as cash when they are made payable to the order of the receiver by the post office where they are issued and drawn on the post office where the receiver is located. Receivers must not accept, or issue receipts for, remittances tendered in any other form. (Treasury Cir. No. 11, Mar. 27, 1913.)

RECEIPTS.

73. *Form of.*—Receivers of public moneys will use form of receipt blank, Form 4–131, for all moneys collected by them, and for all certificates of deposit on account of surveys, military bounty land warrants, certificates of location, etc., which, under any act of Congress, may be received as cash in payment for lands. When the warrants or certificates of location are not tendered as cash, receivers will issue receipt only for the fees paid in connection with the "locating" thereof.

74. *When to issue.*—Receivers must issue receipts for the full amount of money tendered *at the time* the money is tendered and must not have any money in their custody or control *beyond the day of its receipt* for which receipts have not issued.

75. *Significance of.*—The issuance of a receipt by a receiver of public moneys does not mean that the application, entry, proof, etc., in connection with which it is issued, is allowed or approved, or will be allowed or approved. It merely means that the receiver has received the money and that it is in his custody or control until it is applied or returned.

76. *How to issue.*—Receipts must be issued in consecutive numerical order. Each receiver must use the lowest numbered receipt furnished him first. Receipts must always show the serial number of any application, entry, etc., in connection with which they are issued, and the area, price, etc.

77. *Alterations not to be made.*—Any receipt that needs correction before delivery, or is mutilated or spoiled in any manner, should be marked plainly across its face "Canceled," and be placed in proper numerical order with the copies of receipts transmitted with the receiver's accounts and another receipt issued. After delivery, where receipts are returned to receivers or recalled by them for correction, the receiver will indorse the correction across the face of the receipt and certify to same.

78. *Allowances not to be indicated.*—The word "Entry" must never appear upon receipts; the words "Application," "Proof," etc., should be used. Receipts must not indicate the action taken on the paper in connection with which issued, due notice of which will be given. (See 37 L. D., 60.)

79. *Carbon copies.*—The carbon copy of the receipt must show the signature of the receiver, preferably in carbon, as evidence that both original and copy were signed simultaneously. The original will be delivered to the payor. Carbon copies of receipts must be transmitted monthly in consecutive numerical order, with the lowest numbered receipt on top, with the receiver's accounts.

80. *Receipt for coal lands.*—A memorandum copy of each receipt issued in connection with coal-land declaratory statements, applica-

tions, and entries must be forwarded direct to the Director of the Geological Survey, which memorandum shall be prepared by means of carbon paper on a blank sheet at the time the original receipt is prepared. The description of the land involved should be shown on the copy furnished the Geological Survey, which must contain all data and insertions of the original receipt, including the receipt number.

DISPOSITION OF MONEYS.

81. *Deposit to official credit.*—Receivers must deposit all moneys received to their official credit as "Trust funds—Unearned moneys" and forward copies of certificates of deposit, Form 6599, to the General Land Office.

82. *Surplus amounts.*—Surplus amounts in excess of legal requirements should, in the event that final action can not be taken immediately upon the paper in connection with which tendered, be returned with a notice of the action taken; otherwise surplus amounts should be retained by the receiver as "trust funds" (which will hereafter be alluded to as "Unearned moneys") until final action on the paper is had.

83. *Expenses of depositing public moneys.*—Registers and receivers making shipments by express of moneys to their depositories should see that the express receipts or waybills indicate the amount of each kind of money contained in each package shipped. If this information is not stated on the express receipt or waybill, forming a subvoucher to the express voucher, the amount must be shown on the voucher of the express company where receivers make payment for such shipments.

84. *When to deposit.*—Treasury regulations require receivers of public moneys living in the same city or town with the Treasurer or Assistant Treasurer of the United States, a Federal reserve bank, or a national bank depositary, to deposit their receipts at the close of each day to the credit of the Treasurer of the United States. Officers at such a distance from a depositary that daily deposits are impracticable must forward their receipts as often as they amount to $500, and at the end of each month without regard to the amount then accumulated. (Treasury Circular No. 105a, 1917.)

UNEARNED MONEYS.

85. The following class of money may be held by receivers of public moneys with unapproved applications, proofs, etc., as "unearned moneys" and returned:

(*a*) The five and ten dollar payment and commissions, together with any excess purchase money tendered in connection with homestead applications.

(*b*) Final commissions tendered in connection with homestead proofs.

(*c*) Commuted homestead purchase money.

(*d*) Surplus amounts tendered in excess of legal requirements.

(*e*) Contest testimony fees.

(*f*) Testimony fees in connection with desert land final proofs, when the testimony is not reduced to writing in the local land office.

(*g*) Moneys received for transcripts of records and plats when the condition of the local land office will not permit of the work being done therein and the applicant desires the work done by others.

(*h*) Railroad and State selection fees.

(*i*) Moneys tendered under any special act of Congress, or decision or regulation of the department, which specifically provides for the return of such moneys by the receiver in the event of rejection or disallowance of the paper in connection with which tendered.

(*j*) Money tendered with applications where the land applied for is not subject to entry.

(*k*) Moneys tendered with applications which show on their face that the applicant is not entitled to make entry.

(*l*) Timber and stone purchase moneys tendered in advance of submission of proof.

(*m*) Purchase moneys tendered with desert land applications.

(*n*) Moneys tendered with any application to make entry or proof where a withdrawal as a transmission line is made under the act of June 25, 1910 (36 Stat., 847), and the land withdrawn is to be excluded from the patent pending computation in the General Land Office of the area for which deduction of fee, commissions, or purchase price (if any) is to be made.

(*o*) Fees tendered with timber and stone applications, to be returned to the applicant where, for any reason other than fraud, the sworn statement is rejected prior to the submission of proof. Upon the submission of proof the fee together with the purchase money tendered will be applied.

(*p*) Coal-land purchase money tendered prior to completion of proof as permitted in paragraph 18, Circular 557. Such payments must, of course, be applied upon issuance of final certificate.

(*q*) Moneys tendered with applications for amendment, pending receipt of notice from this office of allowance or rejection of same, when they should be earned or returned.

(*r*) Purchase moneys tendered with applications, pending allowance or rejection of same, when they should be earned or returned.

86. *How to apply and earn moneys.*—All moneys will be applied by the receiver drawing his official check therefor in favor of the Treasurer of the United States against his account of "Unearned moneys." The disposition of all moneys will be evidenced by the official checks of receivers, and they must note on all checks the numbers of the receipts and serial numbers which issued for the money covered thereby. Checks so drawn should be deposited to the credit of the Treasurer of United States on account of the particular fund for which drawn, and in the event that any receiver's designated depository will not accept checks so drawn the General Land Office should be immediately advised and the matter will be taken up with the Treasury Department for appropriate instructions to the depository.

OFFICIAL RECORDS OF RECEIVERS OF PUBLIC MONEYS.

87. *For moneys received and deposited to official credit.*—The receiver will use Form 4–103, making notations as indicated by the column headings of this form. No space is provided for the addresses of parties, and in those cases where such addresses are not to be found on the Serial Number Register, for example, where moneys are tendered in connection with requests for plats, the address should be noted on Form 4–103, using a separate line therefor. Receivers must observe especial care in noting the date and disposition of moneys on this form in the column entitled "Date applied or returned," using "A" or "R" as appropriate. The receiver may use a separate line of this form for surplus amounts or for any portion of the amount received that is to be applied separately from the remaining portion. Testimony fees should always be entered on a separate line. Certificates of deposit, Form 6599, should be noted on Form 4–103 in proper chronological order, immediately under the receipts covered thereby. Accounts should not be held in the local office beyond the period allowed by law awaiting receipt of certificates of deposit, but forwarded promptly to this office and the amount reported as in transit but not covered by certificate of deposit.

88. *For moneys returned or applied.*—Receivers will use for their records as to the disposition of moneys Forms 4–103a, 4–103b, and 4–103f. As these forms do not have any space for the name of the depositor great care must be observed to note the correct receipt and serial number, if the latter be involved.

89. *For moneys deposited with Treasurer.*—The receiver will make notations on Form 4–106, "Abstract of Treasury deposits," of all certificates of deposit issued to him, as indicated by the column headings of the abstract.

90. *Filing.*—One binder should be maintained for Form 4–103, and one binder for Forms 4–103a, 4–103b, 4–103f, and 4–106. In this way the receiver will have one record book showing all moneys received and another record book showing the disposition of such moneys.

91. *Return of moneys.*—Moneys must be returned by the official check of the receiver and in no other manner, with notation on such check showing receipt and serial numbers involved.

92. The receiver must hold moneys as unearned until the period for appeal has expired, unless waiver of appeal is filed. If an appeal is taken, the money must be held as unearned until the same is disposed of, when, according to the final action taken, the money should be applied or returned. Observe in this connection paragraph 85.

93. *Checks not to issue less than 50 cents.*—Following the ruling in 2 L. D., 200, that excess payments less than $1 will not be insisted upon, and for the administrative reason that the return of small amounts by the official checks of receivers has tended to increase the amount of outstanding checks—as checks for a few cents are frequently never cashed—receivers will not issue official checks for the return of an amount less than 50 cents. In all transactions where the amounts are tendered over the counter, the receiver will, of course, make change and issue receipts for the amount of money retained by them. The small surplus should be earned with the balance of the remittance.

ACCOUNTS OF RECEIVERS OF PUBLIC MONEYS.

94. *Annual outstanding list of unearned items.*—Receivers at land offices located in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, and Montana will prepare, in triplicate, on the typewriter, an itemized list on Form 4–103 of all "Unearned moneys," that were in their custody or control at the close of business on March 31 of each year. Receivers at land offices located in Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming, will prepare a similar list at the close of business on September 30 of each year. All copies of this list must be forwarded to the General Land Office with the receiver's accounts for the months of March or September of each year, as the case may be. One copy of this list, after verification in the General Land Office, will be returned to the receiver.

95. *When to apply moneys.*—When an item is to be applied, it must be reported upon the proper abstract of moneys returned or applied, as indicated by the column heading thereof. The date reported on the abstract of moneys returned or applied must be the date the money is applied or returned, and should coincide with the date of the certificate of allowance, if any.

96. *Forms to be used.*—Receivers must render the following monthly, in duplicate, showing the month and year at bottom of each page, which should be numbered:

(*a*) 4–103. "Abstract of moneys received."

(*b*) 4–103a. "Abstract of moneys returned or applied." On this abstract must be reported chronologically, as "Returned" or "Applied," the following:

All items returned by the official check of the receiver, the check number to be inserted in the column indicated.

All payments to contest clerks, with number of voucher therefor; the oath on the reverse of this abstract should be executed by the receiver when payments to contest clerks are reported thereon, which should also show that the words have been counted and found correct.

All moneys credited the United States, as homestead fees, homestead commissions (both original and final), and commissions and other fees from whatever source.

All moneys credited the United States as "Sales of public lands."

Checks drawn for moneys earned should be properly shown in column provided therefor.

(*c*) 4–103b. "Abstract of moneys applied." This abstract will be used only in those offices where moneys from sales of town sites or Indian lands are received. The date of the act involved should be inserted in the blank space at the heading of the columns provided therefor, together with the name of the town site or reservation, using a separate column for each town site or reservation.

(*d*) 4–103f. "Abstracts of moneys applied or paid to appraisers." This abstract will be used for reporting moneys credited the United States on account of sales of Government property, and for payment to appraisers for reappraisement of timber and stone lands under the instructions of November 30, 1908 (37 L. D., 294), with the voucher number therefor inserted in the column indicated.

(*e*) 4–106. "Abstract of Treasury deposits." (See par. 88.)

(*f*) 4–106a. "Abstract of certificates of deposits on account of surveys, etc."

(*g*) 4–104a. "Receiver's account current." This form is to be used for both the monthly and quarterly "account current." A monthly "account current" for each of the first two months only in a quarter is required. A quarterly "account current" covering all three months of a quarter, to be rendered in duplicate, is required. Monthly "accounts current" should not be rendered in duplicate.

97. *How to state accounts.*—Form 4–103 should first be prepared from the record copy of the same, and its total carried to the credit side of the "account current" (Form 4–104a) on the line of "Collections as shown by abstracts," in the column "Trust funds—Unearned moneys."

98. Form 4–103a should then be prepared from the record copy of this abstract. The total of the column "Returned to depositors" should be carried to the debit side of the "account current" (Form 4–104a) on the line "Returned to depositors as shown by abstracts," in the column "Trust funds—Unearned moneys." The total of the column "Fees and commissions," including the subcolumns "Homestead fees," "Cancellation fees," and "Commisisons and other fees" should be carried to the credit side of the "Account current" on the line "Applied as shown by abstracts," in the column "Fees and commissions." The total of the column "Sales of public lands" should be carried to the "account current" on the line "Applied as shown by abstracts," in the column "Sales of public lands."

99. The total of each column of Form 4–103b should be carried to the credit side of the "account current" on the line "Applied as shown by abstracts," in the columns of the "account current" corresponding to the columns of the abstract.

100. A copy of Form 4–106 will be mailed by the receiver to the Director of the Reclamation Service. The totals of the columns of

this abstract will be carried to the debit side of the "account current," on the line "Treasury deposits as shown by abstracts," and distributed through the various columns of the "account current," corresponding to the columns of the "Abstract of Treasury deposits." Cash in transit to depository on the last day of a quarter must be included in the balance on hand and shown in the analysis of balance on the face of the "Account current." Credit therefor should be claimed in the month and quarter shown by the date of the certificate of deposit covering such cash.

101. Form 4–106a will be used for reporting the papers indicated thereon received as cash and will be carried to the debit side of the "account current" on the line "Military bounty land warrants, scrip, certificates of location, etc., received as cash, as shown by abstracts," distributed over the various columns of the "account current" according to the purpose for which the paper was received as cash, and the fund to which, if cash had been received, the same would have been deposited. This abstract performs the same functions as the "Abstract of Treasury deposits," Form 4–106, in enabling the receiver to obtain credit for items debited to himself on the various abstracts of moneys and the various abstracts where the cash equivalent of such papers was reported as cash.

102. *Recapitulations.*—Add to the totals of columns on the last page of an abstract for the last month of each quarter the totals of the columns of the corresponding abstract for the two previous months of the quarter.

103. *Account current.*—The preparation of the "account current" (Form 4–104a) has been explained in the preceding paragraphs, except as to line "Applied, as shown by abstracts," on the debit side. This line should show in the column "Trust funds—Unearned moneys" the amount shown in the total column on the corresponding line of the credit side of the "account current." Receivers, in every case, must sign the certificate on the face of the "account current," and also the first indorsement thereon. The register, in every case, must sign the certificate on the "account current" as to the examination of moneys in the hands of the receiver. As to the rendition of accounts current, see Comptroller's Decisions, vol. 19, page 103.

TRANSMITTAL OF ACCOUNTS.

104. Monthly accounts must be mailed within 10 days after the date of the expiration of the period for which rendered.

Quarterly and other accounts must be mailed within 20 days after the expiration of the period for which rendered. When accounts are not rendered within the statutory period (28 Stat., 209), an explanation of the cause of delinquency must be furnished in

order that proper steps may be taken with the Treasury Department to have the bar to advances of funds waived.

105. All papers constituting receiver's accounts must be transmitted flat—not folded—and arranged in the following order:

(*a*) Copies of receipts.
(*b*) "Abstract of moneys received." (Form 4–103.)
(*c*) "Abstract of moneys returned or applied." (Form 4–103a.)
(*d*) "Abstract of moneys applied." (Form 4–103b.)
(*e*) "Abstract of moneys applied or paid to appraisers." (Form 4–103f.)
(*f*) "Abstract of Treasury deposits." (Form 4–106.)
(*g*) "Abstract of military bounty land warrants, etc." (Form 4–106a.)
(*h*) "Receiver's account current." (Form 4–104a.)

Arrange the duplicate forms in like manner.

HOW TO FIND BALANCE OF UNEARNED MONEYS.

106. *Monthly accounts.*—(1) Total the "Abstract of moneys received" (Form 4–103), which would be the aggregate amount of money received for the month or other period for which rendered. (2) Add to this total the balance brought forward from the preceding month. (3) Deduct from this total (*a*) the total amount of moneys returned during the month, (*b*) the total amount paid contest clerk during the month, (*c*) the total amount paid to appraisers during the month, (*d*) the total amount deposited to the credit of the Treasurer of the United States during the month, (*e*) the amount paid register and receiver in abatement of receipts when authorized.

The difference thus ascertained will be the total balance with which the receiver is chargeable. The total amount on deposit with his designated depository or depositories, together with the cash on hand in office safe, may exceed this balance. Therefore the aggregate amount of all outstanding checks should be deducted therefrom. This difference should equal the amount of the receiver's true balance.

107. *Quarterly accounts.*—Follow the same procedure as set forth with reference to monthly accounts, except that the balance brought forward should be that on hand at the end of the last month of the prior quarter, and the totals will be for the entire quarter.

108. *How to determine whether amount of cash on hand in office safe is correct.*—Strike a balance as directed in paragraph relating to monthly accounts, including receipts for the current day; deduct from this total all deposits of "unearned moneys."

COMPENSATION OF REGISTERS AND RECEIVERS.

109. Registers and receivers are allowed a salary of $500 a year without regard to the character or amount of work done by them (sec. 2237, Revised Statutes), except in Alaska. In addition to this salary they are entitled, under section 2238, Revised Statutes, and other

laws, to commissions on moneys received at the receiver's office and to certain fees for specific services rendered by them.

Section 2240, Revised Statutes, provides:

> The compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate $3,000 a year each; and no register or receiver shall receive for any one quarter or fractional quarter more than a pro rata allowance of such maximum.

The term "year" as used in this section relates to the fiscal year beginning July 1 and ending June 30. (Sweet *v.* United States, 34 Ct. Cl., 377; 3 Comp. Dec., 606.)

Section 2241, Revised Statutes, provides that compensation received in any land office in excess of the maximum allowed by law to the register and receiver shall be paid into the Treasury as other public moneys.

Under the decision of the Comptroller of the Treasury dated June 18, 1915, registers and receivers are each entitled to 1 per cent commissions on cash sales of Indian land (unless such commissions are designated or restricted by the act of Congress authorizing the sales), not to exceed the maximum compensation provided by section 2240, Revised Statutes.

In computing the compensation of the local land officers the following order will be observed:

(*a*) Salary.
(*b*) Cancellation fees (earned by the register only).
(*c*) 1 per cent each on sales of public land.
(*d*) 1 per cent each on sales of Indian land.
(*e*) Commissions and other fees.

The excess of the maximum earnings of any month within a fiscal year may be applied to minimum of earnings of any month within the same fiscal year, but the excess of maximum earnings of one fiscal year must not be applied to the minimum earnings of another year.

The excess of earnings of one appointment must not be applied to the minimum earnings of another appointment, even though it be of the same officer, and within the same fiscal year. (13 Comp. Dec., 313.)

Ex-officio registers and receivers at Fairbanks and Nome, Alaska, are allowed only such fees and commissions as are provided by law, not to exceed $1,500, as their maximum earnings, whereas registers and receivers of other land districts except Juneau, Alaska, where a salary of $1,500 per annum is allowed, are allowed a maximum of $2,500 on account of fees and commissions.

110. *Vacancy in office.*—A vacancy in the office of register or receiver disqualifies the remaining incumbent from taking official action upon papers requiring the joint action of said officers until the vacancy

has been filled and the new officer enters upon his duties. (9 L. D., 365; 12 L. D., 297; 14 L. D., 133; 20 L. D., 276; and 22 L. D., 704.)

FEES AND COMMISSIONS.

111. In Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the following fees and commissions are chargeable by law, to be collected by registers and receivers and which enter into the computation of their compensation, except the homestead fee.

112. *Declaratory statements.*—

Preemption declaratory statement	$3.00
Soldiers and sailors' homestead declaratory statement	3.00
Coal land declaratory statement	3.00
Reservoir declaratory statement (Act of January 13, 1897)	3.00

Declaratory statement fees are earned irrespective of the action taken upon the declaratory statement.

113. *Mineral applications and adverse claims.*—

For filing and acting upon each application for a patent	$10.00
For filing and acting upon each adverse claim	10.00

Fees in connection with mineral land applications and adverse claims are earned irrespective of the action taken on the application or adverse claim. Coal applications must be accompanied by a fee of $10, as they are held to be "mineral applications" by comptroller's decision of July 25, 1911. (Appeal No. 20295.)

114. *Timber and stone applications.*—

For filing and acting upon each application to purchase timber and stone lands	$10.00

See Circular No. 576.

115. *Homestead applications.*—

For 160 acres, at $1.25 per acre:		
Fee	$10.00	
Commissions	6.00	
		$16.00
For 80 acres, at $1.25 per acre:		
Fee	5.00	
Commissions	3.00	
		8.00
For 40 acres, at $1.25 per acre:		
Fee	5.00	
Commissions	1.50	
		6.50
For 160 acres, at $2.50 per acre:		
Fee	10.00	
Commissions	12.00	
		22.00

For 80 acres, at $2.50 per acre:

Fee	$5.00	
Commissions	6.00	
		$11.00

For 40 acres, at $2.50 per acre:

Fee	5.00	
Commissions	3.00	
		8.00

Fees and commissions in connection with homestead applications are not earned unless the application is allowed.

NOTE.—A fee of $10, with proper commissions, will be collected in connection with homestead applications where the area involved is 81 acres or more. (See Circular Nov. 14, 1914, 43 L. D., 449.) Proper commissions, original and final, are based upon the area involved unless restricted by special act of Congress.

116. *Final homestead commissions.*—

For 160 acres, at $1.25 per acre	$6.00
For 80 acres, at $1.25 per acre	3.00
For 40 acres, at $1.25 per acre	1.50
For 160 acres, at $2.50 per acre	12.00
For 80 acres, at $2.50 per acre	6.00
For 40 acres, at $2.50 per acre	3.00

NOTE.—The commissions must be tendered with the homestead proof, together with testimony fees at 22½ cents per 100 words. The commissions are not earned unless the proof is approved.

117. *Military bounty land warrants.*—

For locating a 160-acre warrant	$4.00
For locating a 120-acre warrant	3.00
For locating a 80-acre warrant	2.00
For locating a 60-acre warrant	1.50
For locating a 40-acre warrant	1.00

The moneys are earned irrespective of the action taken.

No fees are chargeable on warrants issued prior to February 11, 1847.

Revolutionary bounty-land scrip is received and accounted for as cash, and no fee is chargeable to parties presenting such scrip.

Receipts must issue for the military bounty land warrant tendered, indicating thereon the cash value of same and the date of issuance of warrant, number thereon, serial number of case involved, act of Congress under which issued, name of party to whom issued, last assignee, area of land granted under the warrant, and the description of the land and the area thereon for which the warrant is accepted in payment. The receipts should show as a separate item any cash that may be tendered with the warrant.

The warrant should be accounted for on Form 4–103 as a separate item with a full description thereon as shown by the receipt.

If the item is "earned" it should be accounted for on Form 4–103a under the heading of "Sales of public lands," and in the place of the check number should be set forth "M. B. L. W. No. ———," accounted for on Form 4–106a in accordance with the instructions contained in Circular 304 and debited the

United States in the account current under "Sales of public lands" on the line of military bounty land warrant, scrip and certificates of location received as cash, as shown by abstracts.

Before returning a warrant to the applicant the receiver should first obtain a receipt therefor, which should set forth the same data as that indicated at the time of tender, and file same with the Form 4–103a, in which the item is set forth in the "Returned to the depositor" column as "M. B. L. W. No. ———, see voucher." The warrant must not be set forth on the abstract of certificates of deposits for earned moneys deposited to the credit of the Treasurer of the United States.

118. *Porterfield warrants* (Act of Apr. 11, 1860).—For locating these warrants the same fees are chargeable as are allowed for military bounty land warrants. The moneys are earned irrespective of the action taken.

119. *Sales of public lands.*—The commissions of registers and receivers on cash sales of the public lands are paid by the United States, and no fees or commissions on such sales are chargeable to the purchasers, except in cases of homestead entries on ceded Indian reservations affected by the act of May 17, 1900 (31 Stat., 179), and commuted under the provisions of the act of January 26, 1901 (31 Stat., 740), in which cases the entryman is required to pay a commission of 2 per cent on the cash price of the land (31 L. D., 106). In cases of timber sales in Alaska, the Comptroller of the Treasury has held that the sale of timber is a sale of lands and that the register and receiver are entitled to 1 per cent each commissions on sales of such timber. In cases of sales of Indian lands appropriate instructions will be given as to the collection of commissions, and when the commissions are collected from the entryman, in addition to the purchase price for the Indian lands, the commissions are not earned unless the proof is approved, although the purchase money in many instances may be earned irrespective of the action taken upon the proof.

120. *State selections.*—

For each final location of 160 acres (or fraction thereof) under any grant of Congress to States (except for agricultural colleges)———— $2.00

No fees are chargeable on State swamp-land selections, but a fee of $2 is to be collected on each location of 160 acres, or fraction thereof, made with swamp-land indemnity certificates.

NOTE.—(*a*) This money is not earned unless the selection is approved. For method of computing State selection fees see paragraph No. 121.

(*b*) The enabling act (36 Stat., p. 557) provides that the fees to be paid to the register and receiver in the States of Arizona and New Mexico for each final location or selection of 160 acres made thereunder shall be $1.

121. *Railroad selections.*—

For each final location of 160 acres (or fraction thereof) by railroad or other corporations———— $2.00

In computing the amount of fees payable on a list of State or railroad selections, the receiver will divide the total area by 160; the quotient will be the number of 160-acre selections on which a fee of $2 each is chargeable. Should the quotient consist of a fraction over a whole number the legal fee of $2 will be collected for such fraction.

NOTE.—The moneys are not earned unless the selection is approved.

122. *Agricultural college scrip.*—

For each piece of agicultural college scrip located	$4.00

NOTE.—This money is earned irrespective of the action taken.

123. *Private land scrip, Valentine scrip.*—

For each piece of scrip filed on unsurveyed lands	$1.00
For each location of scrip	1.00

NOTE.—The moneys are earned irrespective of the action taken.

124. *Supreme Court scrip.*—No fees or commissions are allowed on the location of Supreme Court scrip, nor on the location of Indian scrip, or other private land scrip, except as specifically provided for by law.

125. *Reducing testimony to writing.*—Fees for reducing testimony to writing are allowed at the rate of 22½ cents for each 100 words, in the following cases:

(1) Making final proof in preemption cases when the writing is done in the local land office.

(2) Making final proof in commuted and noncommuted homestead and timber culture cases, irrespective of the fact whether or not the writing is done in the local land office, as the fees are allowed for "examining and approving the proof."

(3) In establishing claims to mineral lands. However, at present there is no proof in mineral lands which would be reduced to writing in the local land office and entitling the collection of testimony fees. (Sec. 12, act May 10, 1872.)

(4) In establishing claims to timber and stone lands, when the testimony is reduced to writing in the local office.

(5) In hearings before registers and receivers in contest cases.

Registers and receivers of the United States land offices will employ clerks for reducing testimony to writing in contest cases when such clerical assistance is required in their offices. No specific authorization for the employment of such clerks will be required, nor will such clerks be required to file an oath of office. However, these clerks must attach a certificate, signed by them, to the testimony transcribed in each case, to the effect that such testimony is a true and literal transcription of the verbatim report taken at the hearing. Clerks employed for this work should be qualified as competent stenographers and typewriters and must furnish their own supplies.

The compensation to be paid such clerks will be not to exceed 15 cents per 100 words in the following States, where the amount to be collected from the contesting parties is 22½ cents per folio: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

The compensation to be paid such clerks will be not to exceed 10 cents per 100 words in the following States, where the amount to be collected from the contesting parties is 15 cents per folio: Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

Contest clerks are allowed 5 cents a page for copies of testimony furnished either party. (38 L. D., 615.)

When the reducing to writing, in a contest case, is done by regularly appointed employees of local land offices, the total amount received must be deposited to the credit of the Treasurer of the United States.

No compensation will be allowed contest clerks for docketing. Docketing of contest cases and all other notations on the contest docket will be done by the registers or receivers or by the regular salaried employees of the local land offices.

The estimated cost of reducing to writing all the testimony to be taken before the register and receiver in a contest case shall be collected in advance from the contesting parties on the date of the hearing before the hearing has begun, or, under rule 57 of Practice, the party liable thereto may be required to give security in advance of the trial by deposit in a reasonable sum or sums, for payment of the cost of transcribing the testimony. Receipts (Form 4–131) will issue for the amounts collected and must show the number of words and the rate per hundred. If any additional amounts above the estimated cost are collected, additional receipts will issue therefor and the amounts deposited to the official credit of the receiver as hereinafter directed. Moneys so receipted for will be deposited to the official credit of the receiver of public moneys as "Unearned moneys" and so held until the complete record in the case, in connection with which deposited, has been transcribed and filed in the local land office, and payment will then be made to the contest clerk, after securing proper voucher therefor, and the net balance, exclusive of such payment, deposited to the credit of the Treasurer of the United States, and any excess amount returned to the proper parties. Report will then be made of such collections and expenditures on Form 4–103 and Form 4–103a. (See par. 53 et seq. of Rules of Practice.)

(6) In making final proof on desert-land claims, when the testimony is reduced to writing in the local land offices. (See 36 L. D., 481.)

In computing the fees for reducing testimony to writing, only the words actually written must be charged for and no charge should be made for the printed words. (See pars. 10, 11, and 12, sec. 2238, U. S. Rev. Stats.) The words written must be counted and the charge made in accordance with the result of such count. Registers and receivers must not have a uniform fee of a specific sum in every case of the same class of proofs.

126. *Transcripts from records.*—Registers and receivers are entitled to charge at the rate of 10 cents per 100 words for making transcripts of their records for individuals. (Act of Congress of Mar. 22, 1904.)

A transcript is a literal copy of the words, letters, and figures which make the record. The correctness of the transcript may or may not be certified to, but it is nevertheless a transcript.

Registers and receivers of consolidated land districts only are entitled to charge, for furnishing any other record information, such fees as are properly authorized by the tariff existing in the local courts of their district.

Record information is held to be any official statement of the facts appearing of record, a certificate, and for which they are entitled to charge the fee as above authorized.

In the absence of the State fee bill, providing for such fee, registers and receivers will be entitled to charge the fee allowed clerks of courts for furnishing certificates of their records, and in the receipt for the amounts so collected will cite the section and page of the State statute or other authority for such charge.

While it may often be desirable for any register and receiver to furnish record information, there is no authority for others than officers of consolidated land districts to collect a fee therefor.

The fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute, and are not subject to discretionary action on the part of officials.

Consolidated districts are those districts into which one or more previously existing districts have been merged.

(See Cir. 315, dated Apr. 24, 1914, 43 L. D., 226.)

127. *Plats and diagrams.*—Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats, diagrams, etc., the fees for the same are hearby fixed as follows:

For a diagram showing entries only	$1.00
For a township plat showing entries, names of claimants, and character of entry	2.00
For a township plat showing entries, names of claimants, character of entry, and number	3.00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry, together with topography, etc.	4.00

The plat or diagram must be of standard size (Form 4–590b), and it must be a correct and complete delineation of the particular township. There is no legal authority under said statute for registers and receivers to furnish a plat of a section or subdivision, or any other fraction of a township, and to charge or receive therefor a proportionate part of the authorized fee.

128. *Lists for taxation purposes.*—For lists of lands sold, which are construed to mean lists of final certificates furnished State or Territorial authorities for the purposes of taxation, 10 cents per entry. The receipts must show number of final entries and rate per entry.

129. *Cancellation fees.*—

For giving notice to contestants of the cancellation of any nomestead, preemption, or timber-culture entry	$1.00

This fee must be tendered to the receiver before any application of the successful contestant for the lands involved will be approved. The register only is entitled to the compensation on account of cancellation fees, which must be reported in a separate column of abstract. (Form 4–103a.)

130. In Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin, the following fees and commissions are chargeable by law to be collected by registers and receivers, and which enter into the computation of their compensation, except the homestead fee.

131. *Declaratory statements.*—

Preemption declaratory statement	$2.00
Soldiers' and sailors' homestead declaratory statement	2.00
Coal land declaratory statement	2.00
Reservoir declaratory statement (act Jan. 13, 1897)	2.00

Declaratory statement fees are earned irrespective of the action taken upon the declaratory statement.

132. *Mineral applications and adverse claims.*—

For filing and acting upon each application for a patent	$10.00
For filing and acting upon each adverse claim	10.00

Fees in connection with mineral land applications and adverse claims are earned irrespective of the action taken on the application or adverse claim.

For coal applications see paragraph No. 113.

133. *Timber and stone applications.*—

For filing and acting upon each application to purchase timber and stone lands	$10.00

See circular No. 576.

134. *Homestead applications.*—

For 160 acres, at $1.25 per acre:		
Fee	$10.00	
Commissions	4.00	
		$14.00
For 80 acres, at $1.25 per acre:		
Fee	5.00	
Commissions	2.00	
		7.00
For 40 acres, at $1.25 per acre:		
Fee	5.00	
Commissions	1.00	
		6.00
For 160 acres, at $2.50 per acre:		
Fee	10.00	
Commissions	8.00	
		18.00
For 80 acres, at $2.50 per acre:		
Fee	5.00	
Commissions	4.00	
		9.00
For 40 acres, at $2.50 per acre:		
Fee	5.00	
Commissions	2.00	
		7.00

Fees and commissions in connection with homestead applications are not earned unless application is allowed.

See note to paragraph 115.

135. *Final homestead commissions.*—

For 160 acres, at $1.25 per acre	$4.00
For 80 acres, at $1.25 per acre	2.00
For 40 acres, at $1.25 per acre	1.00
For 160 acres, at $2.50 per acre	8.00
For 80 acres, at $2.50 per acre	4.00
For 40 acres, at $2.50 per acre	2.00

NOTE.—These commissions must be tendered with the homestead proof, together with testimony fees at 15 cents per hundred words. The commissions are not earned unless the proof is approved.

136. *Military bounty land warrants.*—

For locating a 160-acre warrant	$4.00
For locating a 120-acre warrant	3.00
For locating a 80-acre warrant	2.00
For locating a 60-acre warrant	1.50
For locating a 40-acre warrant	1.00

See paragraph 117.

137. *Porterfield warrants (act of Apr. 11, 1860).*—For locating these warrants the same fees are chargeable as are allowed for military bounty land warrants. The moneys are earned irrespective of the action taken.

138. *State selections.*—

For each final location of 160 acres (or fraction thereof) under any grant of Congress to States (except for agricultural colleges)..... $2.00

No fees are chargeable on State swamp-land selections, but a fee of $2 is to be collected on each location of 160 acres or fraction thereof made with swamp-land indemnity certificates. (See par. 139.)

NOTE.—This money is not earned unless the selection is approved. (See par. 120.)

139. *Railroad and other selections.*—

For each final location of 160 acres (or fraction thereof) by railroad or other corporations..... $2.00

See paragraph 121.

140. *Agricultural college scrip.*—

For each piece of agricultural college scrip located..... $4.00

NOTE.—This money is earned irrespective of the action taken.

141. *Private land scrip, Valentine scrip.*—

For each piece of scrip filed on unsurveyed lands..... $1.00
For each location of scrip..... 1.00

NOTE.—The moneys are earned irrespective of the action taken.

142. *Supreme Court scrip.*—No fees or commissions are allowed on the location of Supreme Court scrip nor on the location of Indian scrip or other private land scrip, except as specifically provided for by law.

143. *Reducing testimony to writing.*—Fees for reducing testimony to writing are allowed at the rate of 15 cents per 100 words. (See par. 125.)

144. *Transcripts from records.*—Registers and receivers are entitled to charge at the rate of 10 cents per 100 words for making transcripts of their records for individuals. (See par. 126.)

145. *Plats and diagrams.*—(See par. 127.)

146. *Lists for taxation purposes.*—(See par. 128.)

147. *Cancellation fees.*—(See par. 129.)

148. *Soldiers' additional homesteads.*—The fees and commissions with soldiers' additional homestead applications will be computed in the same manner as are ordinary homestead fees and commissions. The original fee and commissions and final commissions will be collected together at the same time, and must be applied before certificate issues.

149. *Penalty for improper fees.*—No fees, commissions, or rewards are required or allowed to be paid at United States land offices for extra services of any character whatever; and registers and receivers are absolutely prohibited by law from charging or receiving,

directly or indirectly, any fee or compensation not expressly authorized by law, or for any services not imposed upon them by law, or a greater fee or compensation in any case than specifically allowed by law. Officers charging or receiving illegal fees, compensations, or gratuity are subject to *summary dismissal from office*, in addition to the penalties provided in title "Crimes," chapter "Official misconduct," United States Revised Statutes. Illegal fees received by clerks, employees, or agents are received by the land officers within the meaning and prohibitions of the law, and registers and receivers will be held personally and officially responsible therefor.

CHECKS.

150. *Checks returned unclaimed.*—Where checks issued by receivers for return of unearned moneys have been returned as unclaimed they should be retained in the possession of the receiver, to be delivered to the payee when applied for. After the expiration of five years from the date the moneys covered thereby were originally received by the receiver, such checks should be transmitted with the return of outstanding checks (hereinafter provided for), in which they are included, to this office, which will forward them to the Secretary of the Treasury, who will place the amounts thereof to the credit of the appropriation "Outstanding liabilities" and the personal credit of the payee, as provided by the act of March 2, 1907. (See 34 Stat., 1245.)

151. *Outstanding checks—Return required.*—Receivers of public moneys should not deposit to the credit of the Treasurer of the United States on account of "Outstanding liabilities" the amount of unearned moneys on hand for five years or more that are represented by checks issued by them for the refund of such moneys to applicants which remain outstanding, but they should make a return, in duplicate, of such checks to this office at the end of each quarter and they will be forwarded to the Secretary of the Treasury.

152. *Outstanding checks—Return when receiver retires.*—Whenever any receiver of public moneys shall cease to act in that capacity, he should at once inform the Secretary of the Treasury what checks, if any, drawn by him are still outstanding and unpaid. If the checks are in his possession he should transmit them to this office with a schedule thereof, in duplicate, for reference to the Auditor for the Interior Department for file with his schedule to await claim of payees for delivery to them.

153. *Outstanding checks—Amounts to be determined.*—As it is necessary for the receiver in order to balance his account to know the amount of outstanding checks, he should carefully examine and compare with his records of checks issued, the monthly statements of paid

checks from the Treasurer of the United States, making notations on stubs of checks of the payment or cancellation thereof.

MISCELLANEOUS.

154. *Moneys tendered for lands in other districts.*—A tender of money in connection with an application for lands not situate in the receiver's land district must be receipted for by him and the amount thereof deposited as "Unearned moneys" and immediately returned to the party tendering same by the receiver's official check, together with the application with which tendered, after giving the latter current serial number and making proper notations thereof upon the serial register. Due report of the receipt and the return of the money must, of course, be made in the receiver's accounts and of the application thereof in connection with which tendered, upon the "General schedule of serial numbers," with notation in the "Remarks" column. For example, "Application returned, lands in Seattle District."

In returning such moneys the receiver will advise the party remitting same of the reason therefor, and that he may immediately forward his application, together with the check returning his remittance, properly indorsed, to the receiver for the land district in which the lands desired are located. In this connection, however, applicants must be advised by receivers that checks issued by receivers of public moneys will in no case be accepted as a form of remittance in connection with any other application than that of the original remitter, as more than one indorsement on such checks will prohibit their acceptance by receivers of public moneys. If any checks of this character should be forwarded to a receiver in connection with applications for lands in his district, which applications were originally presented to another land office, the receiver will issue receipts therefor and account for the amounts thereof under existing regulations.

155. *Reappraisement of timber and stone lands.*—The money deposited to cover the cost of reappraisement of timberlands under the circular of November 30, 1908, as revised to August 22, 1911, should be retained by the Receiver as "unearned moneys" pending reappraisement. The appraisement will be made by party designated by the chief of field division, and before making payment in accordance with paragraph 24 of said circular the receiver should secure a voucher (Form 4-152), signed by the appraiser, and certified by the chief of field division who employed him. This voucher should be forwarded with memorandum copy thereof with the receiver's "Abstract of moneys applied or paid to appraisers." (Form 4-103f.)

156. *Sales of Government property.*—Moneys received at land offices from proceeds of sales of any property should be deposited as

"Unearned moneys," recorded on Forms 4–103 and 4–103f, and received and applied in the same manner as other moneys. Such moneys should be deposited to the credit of the Treasurer of the United States as "Miscellaneous receipts, proceeds of Government property." Certificates issuing therefor must show on the back thereof, in detail, what property was sold and a copy of the letter of the General Land Office authorizing the sale must be furnished and attached to the abstract. (Form 4–103f.)

OUTSTANDING LIABILITIES.

157. *Act of March 2, 1907 (34 Stat., 1245).*—At the end of each quarter receivers will prepare, in triplicate, on Form 4–103, an itemized list of all unearned moneys which have been on hand for five years or more, giving thereon the date each item was originally received, the receipt number, if any issued therefor, the name and address of the remitter thereof, and the purposes of its tender, which list shall bear the certificate of the register and receiver that the same is correct; that the amounts are due and payable; that due diligence has been exercised to the return of same; and that the sums specified have remained unclaimed for a period of five years or more. (35 L. D., 568.)

Where amounts appear on receiver's records, and the remitter can not be identified, a separate list upon Form 4–103 shall be made thereof, in triplicate, showing the amount, and, if possible, the date of receipt of each item and whatever other information is available for identification, which list shall bear the certificate of the register and receiver, that after careful investigation the ownership of such moneys could not be determined, and that they have been reported in the unearned account for five years or more.

The total of each list above provided for will be separately deposited to the credit of the Treasurer of the United States as "Outstanding liabilities," lands, act of March 2, 1907. (34 Stat., 1245.)

158. *Repayment of outstanding liabilities.*—Application for the return of unearned moneys that have been transferred to the Treasury under the act of March 2, 1907, should be stated by the applicant in the following form:

APPLICATION FOR RETURN OF MONEYS COVERED INTO THE TREASURY AS "OUTSTANDING LIABILITIES."

I, _____of_____, who made payment of $_____, in connection with_____ (Kind and number of application, etc.) _____, on_____ (Date.), receipt No._____, hereby make application, in pursuance of section 4 of the act of March 2, 1907 (34 Stat.,

1245), for the return of said amount, which has been transferred to the Treasury as "Outstanding liabilities" under said act.

_____
(Signature.)

United States Land Office at_____
_____19__

We hereby certify that it appears from the records in this office that the statements in the foregoing application are correct, and that the amount stated was transferred to the Treasury as "Outstanding liabilities," in pursuance of the act of March 2, 1907, in the accounts of the receiver of public moneys of the United States land office at_____, for the quarter ended_____.

_____
Register.

_____
Receiver.

—

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C. _____19__

Examined and approved. It appears from the records of this office that the statements in the foregoing application and certificate are correct, and that the amount involved has been deposited in the Treasury in accordance with the act of March 2, 1907.

_____
Commissioner.

The register and receiver will certify, as above directed, to the correctness of the account as shown by the records of their office, and forward same to the Commissioner of the General Land Office for administrative examination, and transmittal to the Treasury Department for settlement.

BONDS.

159. *Receiver's new bonds—Balances.*—As to receiver's accounts, it is required that the receiver transfer to his acounts under his new bond (or to his successor when he has not been reappointed) all moneys which constitute his balance of "unearned moneys" at the close of business on the last day for which he is to render accounts under his old bond. The balance due the United States embraces both "unearned" moneys and "earned" moneys. If the depository is not in the same town with the receiver, the account should be extended to include the date of the last certificate of deposit, and same should be included in the "Abstract of Treasury deposits."

160. *Rendition of accounts time.*—Final accounts under any bond must be rendered within 20 days from the date preceding the date of the approval of the new bond.

161. *Balance from United States.*—The balance due FROM the United States embraces the balance due to the receiver because of overdeposits, credit differences, etc.

162. *Certificate of deposit.*—All receivers of public moneys must secure SEPARATE certificates of deposit (Form 1A) for moneys or balances deposited as receiver and as special disbursing agent, and the proper funds, appropriations, etc., must appear upon all certificates of deposit. The certificates of deposit must also clearly show that they are moneys or balances deposited "Under bond dated ----------."

163. *Closing accounts when relinquishing office.*—When relinquishing his office, the receiver will prepare, in TRIPLICATE (Form 4–103), a list of all "unearned moneys" in his possession at the time of relinquishing such office, all copies of which the receiver will forward to the General Land Office with his final accounts. The triplicate copy will, after it has been checked with the records of the General Land Office, be transmitted to his successor. The outgoing receiver should transfer by his official check the amount of such list to his successor as soon as he has been officially notified that his successor has entered on duty and his bonds approved.

164. *Deposits on relinquishing office.*—The receiver of public moneys must deposit to the credit of the Treasurer of the United States on account of various funds—"Sales of public lands," "Fees and commissions," etc.—all moneys which are earned at the time of relinquishing his office, and he should deposit to his official credit, as receiver of public moneys, all "unearned moneys" on hand at that time.

165. *Fractional accounts.*—The receiver must render fractional quarterly account when necessary up to and including his last day in office.

166. *Death of receiver.*—In case of vacancy caused by death of the receiver his final accounts should be prepared and certified to by the register as shown by the records.

(For vacancy in office see 9 L. D., 365; 12 L. D., 297; and 26 Stat., 657.)

167. *Disbursements.*—No payments will be made by the receiver as special disbursing agent of the land office for any salaries or expenses that may have accrued for a fractional month, except semimonthly payments to clerks on the 15th, but he will deposit all balances of moneys advanced him as such officer less outstanding checks to the credit of the Treasurer of the United States on account of the various appropriations from which advanced. Care should be observed that the certificates of deposit issuing for such deposits clearly show the appropriations. Unpaid claims should be forwarded to the General Land Office for settlement.

168. *Entrance on duty and instructions.*—When a receiver is notified that his bonds have been approved he is authorized to receive, when he enters on duty, all "unearned moneys" which the outgoing

receiver has been directed to transfer to him by his official check, and which, when received, he must immediately place to his credit as receiver of public moneys as "unearned moneys" with his official designated depository.

The new receiver must not return or apply any of this money until the list thereof, which his predecessor will forward with his final accounts, has been approved by the General Land Office, when it will be transmitted to him, and he will be duly notified as to its approval or any discrepancies therein and authorized as to the return or application of the amount covered thereby.

The incoming receiver should receipt to the outgoing receiver, in duplicate, for receipt blanks, by numbers, one copy of which should be forwarded with the final accounts of the outgoing receiver.

SPECIAL DISBURSING AGENTS.

Account Consists of What.

169. The account of a disbursing officer consists of a complete, continuous, itemized record of his receipts and disbursements (the latter term being herein used to include expenditures and deposits to personal credit), as shown by his bond, requisitions, abstracts of collections, checks, vouchers, subvouchers, cash receipts, abstracts of expenditures, accounts current, and cash account, which will be considered in the order named, and the account for any specific period should include only such fiscal transactions as are completed within that period, as evidenced by the dates appearing on checks, cash receipts, accountable warrants, and certificates of deposit.

Account Begins When.

170. A disbursing officer's account under any bond must begin from the date of *approval* of such bond by the Secretary, without reference to the date on which funds may be advanced thereunder, except that in cases where a bond given in connection with a particular appointment is approved prior to the date on which such appointment becomes effective, the account should begin on the date the appointment is to take effect.

Receipts.

ADVANCES.

171. *Authority for.*—Advances of public money to disbursing officers are authorized by section 3648, Revised Statutes.

172. *Conditions precedent.*—Before an advance of public funds can be made to any officer or employee of this bureau he must execute

a bond for the careful discharge of his duties and the faithful disbursement of and an honest accounting for all moneys, public funds, and property coming into his hands, and such bonds must be approved by the Secretary of the Interior. And if funds are already in hand under a former bond he must deposit such balance and close his account.

173. *Requisitions.*—When a disbursing officer has filed a proper bond and with it the three cards showing his autograph signature, he may make requisition for an advance of public funds. This requisition must always be made on Form 4–531, must be mailed without other inclosure except in cases where a letter of explanation is necessary, and must show the following facts:

(*a*) The date of the bond under which the advance is requested.

(*b*) The balance under each appropriation on the date the requisition is transmitted.

(*c*) The total balance on hand.

(*d*) The amount requested under each appropriation.

(*e*) The total amount requested.

174. *Requisitions, special cases.*—Special disbursing agents who make requisition for funds from the appropriation for "Deposits by individuals for surveying public lands" should show the specific amounts to be used in connection with mineral or agricultural surveys and in connection with railroad surveys, giving the initials of the railroad company in connection with the latter. And whenever the terms of a general appropriation allow the use of not to exceed a maximum named for some specific purpose requisitions for any amounts to be used for the specific purpose must indicate the amount requisitioned for such specific purpose. A failure to enter the balance on hand under each and all appropriations, or to give any other information hereinabove required, will result in a delay in the advance of funds.

175. *Requisitions, funds of other bureaus.*—If requisitions include a request for funds of some other bureau set aside for use by this office, two memorandum copies should be furnished, but if a separate request is made for funds of the other bureau one memorandum copy only is required. Requisitions for Indian moneys should cite the Indian Office authority, as, for example (Land—Allotments, C. E. F., 32191–15, March 26, 1915).

176. *Requisitions made special.*—All requests for funds are made special by this office and are promptly forwarded through the Secretary of the Interior to the Treasury Department for the issuance of warrant.

177. *Notice of advance.*—A copy of the requisition made by this office is in each case forwarded to the disbursing officer as notice to

him of the fact that the original of such requisition has been forwarded to the Treasury Department.

178. *Make requisition early.*—As there will necessarily be some delay in view of the large number of requisitions received in the Treasury Department each quarter, disbursing officers should mail their requests in sufficient time to permit of their reaching this office at least 10 days before the funds are needed.

179. *Funds not to exceed bond.*—Funds can not be advanced in excess of the amount of the disbursing officer's bond, and he should in no case make requisition for an amount which, added to the total of the balance on hand from all appropriations, would exceed the amount of his bond.

180. *Appropriation titles.*—Treasury regulations require that the titles of appropriations, as shown in all estimates, disbursements, accounts, and vouchers, shall be exactly as such titles appear on the books of the Treasury. These titles are correctly shown on the memorandum copy of the requisition mailed to the disbursing officer, and he should use such memorandum copy in posting the amounts to the several appropriations, being very careful to credit the United States with amounts under the exact titles as reported to him.

181. *Fiscal year an important part of title.*—The fiscal year is an important part of the title of annual appropriations and should in no case be omitted. Appropriations are ordinarily made for a specific fiscal year, ending in each case with June 30, and the appropriation is available for payment of expenses incurred or services rendered during the fiscal year ending with June 30 of the year shown in the title. For example, "Protecting public lands, timber, etc., 1918," indicates that the appropriation was made for the payment of services rendered or articles purchased in accomplishing the object indicated during the fiscal year beginning July 1, 1917, and ending June 30, 1918.

While the same quantity of supplies may be purchased in June as would under the same needs of the service be purchased in any other month, notwithstanding the fact that such supplies may not all be consumed during that month, no additional quantity should be purchased for the purpose of using an unexpended balance of annual appropriations. (Sec. 3690, R. S.; 6 Comp. Dec., 818; 7 Comp. Dec., 793.)

182. *Fiscal year—When title includes two.*—The use of two years as a part of the title of an appropriation indicates that the appropriation is available from the date of the approval of the act to the end of the succeeding year. For example, the appropriation for "Classification of lands involved in Oregon & California Railroad forfeiture suit, 1917 and 1918," was available from April 17, 1917, the date of the passage of the act, till June 30, 1918.

183. *Check books.*—Requisition in duplicate on Forms 1231 and 1231a for a supply of checks sufficient in each case to last six months should be made on the Secretary of the Treasury, allowing six weeks for printing and delivery in normal times.

184. *Depositary.*—All funds advanced to disbursing officers are placed to their official credit with the Treasurer of the United States, on whom all checks should be drawn and with whom all public funds should be deposited, deposits being made through convenient designated United States depositaries.

185. *Embezzlement.*—Every officer or agent of the United States who deposits, converts, loans, withdraws, transfers, or applies public money in any manner, except as authorized by law, is deemed guilty of embezzlement, and is liable to a heavy fine and imprisonment. (Secs. 5488, 5491, and 5492, Revised Statutes.)

186. *Official credit defined.*—Whenever funds are placed or deposited with the United States Treasurer to the credit of a disbursing officer, and subject to his official check as such, the deposit is said to be to his official credit. Any amount collected or conceded pertaining to a current appropriation should be deposited to official credit (Form 6599) in accordance with section 3620, Revised Statutes, Treasury Circular No. 102, 1906, and Treasury Circular of January 18, 1913. Credit for such deposits should *not* be claimed in the account current.

187. *Personal credit defined.*—Whenever a special disbursing agent deposits an amount to the credit of the Treasurer of the United States on Form 1A, not subject to his official check, the deposit is said to be to personal credit. Any amount collected or conceded pertaining to an appropriation not then current or belonging to "Miscellaneous receipts" should be deposited to personal credit. Certificates of deposit for "Miscellaneous receipts, proceeds of Government property," should have indorsed on the back a detailed list of the property sold. Credit for deposits to personal credit only should be claimed in the account current.

COLLECTIONS.

188. In addition to the amounts advanced by Treasury warrant, special disbursing agents may occasionally receive funds from other sources, such as for the sale of Government property (collections from which should be deposited to personal credit on account of "Miscellaneous receipts, proceeds of Government property"), refund on mileage or scrip books (which should be deposited to official credit if the appropriation is current, and to personal credit if it is not current, on account of the appropriation from which the books were originally purchased).

189. *Amounts recovered or withheld from carriers.*—Moneys recovered from common carriers, whether in cash or by deduction, for

value of lost or damaged property, should be covered into the Treasury as miscellaneous receipts on account of "Proceeds of Government property." (Secs. 3617 and 3618, Revised Statutes; 22 Comp. Dec., 379, 703.)

190. *Expense of sale to be deducted.*—Whenever the sale of Government property is authorized and there is an expense in connection with such sale the expense, supported by proper subvouchers, should be deducted from the gross receipts and the net proceeds only should be deposited to personal credit under "Miscellaneous receipts, proceeds of Government property." The officer conducting the sale or receiving the proceeds thereof should furnish the following certificate:

I hereby certify that the above statement is true and correct, and represents the actual amount received and expended.

(Treasury Circular 6, Jan. 9, 1897.)

191. *Abstracts of collection.*—For any collection made by a disbursing agent "Abstracts of collection" (Form 4–106b) must be rendered in duplicate, on which should be shown the date of receipt, the name of the party from whom received, the amount, and the appropriation or fund to be credited. Collections from different funds should be kept distinct.

192. *Receipts for office work.*—Moneys received by the United States surveyors general for work to be done in their offices should be accounted for in accordance with Circular No. 483, dated June 29, 1916.

DISBURSEMENTS.

EXPENDITURES.

193. *Advance decisions by comptroller.*—Section 8 of the act of Congress approved July 31, 1894 (28 Stat., 208), provides:

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

All requests for decisions by the comptroller must be submitted through the Secretary of the Interior.

194. *Conditions precedent to.*—The conditions necessary before a disbursing officer may pay any claim are that he shall have filed a bond; that the bond shall have been approved by the Secretary; that he shall have made requisition on this office for an advance of funds; that this office shall have requested the Treasury Department to make such advance; that the necessary amount from the particular appropriation shall have been placed to his official credit with the United States Treasurer; that he shall have knowledge of the funds

being so placed; and that a voucher made up in the prescribed form shall have been presented to him for payment. (Secs. 3623 and 3678, Revised Statutes; 4 Comp. Dec., 317, 568; Comp. Dec., Sept. 23,

CHECKS.

195. *In general.*—Payments should be made by check unless it is impracticable to make payment in that manner; the checks to be numbered in the order in which they are drawn, beginning with No. 1 for the first check and continuing in one series so long as the officer or employee continues as a disbursing officer (checks are numbered when printed in accordance with officer's requisition—Form 1231); each check should bear the date on which it is drawn; should be in favor of the party, by name, to whom the payment is to be made (except when drawn for cash under paragraph 301); should agree in amount with the voucher in payment of which it is drawn; must show on the face or back "the object or purpose to which the avails are to be applied," the purpose being clearly but briefly indicated in some such form as "Pay," "Pay roll," "Purchase of subsistence," "Purchase of supplies," "Pay and expenses," etc.; and must be identified with the voucher upon which it is issued in payment by having noted thereon the number of the voucher. (For outstanding see par. 312.)

196. *Check stubs.*—The title of the appropriation should be noted on the check stub, together with the date, name of payee, and voucher number, but it is not necessary that the appropriation should be shown on the check.

197. *Issuing duplicate checks.*—Immediately upon the loss of a check, the owner, to better protect his interest, should, in writing, notify the office or bank on which it was drawn of the fact of such loss, stating the name of the disbursing officer or agent by whom it was drawn, describing the check—giving, if possible, its date, number, and amount—and requesting that payment of the same be stopped. The disbursing officer or agent who issued the original check should also be notified. The necessary instructions relative to the issuance of duplicate checks (Treasury Circular Form 1343, Apr. 14, 1916) and blank indemnity bond may be obtained on application to this office. (Secs. 3646—as amended and reenacted by acts of Feb. 23, 1909, and Mar. 21, 1916—and 3647, Revised Statutes.)

198. *Spoiled or canceled checks.*—Spoiled or canceled checks should be sent quarterly direct to the auditor for preservation and future reference.

VOUCHERS IN GENERAL.

199. *Forms of vouchers.*—A voucher made up in the prescribed form may be a "Voucher for personal services" (Form 4–665a), a

"Pay-roll voucher" (Form 4–112), a "Voucher for services and traveling and other expenses" (Form 4–152), a "Voucher for witness's services" (Form 4–665e), a "Voucher where testimony is taken by deposition" (Form 4–665d), or a "Voucher for purchases and services other than personal" (Form 4–665b). These vouchers will be discussed later in the order named.

200. *To be in favor of claimant—Assignments void.*—All vouchers must be stated in the name of the person, company, or corporation rendering the service, and checks drawn by disbursing officers in payment of such vouchers must be in favor of the party, by name, to whom the payment is to be made, and payable "to order," the assignment of claims upon the United States being prohibited by section 3477, Revised Statutes.

201. *To be filled in before signature.*—All vouchers must be completely filled in by the payee, or before signature by the payee, without alteration or erasure at any time; and all vouchers (except vouchers for personal compensation for services rendered under the personal supervision of some administrative officer and so certified by him, and vouchers for services and traveling and other expenses) must be certified by the claimants as correct and just.

202. *Signature to.*—Each voucher must be signed with the full name of the payee and, if signed by an agent, with the full name of his authorized agent, the relation of the agent to his principal being shown in all cases where a voucher is signed by other than the payee. When a voucher is signed in the name of a firm, company, or corporation, the name of the person writing the firm or corporate name, as well as the capacity in which he signs, must appear, and if a signature is made by mark, the mark must be witnessed by a disinterested party.

203. *Certifying officer.*—All vouchers, before payment by a disbursing officer, must be certified to as correct by some administrative officer, such as United States surveyor general, supervisor of surveys, assistant supervisor of surveys, United States surveyor or transitman, register or receiver of United States land office, chief of field division, special agent, mineral examiner, timber cruiser, practical miner, detailed clerk, etc.

204. *Approving officer.*—The commissioner is approving officer for expenditures from any appropriation under his control; surveyors general are approving officers for vouchers covering the salaries and expenses of their several offices; the supervisors of surveys and assistant supervisors are approving officers for vouchers pertaining to surveys in the field, and it is required that all such vouchers shall receive the approval of one of these officers; registers and receivers are approving officers as to the expenses of their own offices, and chiefs

of field divisions are the approving officers for the expenditures in their respective divisions. Ordinarily when a voucher would be approved by the same officer that has certified to the service represented thereby his signature on the same voucher as an approving officer is not required. The approval of a voucher by a disbursing officer serves no purpose whatever; they are not approving officers. The space for approval on vouchers sent to Washington, D. C., for direct settlement must be left blank by the usual approving officers in the field, because such vouchers must be approved by the commissioner or assistant commissioner.

205. *Numbering.*—Vouchers should be numbered in the order in which they are paid, without reference to the character of the voucher, the period of service covered, the appropriation chargeable, or whether the voucher is supplemental to one already paid. The first voucher paid by a disbursing officer during a fiscal year will be numbered 1 and the others in numerical order in a single series throughout that fiscal year. The filing of a new bond during the year in no way affects this series of numbers.

206. *Appropriation to be shown on voucher.*—The full and correct title of the appropriation chargeable must be indorsed in the proper place at the top of each voucher and each memorandum copy thereof, and if a voucher is chargeable to two or more appropriations the title of each appropriation must be shown, together with the specific amount chargeable to each appropriation. In the latter event the time chargeable to each or other facts controlling the division between the appropriations must be shown on the voucher or in a statement attached thereto.

VOUCHERS FOR PERSONAL SERVICES.

207. *For personal service, including pay rolls.*—A payment to one individual for personal services should be supported by a "Voucher for personal services" (Form 4–665a), and, where several employees are paid at one time, as at the end of the month or at the close of a particular period, a "Pay roll voucher" (Form 4–112) should be used. Services of the entire office force, or of the field party, for a particular period may be listed on a single "Pay roll voucher," although chargeable to several appropriations, if the names are grouped according to appropriations. Whichever form of voucher is used it should not cover services in more than one month.

208. *Pay roll vouchers, etc.—Must show what.*—Vouchers covering personal services must show the name (first name, middle initial, and surname, or first initial, middle name, and surname—John M. Doe or J. Marcus Doe), the dates, inclusive, of service, the rate of compensation, and the amount, and, if there are any days excepted from the number included in the dates inclusive of service, the specific

days excepted must be shown. Care should be taken that on the first voucher an employee's name (especially field assistants) shall be written fully, correctly, and legibly, and that on each succeeding pay roll the name shall be entered in the same manner, or explanation made as to the reason for any change. Do not write John M. Doe one time, J. Marcus Doe another, or John Doe, Mark Doe, J. M. Doe—write the names uniform on all vouchers.

209. *Payee's certificate omitted.*—If vouchers covering personal services are rendered without the certification of the payee under paragraph 3 of the Treasury Circular No. 52, dated July 29, 1907, which provides "that vouchers for personal compensation for services rendered under the personal supervision of some administrative officer and so certified by him, need not be certified by the claimant, provided the voucher describes specifically the position, the rate of compensation, and the period covered," those conditions must be fulfilled. The term "assistant" does not describe specifically the position of an employee.

210. *Personal service defined.*—The comptroller, in Treasury Circular No. 36, June 21, 1911, defines personal services as "services which are personal in character—that is, which consist in acts of particular persons, performed by virtue of a contract (express or implied), or by virtue of the existence of an official relation, which places the skill or ability of the persons rendering such services under the continuous direction and control of another (employer or official superior) during the period of service * * *."

211. *Computation of salaries.*—The act of Congress approved June 30, 1906 (34 Stat., 763), providing for computation of annual or monthly compensation, has been construed by the comptroller under date of March 24, 1917 (23 Comp. Dec., 793), as requiring that—

1. Each calendar month shall consist of 30 days, and the computation of salary shall be by each month separately, one-twelfth of an annual salary constituting the compensation for each month.

2. One-thirtieth of a monthly installment of salary is to be allowed for each day of service from the 1st to the 30th, inclusive. The last day of February counts as three days of service for pay purposes (two days in leap years).

3. The 31st day of a month enters into the computation of salary only where there is *one day's* absence in a nonpay status on that day—that is, absence in a nonpay status did not occur also on the 30th. For such absence on the 31st one day's pay is forfeited.

212. *Per diem rates of compensation.*—The above method of computation applies only to annual or monthly compensation of persons in the service of the United States and not to per diem rates of compensation, rents, or livery, which are explained in paragraph 299. Except where otherwise specified field employees at a per diem rate of compensation will be allowed payment for Sundays and legal holidays included within the period of service.

213. *Rate in Alaska.*—An employee who receives a higher rate of compensation or per diem in lieu of subsistence while in Alaska is not entitled to such higher rate before arrival at an Alaskan port in going nor after departure from an Alaskan port in returning, and all vouchers including the commencement or completion of a period at the higher rate must show time of arrival at or departure from Alaska.

214. *Oath of office.*—Section 1757, Revised Statutes, as amended by section 2 of the act of Congress approved May 13, 1884, provides that "any person elected or appointed to any office of honor or profit either in the civil, military, or naval service of the United States," shall take and subscribe the following oath:

I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

215. *Oath to be filed before payment.*—The comptroller has held (4 Comp. Dec., 95) that a person employed or appointed to any position not created by law and payable from a general appropriation is not an officer within the meaning of section 1757, Revised Statutes, and that, therefore, the taking of an oath in such cases is not a condition precedent to the right of compensation. However, as the regulations of this department require all classified employees to take an oath of office in form as above quoted, disbursing officers are not authorized to make payments to such employees until the required oath has been filed.

216. *Services before taking oath.*—As soon as the necessary oath has been filed payment of compensation may be made from the date of entrance on duty notwithstanding the fact that the oath may not have been taken until some time subsequent to the date of entrance on duty.

217. *Expense of taking.*—In no case is an employee entitled to reimbursement for the expense incident to taking the oath of office.

218. *Salaries of statutory clerks.*—The salaries of clerks, chiefs of divisions, etc., of this office are paid by the chief disbursing clerk of the department on a pay roll certified by the Secretary on a certificate from this office as to the changes in the office force during the month, and no other disbursing officer should pay salaries of any such employees unless he is specifically directed to do so.

VOUCHERS FOR SERVICES AND TRAVELING AND OTHER EXPENSES.

219. *Traveling expenses—Only actual to be allowed.*—The act of Congress approved March 3, 1875 (18 Stat., 452) provides:

That hereafter only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, except marshals, district attorneys, and clerks of the courts of the United States and their deputies; and all allowances for mileages and transportation in excess of the amount actually paid, except as above excepted, are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision.

220. *What may be reimbursed.*—The Comptroller of the Treasury in a decision dated July 29, 1905 (12 Comp. Dec., 48), holds that:

Employees are not entitled to reimbursement for expenses of the Government paid by them out of their private funds, except where such expenditures were for services engaged or articles purchased under stress of urgent and unforeseen public necessity or for personal traveling expenses.

A field employee of the General Land Office may be reimbursed as a part of his personal traveling expenses, for expenditures made by him for guides where their services were necessary and their employment occasional and temporary.

A field employee of the General Land Office is not entitled to reimbursement for expenditures for "assistants" unless it appears that they were employed under urgent and unforeseen public necessity, and that such employment did not continue for any considerable period of time.

221. *Traveling expenses defined.*—Unless otherwise provided by law, the expenses of all officers or other persons traveling on duty or other public business for or on account of this office shall be confined to actual and necessary traveling expenses as hereinafter defined.

222. *Authority for.*—All travel expenses shall be either authorized or approved in writing by the department, by this office, or by some subordinate officer to whom such authority has been properly delegated, and, except as provided in paragraph 223 following, the authority shall be issued prior to the incurrence of the expense; shall specify the travel to be performed as definitely as circumstances will permit, and shall be attached to the voucher for reimbursement or (if on file in the auditor's office) be referred to therein.

223. *Approvals.*—(*a*) Whenever the travel is a necessary and regular accompaniment of the office or place to which an appointment has been made and the general classes of the expense to be allowed are governed by law or are specified in the appointment, or (*b*) whenever the expense has been incurred on account of an emergency, the approval by this office shall be sufficient authorization. However, all vouchers for reimbursement on account of emergency travel without prior authorization must be accompanied by full and satisfactory explanation of the facts constituting the emergency.

224. *Headquarters.*—The selection of official stations and the assignment of temporary headquarters is placed under the control of the commissioner, subject to revision by the Secretary on his own initiative or upon application of an interested party. The official stations of chiefs of field divisions have been definitely established and special

agents, mineral examiners, timber cruisers, practical miners, and other employees in that branch of the service are to be considered as having their official headquarters with the chiefs of their respective divisions. The official station of the supervisors of surveys is Denver; and the official stations of the assistant supervisors of surveys, surveyors, and transitmen are with the surveyors general of the States to which they may be assigned or such other quarters as may be authorized or designated within that city. Field assistants to surveyors will not be assigned headquarters.

225. *Change of headquarters.*—Employees may be ordered from one division or district to another from time to time and the headquarters of the division or district to which they are assigned will be their headquarters while engaged in such division or district. However, if it is known in advance that the new assignment is purely temporary and that the employee will return to his old headquarters at its termination, and his travel orders state specifically in advance that his headquarters will remain unchanged during the period of detail, his headquarters will remain the same.

226. *Route.*—All travel performed on official business must be by the shortest practicable route, unless otherwise authorized, and without any unusual or unnecessary delay. The route shall be carefully arranged to avoid unnecessary duplication of travel. When diversion from the shortest practicable route is permitted, the extra expense to be borne by the traveler, the charges for meals shall be limited to the meals which ordinarily would have been taken had the shortest route been traveled, and the extra time consumed shall be charged as annual leave or leave without pay.

227. *Limitations and specific exceptions.*—Certain limitations on, or specific exceptions to, the general rules governing travel expenses and allowances may here be noted:

Assistants such as are enumerated in paragraph 254 are entitled to sleeping car accommodations, provided the Government is not charged with more than $3.50 for one day for such accommodations and subsistence combined. The principal assistant and assistant chainman may be transported from the headquarters of the State or from their home, if within the State, to the field; other subordinate assistants may be transported from the outfitting point or from the nearest town thereto (not distant from the field more than 50 miles by rail); and those assistants who remain to the close of the season's work may be returned to the point from which they were originally transported. The two assistants first named may be transported from one group to another within the State and the other assistants may be so transported when the distance in each case is no more than 50 miles by rail. Assistants other than the first two may not be transported a distance greater than 50 miles by rail, except (*a*) in

cases where specific and special authority is granted, and (*b*) in cases where such assistants are employed on one group and taken by successive stages to other groups each no more than 50 miles by rail from the next preceding and, having remained to the end of the season, are then entitled to transportation back to the point from which they were transported, without reference to the distance. If in rare instances cases arise in which it is impossible to engage assistants at the rate of compensation stated in paragraph 254 a statement of the facts in the particular case should be transmitted to this office through the proper channel (assistant supervisor and supervisor of surveys) and authority for paying a greater amount asked, and, if cases should arise in which assistants can not be employed with such travel allowance as is authorized by this paragraph, the facts should be stated by or through the assistant supervisor to the supervisor of surveys who, if the facts seem to warrant, may authorize transportation for a greater distance within the State. Should the emergency in either case be such as to preclude the possibility of securing previous authorization the nature of the emergency should be clearly set forth in writing as directed by paragraph 252.

228. *Daily reports.*—All detailed clerks and other employees not in the surveying force (who render weekly reports) or regular field service (who submit daily reports) will render daily reports for all periods of service outside of the District of Columbia, adapting Form 4–509, in accordance with circular of September 30, 1916.

Expense vouchers will not be approved until reports for all the days covered thereby are received in this office.

229. *Travel expense—On entrance on duty.*—Field employees, the nature of whose duties ordinarily require them to travel on duty, whose appointments are signed by the Secretary or the commissioner, will be allowed traveling expenses to their respective divisions or districts, and may, in the discretion of the commissioner, be allowed traveling expenses in returning from the field on separation from the service or on indefinite furlough without pay.

All other employees must place themselves at the place of official duty at their own expense, unless, when employed under lump-sum appropriations, other provision is made as to the payment of traveling expenses as a part of their compensation in their contract of employment and except as herein otherwise provided. Agreements to pay traveling expenses must be made in advance of the incurrence of the expense, and only after authority to enter into such agreements has been properly delegated.

230. *Travel expense—On change of station.*—A person who is away from his official station on his own business or pleasure must, at the expiration of his leave of absence, report to his station, and if during the absence the station is changed, and the expenses of

travel to the new station are not greater than those of return to the former station would have been, there can be no allowance of traveling expenses to the new station. Reimbursement can be allowed for the excess only of the distance from the place of receipt by him of his order to his new station over the distance to his old station. (7 Comp. Dec., 84; 8 Comp. Dec., 190.)

A clerk detailed to temporary duty in the field while on leave of absence is entitled to reimbursement for traveling expenses from the place where he receives his instructions to travel to the place to be visited and return to the place where his instructions were received. (Comp. Dec., Jan 18, 1915; Jan. 27, 1916.)

ALLOWABLE TRAVELING EXPENSES.

TRANSPORTATION.

231. *Railroad, steamer, and other fares.*—Fares upon railroads, stage coaches, steamers, packets, or other usual modes of conveyance. Charges for fares on steamers, packets, or other means of travel by water must show whether meals or lodging, or both, were included without increase of fare over the lowest first-class rate. (For meals on boats see par. 246; for excess fare on trains see par. 252.) Through tickets, excursion tickets, and round-trip tickets must be purchased whenever practicable and economical. (For transportation request see pars. 274–276; for mileage and scrip see pars. 276–281.)

232. *Excess baggage.*—Charges for excess baggage, when the extra weight consists of public property or private property to be used for public purposes. Such charges must be explained. When practicable, excess baggage should be forwarded by freight or express, and if prior authority is procured may be covered by Government bill of lading. When using bill of lading a consignor must deliver shipping order to agent of receiving carrier, send original by first mail to consignee and send blue memorandum copy by first mail to this office (except such as must come through a surveyor general). Mailable articles should be forwarded by mail under penalty label by the Government officer or employee.

233. *Special conveyances.*—Hire of special conveyances, such as taxicabs or other automobiles, livery, or boat, only when no public or regular means of transportation are available and the necessary incidental expenses connected therewith, such as feed and stabling of horses and the subsistence of driver, ferriage, and tolls. Also services of and subsistence of guide when no driver is employed. If the charges for special conveyance include feed and stabling of horses and subsistence of driver, or any such items, the principal voucher or subvoucher must so state. The advantage and economy of hiring auto-

mobiles instead of teams must be shown in connection with all charges for auto hire, and the maximum amount that may be paid by special disbursing agents without specific authorization by the commissioner is $20 a day for hire of each auto. If in rare cases it is necessary to exceed this rate the excess amounts must not be paid until full explanation has been submitted to the commissioner and receives his approval.

234. *Transfer of self and baggage.*—Fares on street car, transfer coach, omnibus, or other vehicle and the transfer of baggage. A charge not to exceed 50 cents for either transfer coach or omnibus, or for the transfer of each piece of baggage, if within the customary rate, will be allowed. Payment in excess of this amount must be explained in writing, and *street cars must be used when practicable.*

235. *Checking and handling of baggage.*—Charges for checking or porterage of hand baggage at hotels and stations, not exceeding 10 cents for each piece.

236. *Steward fees and steamer chairs.*—Customary fees to stewards and others on steamers, as follows: For an ocean trip, not exceeding a total at the rate of $1 per day or fraction thereof; on coastwise steamers, not exceeding 50 cents per day; rent of steamer chair, not exceeding $2. On ocean and coastwise steamers, where meals are not included in the cost of passage, fees to dining-room stewards and dining-room waiters must be included as a part of the maximum daily allowance for subsistence. Fees to porters and cabin or deck stewards on such vessels will be deemed expenses of transportation.

237. *Pullman fares and state-room accommodations.*—Sleeping-car fare for one double berth, customary state-room accommodations on steamers and other vessels, and fare for one seat for each person in sleeping or parlor car. The subordinate assistants mentioned in paragraph 254 are not entitled to parlor car or seat fare and are entitled to sleeper fare, provided the Government is not charged with more than $3.50 for one day for such accommodations and subsistence combined. Pullman charges must specify whether for a seat or upper or lower berth, and whether for standard or tourist service.

238. *Porter fees.*—Porter fees on sleepers must not exceed 25 cents per night. Porter fees on sleeping cars used in the daytime or in parlor cars or chair cars must not exceed 15 cents per trip.

SUBSISTENCE.

239. *Maximum amount allowed.*—Act of Congress approved April 6, 1914, provides that:

> On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away

from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; nor shall any allowance or reimbursement for subsistence be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties.

Therefore, except where otherwise expressly provided by law, subsistence items hereinafter defined in paragraphs 240 to 243 may not be allowed in excess of $5 per day. While in camp surveyors and their assistants will be subsisted from Government stores; such employees in Alaska will, when going to or returning from the field, be allowed reimbursement up to this maximum in cases where a lower rate can not ordinarily be obtained; in the States the maximum for surveyors and their assistants is $3.50 per day, while going to or returning from the field. No employee is allowed subsistence, reimbursement therefor, nor a per diem in lieu thereof while at his official headquarters or at his home, unless his presence in his home town is made necessary in the performance of field duties.

240. *Meals and lodging.*—Meals and lodging when the detention away from headquarters is incident to or necessary for the performance of the duties for which the travel is ordered, and necessary meals en route, but for no items of refreshment other than the ordinary food provided for travelers. Charges for meals must be itemized by meal in every instance.

241. *Waiters' fees.*—Fees to waiters at hotels or on dining cars or boats not exceeding 10 cents per meal or 30 cents per day.

242. *Baths.*—Charges for baths not exceeding 25 cents each while absent from designated headquarters.

243. *Telegraph expenses.*—Charges for telegrams reserving hotel accommodations.

244. *Per diem in lieu of.*—Supervisors of surveys, assistant supervisors of surveys, the chief of field service, chiefs of field divisions, special agents, mineral examiners, timber cruisers, and practical miners are allowed $3.50 per diem in lieu of subsistence when engaged in field work or traveling on official business outside the District of Columbia and away from their designated posts of duty, and of these, those employed under protecting public lands, timber, etc., will, while on duty in Alaska, receive $5 per diem under the same conditions. During leave of absence that may be granted no subsistence or per diem in lieu thereof will be allowed from the date that such leave begins to the day that the employee again enters upon active duty in a travel status.

245. *To include what.*—Per diem in lieu of subsistence is held to be in lieu of the items mentioned in paragraphs 240 to 243, and no charges for any other items of subsistence will be allowed.

246. *On board boats.*—No per diem in lieu of subsistence will be paid during travel on a boat when the charge for transportation includes meals and berth, but reimbursement for other authorized items of subsistence not included in the charge for transportation may be allowed.

247. *Fractional days.*—The allowance of per diem in lieu of subsistence being dependent upon absence from official headquarters or designated posts of duty, if the traveler leaves his headquarters before 12 o'clock noon, to be absent on duty the balance of the calendar day, he will be allowed the whole per diem, and when returning to headquarters after traveling from midnight, if he arrives after 12 o'clock noon he will also be entitled to the whole per diem, but if in departing he leaves after noon or in returning arrives before noon only one-half of the per diem will be allowed.

If a traveler leaves headquarters any time during the day and returns thereto before midnight, only one-half of the per diem will be allowed.

Per diem will be allowed for days on which the traveler boards or departs from a boat when the charge for transportation includes meals and berth, exactly the same as if the boat were his headquarters. When the whole or half per diem is allowed, no other items of subsistence are allowable for that day.

One-fourth of the per diem allowance shall be deducted for each meal taken in a Government-maintained camp.

Travel expense vouchers shall show the hour and date of each departure from and arrival at headquarters, and each embarkation or disembarkation, and state specifically the meals taken in a Government-maintained camp during the period for which they are stated.

MISCELLANEOUS EXPENSE.

248. *Telegraph service.*—Telegrams and cablegrams on official business at Government rates. Night service should be employed when practicable. Telegrams should be sent as "paid" messages—that is, chargeable to the sender—should be signed by him, and should be marked as follows:

Official business: Government rate. Charge General Land Office. Card No. ———.

Classified employees authorized to travel on duty, as well as surveyors general, are supplied with Western Union and Postal Government rate cards, and their card numbers should be shown on the original messages. If compelled by force of circumstances to pay for the telegram, the necessity therefor should be explained in writing. Charges for telegrams and cablegrams must be accompanied by copies of messages, marked to show whether sent at day or night rate.

249. *Telephone service.*—Reasonable charges for the use of telephones on official business. Charges for long-distance calls should show with whom the communication was held and the points between which the service was rendered.

250. *Freight and express.*—Freight and express charges on shipments in connection with official duties in the field, when it is necessary to make payments from private funds, but all such charges must be supported by a statement to the effect that no Government bill of lading was used. Express and freight receipts must be furnished for all such charges, regardless of the amount, showing weight and rate.

251. *Incidental expenses.*—Charges for ink, mucilage, library paste, and typewriter oil (but for no other items of stationery), and charges for other miscellaneous items of expense peculiar to the exigencies of the work on which employed, such as kodak supplies, developing and printing in connection with cases under investigation. Charges for registry or post-office money-order fees when official business demands either.

252. *Emergency expenditures.*—Emergency expenditures not enumerated in the foregoing classes, such as payment of extra fares on limited trains when delay would injuriously affect the public interests. In connection with all emergency charges full authority for which does not previously exist the nature of the emergency must be clearly set forth in writing and must receive the approval of this office or of the subordinate officer to whom such authority may have been delegated.

253. *Field party expense.*—Surveyors in charge of parties are authorized to hire (under proper supervision) the assistants named in paragraph 254; to procure or otherwise arrange for their subsistence en route; to purchase the supplies, utensils, and other minor articles necessary for subsisting them in camp, for maintaining such camp, and for the proper conduct of the surveying work; and to hire the necessary transportation equipment when no Government animals or wagons are available. When such service is temporary and it is impracticable to have them paid by a disbursing officer, expenses of this character may be paid from personal funds, subvouchers to be taken therefor in accordance with paragraphs 264 to 268, inclusive. Subvouchers for subsistence supplies for camp use must show the number of persons composing the field party for the use of which the supplies were purchased. Expenditures from personal funds for items enumerated in this paragraph must be limited strictly to those obligations which it is impracticable to have paid directly by a disbursing officer.

254. *Rates of compensation authorized.*—Compensation for the surveying service will be limited to the following rates:

Surveyor's principal assistant, teamster or packer, and cook for double party, $60 per month each; assistant chainman, $55 per month each; cook for single party, $50 per month each; all other subordinate field assistants including axmen, cornermen, flagmen, rodmen, etc., $45 per month each. In Alaska the following rates may not be exceeded except upon special authority from this office: Packers and cooks, $105 per month when hired in Alaska, or $90 per month when hired in the States and their fares paid to Alaska; others, $90 per month when hired in Alaska or $75 per month when hired in the States and their fares paid to Alaska. Existing authority to exceed temporarily the above rates of pay is not to be disturbed by this more permanent regulation.

255. *Fees advanced to witnesses.*—Section 2 of the act of Congress approved January 31, 1903, providing for the compulsory attendance of witnesses in land hearings, provides "that witnesses shall have the right to receive their fee for one day's attendance in advance." When, therefore, an employee of this bureau serves a subpœna on a witness under the act mentioned and the witness at that time demands his fee for one day's attendance and mileage in advance, he may advance the amount from his personal funds, taking a subvoucher therefor, and claim reimbursement in his regular voucher for services and traveling and other expenses. Such items will be listed after the regular expense items, a space being left between, and the employee will indorse in parentheses over the double line above "date" and "subvoucher number" the amount chargeable to the appropriation for "expenses of hearings in land entries," as "(Hearings, $2.85)."

256. *Items not allowed.*—Employees will not be allowed reimbursement for exchange paid for cashing drafts or checks received in payment of vouchers for services and traveling and other expenses, nor will they be allowed reimbursement for surgical or medical fees.

257. *Tax exemption.*—Payments by employees for freight, express, passenger, sleeping or parlor car, telegraph, telephone, and radio service, incurred in connection with official business, are exempt from the Federal tax imposed by act of Congress approved October 3, 1917 (40 Stat., 314). In cases of transportation, exemption certificate, Form 731, issued by the Commissioner of Internal Revenue (Interior Form 1–398) should be delivered to the conductor or agent in lieu of the tax. In other cases the employee should state that the matter is official business of the United States Government. A certificate should be made on vouchers containing such taxable items, as follows: "I certify that no war revenue tax is included in the above charges."

258. *Injuries to employees.*—Every civil employee receiving an injury while in the performance of duty should immediately seek

first-aid treatment, and promptly make report of his injury to his immediate superior. Under act of September 7, 1916 (39 Stat., 742) he is entitled to receive reasonable medical, surgical, and hospital services and supplies, to be furnished by United States medical officers and hospitals where possible, and, during the period of total disability, compensation is payable at the rate of two-thirds of his monthly pay, but can not exceed $66.67 per month. Annual or sick leave, when available, may be used in preference to compensation under this act. Claims under this act are to be settled by the United States Employees' Compensation Commission, Washington, D. C.

EVIDENCE OF EXPENDITURE.

259. *Memorandum of expenses.*—Every officer or other person traveling should keep a memorandum of the expenses incurred, noting each item as soon as payment is made.

260. *The principal voucher.*—All accounts for reimbursement on account of travel expense, or other expense the reimbursement of which may be authorized, shall be submitted on the regular voucher form (4–152) approved by the Comptroller of the Treasury; shall be itemized as fully as practicable and in accordance with paragraphs 269 to 273, inclusive, following; shall be supported by subvouchers, as required by paragraphs 264 to 268, inclusive, and shall include the services rendered and expenses incurred during a particular month.

261. *How verified.*—All travel-expense vouchers, except as noted below, must be sworn to in the manner and form prescribed by law or approved by the Comptroller of the Treasury.

As provided by section 8 of the act of August 24, 1912, affidavits may be executed before a postmaster, an assistant postmaster, a collector of United States customs, a collector of United States internal revenue, the chief clerk of any department or bureau, or the clerk designated by him for that purpose; the superintendent, acting superintendent, custodian, or principal clerk of any national park or other Government reservation; the superintendent, acting superintendent, or principal clerk of any Indian superintendency or Indian agency; the chief of a field party, or a notary public who is in the service of the United States. The officers named are not permitted by law to make any charge for such service and no jurat fee will be allowed therefor.

Affidavits executed before any other officer who has been authorized to administer oaths for general purposes and whose signature is attested by an official seal will be accepted, but no jurat fee will be allowed.

262. *Affidavit may be omitted when.*—Where the employee is far removed from an officer before whom the oath can be taken, or where,

by the taking of such an affidavit, the disclosure of the fact of the presence of a Government officer, agent, or employee at the particular place where such affidavit is taken will be detrimental to the public interests, the oath may be omitted and the account certified on honor as correct, provided the employee shows on the voucher over his signature the place and date of such certification on honor and the conditions which made it impracticable to make affidavit. In cases where the affidavit is omitted the employee should strike out "I do solemnly swear" and insert in place thereof "I certify on honor," and should sign such certificate, after which, on the lines provided for the officer's jurat, he should show the place and date of certification and the reasons which made the affidavit impracticable, which statement he should also sign.

263. *False accounts—Penalty.*—False or fraudulent representations in connection with the rendition of reimbursement or other accounts are unlawful, and the offender is liable to a heavy fine or imprisonment under the act of Congress approved March 4, 1911 (36 Stat., 1355).

264. *Subvouchers—Defined.*—A subvoucher consists of two parts, in both of which it must be complete: A receipt showing that a specific amount, written therein in words, was received on the date indicated from the party claiming reimbursement, and an account showing, if for purchases, the date of purchase and character, quantity, and price of the articles, and, if for services, the character of the service or capacity in which employed, dates inclusive of service, number of days, rate per day, or per meal, as the case may be, and amount.

265. *Subvouchers—To be filled in before signature.*—Subvouchers, like vouchers, must be completely filled in by the payee, or before signature by payee, without alteration or erasure at any time, and must be signed with the full name of the payee or his authorized agent, the relation of the signer to his principal being shown in such cases, and if a signature is by mark it must be witnessed by a disinterested party.

266. *Subvouchers—When required.*—Express and freight receipts will be accepted as subvouchers and must be furnished for all such charges. The weight and rate must be shown.

Copies of telegrams or of cablegrams will be accepted as subvouchers, and must be furnished in support of all such charges. The copy shall show whether the message was sent at day or night rate.

Subvouchers must also be furnished for all other charges in excess of $1, except as noted below in paragraph 267.

267. *Subvouchers—When not required.*—(*a*) Subvouchers are not required for railroad or steamboat fares, sleeping or parlor car fares,

taxicab fares (see pars. 233 and 234), nor for separate meals specifically named which were not taken in connection with lodging.

(*b*) Subvouchers will not be required when the taking thereof would disclose the identity of the traveler and the disclosure would be detrimental to the public interest, provided authority for their omission is granted by the Secretary, or by this office.

268. *Subvouchers—How stated.*—Subvouchers for hotel expense must state the beginning and ending of the full period of service and the rate by the day or week. The "day" shall be considered as beginning with breakfast and ending with lodging. Receipted bills on the regular billheads of the hotel are acceptable as subvouchers, provided they are properly made out to show the entire period and the services rendered.

Subvouchers for livery and other special transportation must describe the service hired, as "one horse and buggy," "two horses and wagon," "with driver;" state the quantity of service rendered, and the rate of compensation by the day, hour, or other unit, as may have been agreed. If the subsistence of driver or team is included in the cost of hire, that fact must be stated.

ITEMIZED STATEMENT OF EXPENSES.

269. *What shall be included in.*—Every item of expense incurred during a particular month must, in every case, be included in the voucher for that month; or, if omitted therefrom or deducted before payment, must be stated in a supplemental voucher for the month to which such expenses pertain, explanation being made in connection with omitted items as to why they were not included in the original voucher.

270. *Manner of stating items.*—The items of expense shall be stated in the order in which they are paid, the date of payment being shown in the date column and the subvoucher number in the subvoucher column; each item should be carried out separately, except in the case of subvouchers each of which should be stated as one item, and each item should show (*a*) date of payment, (*b*) number of subvoucher, if any, (*c*) the name and address of payee, (*d*) the character of the service or capacity in which employed, (*e*) the dates inclusive of service where time is a factor, and (*f*) the amount, following carefully the sample given under paragraph 273. If an item is not supported by a subvoucher the charge in the itemized statement should set forth all the facts required of subvouchers except the payee's receipt. (See pars. 264 to 268.) In writing the itemized statement the lines should be at the intervals indicated on the blank and there should be no writing between the lines.

271. *When an assistant's expenses may be included.*—(*a*) When an employee is traveling on duty with assistants he may pay their

traveling expenses from his personal funds and include such expenses in his own "Voucher for services and traveling and other expenses," supported by subvouchers where necessary, and (*b*) when a driver or other employee is detailed to a near-by town or railroad station for provisions, supplies, mail, etc., and in that connection expends money advanced him by his principal, for subsistence of himself and keep of team, such expense may be stated in the principal's voucher as though made by him direct. Subvouchers in such cases should be taken in the name of the principal, showing payment by the detailed employee as deputy.

272. *Assistants' expenses not included when.*—In all other cases every assistant or subordinate employee must state in his own name, supported by subvouchers and duly sworn to, a "Voucher for services and traveling expenses" for all items of expense paid by him that should be reimbursed by the Government.

273. *Sample itemized statement.*—In this sample no attempt is made to connect any charge with a prior one; each item must be considered as standing alone. The sample does not authorize any of the expenses represented, but when an employee has incurred an authorized expense he may refer to the sample as a guide for stating the charge in the approved form on his voucher. This warning is necessary because the sample covers items that would be proper for an employee with actual subsistence, but not for one who receives a per diem in lieu of subsistence.

Date.	Sub-voucher No.	Itemized statement of expenses.	Amount.
1918.			
July 6	.....	D. & R. G. R. R., fare, Denver to Glenwood Springs, Colo.	$10.00
6	.....	Pullman Co., lower standard berth, Denver to Glenwood Springs	2.00
6	.....	Seat in parlor car, Alamosa to Denver	.75
6	.....	Alaska S. S. Co., fare, Seattle, Wash., to Valdez, Alaska	45.00
6	.....	Myrtle Point Stage Co., fare, Myrtle Point to Roseburg, Oreg.	7.00
7	.....	D. & R. G. R. R., fare, Walsenburg to Pueblo, Colo., for assistants, Chamberlain and Vandergift, at $2.25	4.50
8	1	Myrtle Point Stage Line, fare	2.00
9	2	George Wills, Durango, Colo., livery hire, July 8–9	10.00
9	3	George Wills, Durango, Colo., auto hire, July 8–9	30.00
9	4	Harry Ross, Tanana, Alaska, hire launch, July 9	10.00
9	.....	George Wills, Durango, Colo., hire two horses and buggy, without driver, 9 a. m. to 11 a. m., July 9	1.00
10	.....	Howard Phillips, Newcastle, Colo., ferriage of self, two horses, buggy, and driver across Grand River	1.00
10	5	Howard Phillips, Newcastle, Colo., ferriage, July 10	1.50
10	.....	Toll over Rifle and Meeker turnpike, Rifle to Meeker and return	.75
10	.....	The Barton Ferry, fare, Barton to Amity and return	.50
11	.....	Fee to porter on sleeper, Denver to Glenwood Springs	.25
11	.....	Fee to cabin boy, Seattle to Valdez	.25
11	.....	Fee to porter on parlor car, Alamosa to Denver	.10
12	.....	Transfer self and baggage, hotel to depot, Alamosa	.25
12	.....	Transfer baggage, depot to home, Denver (3 pieces)	.75
12	.....	Street-car fares in Denver (3)	.15
13	.....	Checking baggage at depot, Denver (2 pieces)	.20
13	.....	Porterage on baggage at depot, Denver	.10
14	.....	Breakfast on dining car, Denver to Glenwood Springs	.85
14	.....	Fee to waiter on diner, breakfast	.10
14	.....	Foley's Cafe, Glenwood Springs, dinner, July 14	.35
14	6	John Small, Starkville, Colo., B. & L. self and two assistants, 12B–13L	18.00
15	7	James West, Durango, Colo., B. & L. team (75), and driver (75) 13S–14B	1.50

Date.	Sub-voucher No.	Itemized statement of expenses.	Amount.
1918.			
July 15	.....	John Ross, Durango, Colo., dinner for team (50), and driver (25).....	$0.75
15	.....	Frank Rose, Walsenburg, Colo., dinner for assistants, Chamberlain and Vandergift, July 15.....	.70
16	.....	Warren York, La Junta, Colo., 1 bottle of ink.....	.15
17	.....	Paul Gahn, Morley, Colo., services as guide locating section corner, 2 to 5 p. m., July 17.....	1.00
18	.....	Telegram, Trinidad, to United States Surveyor Jones, Denver (identification card not available).....	.20
18	.....	Telephone, Trinidad to Special Agent Jones, Denver (3 minutes).....	.90
19	.....	Registering report to Commissioner General Land Office.....	.10
20	8	D. & R. G. R. R., freight on 1 box of surveying instruments, Trinidad to Denver (Government B/L not available).....	.40
21	9	Wells Fargo & Co. Express, express on Jacobs staff, Trinidad to Walsenburg (minimum charge; no Government B/L available).....	.25
		TRANSPORTATION REQUESTS.	
22	001	D. & R. G. R. R., fare Denver to Glenwood Springs, Colo..... $10.00	
23	002	Pullman Co., lower standard berth, Denver to Glenwood Springs 2.00	
24	003	D. & R. G. R. R., fare Walsenburg to Pueblo, Colo., for self and assistants, Chamberlain and Vandergift, at $2.25..... 6.75	
25	004	A. T. & S. F. Ry., scrip book 85210 SA, for H. K. Carlton..... 90.00	
		108.75	
		MILEAGE.	
26	01A 02B	D. & R. G. R. R., Denver to Hotchkiss, Colo. {2701–3000. 1–98.	
27	02B	D. & R. G. R. R., Hotchkiss to Gunnison, Colo., 99–207.	
		PER DIEM.	
		Leave headquarters. Return headquarters. July 6, 10 a. m. July 14, 4 p. m..... 9 July 17, 12.30 noon. July 17, 10.15 p. m..... ½ July 19, 4.15 p. m. July 28, 10.45 p. m..... 9½	
		19	
			153.30

This total will, of course, be carried to the proper place on the reverse of the voucher where the grand total claimed will be shown, as follows:

Expenditures, as shown by foregoing itemized statement	$153.30
Services, July 1 to July 31, 1918, at $1,200 per annum	100.00
Per diem in lieu of subsistence, July 1 to July 31 (except 12 days—see statement), 19 days, at $3 per day	57.00
Total	310.30

NOTES EXPLANATORY OF FOREGOING SAMPLE.—Reference is herein made in each case to the number appearing in the date column. Quotation marks inclose statement of facts which should appear in the account part of subvouchers. Field employees can not be too deeply impressed with the necessity for stating their travel-expense vouchers in accordance with the sample, for by so doing all the requirements of the accounting officers will be met and the probability of suspension removed:

7. Whenever tickets are purchased for other than self, the name and titles of the extra travelers must be shown.

8. *Subvoucher 1:* "Fare on stage from Myrtle Point to about 10 miles out in the country and return on July 8, 1918." When fare is not between two definite points regularly traveled a subvoucher is required the same as for hire of special transportation.

9. *Subvoucher 2:* "Hire of 2 horses and buggy with driver for trip to country and return, distance traveled about 55 miles, from 8 a. m., July 8 to 7 p. m., July 9, 2 days at $5 per day, $10."

9 (*a*). *Subvoucher 3:* "Hire of automobile with driver, expenses included, for trip to country and return, distance traveled about 160 miles, from 9 a. m. July 8 to 5 p. m. July 9, 2 days at $15 per day, $30." A letter must accompany all vouchers in which charge is made for automobile hire, explaining the necessity therefor and stating the benefit to the Government.

9 (*b*). *Subvoucher 4:* "Hire of launch with services of boatmen, expenses included, to several points along the Tanana River, distance traveled about 25 miles, from 10 a. m. to 6 p. m., July 9, $10."

10 (*a*). *Subvoucher 5:* "Ferriage of—(name of employee)—2 horses, buggy, and driver across Grand River, July 10, $1.50." If the service is rendered by a regularly established ferry with fixed rates, and not through accommodations of a private individual, the charge may be stated as shown in last item under July 10.

(*b*) When a toll road is definitely located, the name and address of the party to whom the toll charge is paid may be omitted.

14. *Subvoucher 6:* "Board and lodging for—(name of employee) and assistants Miller and McDonald, July 12 breakfast to 13 lodging, 4 days at $1.50 per day each, $18."

15. *Subvoucher 7:* "Board and lodging team (75) and driver (75), July 13 supper to 14 breakfast, for the period, $1.50." Whenever possible the rate per day should be shown on subvouchers.

16. Any ordinary purchase is illustrated here. When several articles are purchased and a subvoucher fully enumerating them is furnished, a brief description of them as a class only need be shown in the itemized statement of expenses, as "supplies," "provisions," etc.

20. *Subvoucher 8:* "Freight on 1 box of surveying instruments, Trinidad to Denver, Colo., July 20, 1918, 100 lbs. at 40 cents per cwt. (no Govt. B/L used), $0.40." A receipt is required for all express and freight charges regardless of the amount. The weight and rate must always be shown, and there must be a statement as to the nonuse of a Government bill of lading. (See paragraphs 250 and 266.)

21. *Subvoucher 9:* "Express charges on Jacobs staff, Trinidad to Walsenburg, Colo., 8 lbs. (minimum charge—no Govt. B/L used), $0.25." Instead of showing rate in this instance the statement "minimum charge" is used and is sufficient.

274. *Transportation requests.*—Transportation requests are provided for the use of persons traveling on official business of this office. They protect the traveler from any disallowance on account of an overcharge by the carrier. They may be procured by requisition upon this office (the requisition being made the subject of a separate communication) and may be exchanged for railroad, sleeping or parlor car, or steamer tickets. They should be used only by the party in whose name they are issued; they are not transferable. They should not be used for the payment of livery bills, meals on dining cars, nor any other expenses than those specified. Transportation requests should not be used to pay fares amounting to less than $2, unless necessary or so ordered by this office. If an excursion rate is effective and available, it should be asked for, and the transportation

request tendered in exchange should be marked "excursion rate." Should the agent of the company refuse to accept the transportation request for an excursion ticket, a full-fare ticket should be secured in exchange for the transportation request, and the fact should be reported to this office.

A traveler must not attempt to secure a refund from a transportation company for the unused portion of a ticket obtained in exchange for a transportation request. The unused portion of such ticket must be forwarded, with a full explantion, to this office.

275. *Using requests.*—When using a transportation request the necessary data, including name or initials of the transportation company, the points of travel, routing, whether upper or lower berth, standard or tourist, the cost of fare, and the names of extra travelers should be indorsed on the request (and so reproduced by carbon process on the duplicate) and the stub; the request should then be dated and delivered to the agent of the transportation company in exchange for the ticket, and the duplicate, bearing such other indorsement as is necessary (such as, for example, the name of the particular Indian reservation), should be immediately mailed to this office in accordance with the instructions on the reverse thereof. If a request is exchanged for mileage or scrip the serial number of the mileage or scrip book and the name of the employee for whose use the book is secured must be indorsed on the request and the duplicate, and if part of an old book is exchanged (together with a transportation request for the difference) for a new book the serial number of the old book exchanged and the amount thereof unused must be indorsed on the duplicate request. It is most important that the value of transportation secured in exchange for a transportation request shall be indorsed on the duplicate thereof before mailing to this office.

276. *Listing requests, mileage, and scrip in voucher.*—Every travel-expense voucher must show what portion, if any, of the transportation was procured on transportation requests; what portion, if any, was procured by use of mileage or scrip books, giving the dates, points from and to, and the first and last serial number in each case of the mileage or scrip coupons pulled for the particular trip, such use of transportation requests, mileage, and scrip being shown at the end of the itemized statement as per sample under paragraph 273. If a request is issued to procure a ticket for some other traveler, the person using the ticket should be furnished the number of the request and be instructed to state on his voucher that travel between those points was procured on that particular request, giving the name of the issuing officer.

277. *Mileage and scrip.*—Chiefs of field divisions, supervisors of surveys, and assistant supervisors of surveys are authorized to pro-

cure mileage or scrip books in exchange for transportation requests, but their use is not recommended except when it appears probable that they will be entirely used within the period of their validity.

278. *Mileage and scrip—Reporting purchase.*—When such a book is procured the fact must be immediately reported to this office. The report must be made in triplicate, on the white, yellow, and blue cards (Forms 161, 161a, and 161b), and must give the number of the transportation request exchanged, the name of the railroad issuing the book, the number of miles or the value of scrip contained therein, the cost of the book, the amount and conditions of refund, and any other information necessary to enable this office to keep an accurate account of said book. The purchaser should certify on the reverse of the original (white) card the place and date of delivery and the States in which the mileage or scrip may be used, secure the receipt therefor of the traveler for whom the book was purchased, if practicable, and transmit the original and duplicate (white and yellow) cards to this office. The blue card should be filed with the purchasing officer's records.

279. *Mileage and scrip—Employee chargeable with value of book.*—Each mileage or scrip book will be charged to the employee in whose name it is issued. He will be held strictly accountable for its proper use and the correctness of the number of miles or the value of the scrip detached for travel between different points, and when the book is exhausted, or when no further travel is to be performed on official business with said book, or when the time limit of the book is about to expire, it should be forwarded without delay to the purchasing officer, who will promptly forward it to the disbursing officer for his particular division, district, or unit for settlement. An employee in possession of such a book at the time of his separation from the service, or upon demand of this office, must settle his accountability therefor before final payment of his salary will be made.

280. *Mileage and scrip—Purchasing officer's monthly report.*—At the end of each calendar month each purchaser of mileage or scrip will report to this office what mileage or scrip books have been completely used, forwarded to the disbursing officer for collection, applied on the purchase of new books, or have expired during that month, and will furnish the disbursing officer for his division, district, or unit with a copy of such report.

281. *Mileage and scrip—Refund on.*—All collections on account of refunds in connection with or redemption of unused mileage or scrip should be made by the disbursing officer paying the vouchers of the purchasing officer.

HEARINGS IN LAND ENTRIES.

282. *Authorizations for expenditure.*—A disbursing officer is not authorized to make any payment for services of witnesses, taking

depositions, or other expense chargeable to "Expenses of hearings in land entries," or any allotment from another appropriation made available for hearings expenses until a schedule of hearings (Form 4–638), including the particular hearing, has been received in triplicate at this office, the expenditure authorized, and the disbursing officer notified thereof by the return to him of the triplicate schedule approved, and a disbursing officer is not authorized to pay any hearings voucher unless it bears the initials, in the blank space under the certifying officer's title, of the chief of field division or of an employee designated by him as a hearings clerk.

283. *Witnesses—Limitation on mileage of.*—A witness can not be compelled under subpœna to appear outside of his own county, and if he does so appear, can claim mileage in but one county; the county where the land office is located if he appears before that office, the county of his residence if he appears before another officer.

284. *Witnesses—Per diem and allowances to.*—Witnesses attending hearings in Montana, Wyoming, Colorado, New Mexico, and the States to the westward thereof are entitled (under the above limitations) to $3 per diem for time necessarily occupied in going to, returning from, and in attendance on the office or officer before whom stage line, or by private conveyance, and 5 cents for each mile by any stage line, or by private conveyance, and 5 cents for each mile by any railway or steamship in going to and returning from such office. Witnesses in other States are entitled to $1.50 per day only and for such days only as they are in attendance on the officer before whom testimony is taken, and 5 cents for each mile necessarily traveled in going to and returning therefrom.

285. *Witnesses—Vouchers for services.*—Vouchers for witnesses' services should show whether deposition was taken, or oral testimony was given before the register and receiver, and should be specific as to the dates inclusive of service, and as to the points of travel, the county being given in connection with the initial and objective points and the residence being given by section, township, and range whenever possible.

286. *Witnesses—Salaried Government employees subpœnaed as.*—Salaried Government employees when subpœnaed as witnesses in land hearings are entitled to reimbursement for actual and necessary traveling expenses only, payable from "Expenses of hearings in land entries" in case of hearings under this office and by the Department of Justice when called before a United States court, and those expenses should be stated on "Voucher for services and traveling and other expenses," duly itemized and sworn to in the usual manner. This does not apply to the employees of the Forest Service, who testify in connection with lands located on forest reserves, as their expenses in such cases are paid by their own bureau. Special agents

and others whose official duty it is to investigate and find out the facts upon which the case is predicated, and who appear in such case in their official capacity to give evidence of such facts so acquired, should be paid salary and usual traveling expenses for the period required to attend from the appropriation regularly chargeable therewith. (16 Comp. Dec., 411.)

287. *Depositions—Vouchers for testimony taken by.*—The act of Congress approved March 3, 1915 (38 Stat., 855), and succeeding acts, in which appropriation is made for "Expenses of hearings in land entries," provide:

> That where depositions are taken for use in such hearings the fees of the officer taking them shall be 20 cents per folio for taking and certifying same and 10 cents per folio for each copy furnished to a party on request.

Where the officer takes the testimony of a witness or witnesses once and furnishes copies of that testimony for use as evidence in other cases under stipulated agreement between the interested parties, he is entitled to 10 cents per folio only for the copies furnished. (Comp. Dec., Jan. 28, 1915.)

The title of the officer taking the deposition should be shown on the voucher in every case.

288. *Depositions—Costs.*—When the deposition is taken in its true sense the fees of the officer taking it shall be paid by the party on whose behalf it is taken. When witnesses of both parties are assembled under authority of act of January 31, 1903, supra, and then in reality the hearing is held, each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses, just the same as when final hearing is held before the local land officers. The cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

PURCHASES AND SERVICES OTHER THAN PERSONAL.

289. *Definition.*—Treasury Circular No. 36, June 21, 1911, defines services other than personal as those services:

> * * * which consist in the results of acts of persons who by contract (expressed or implied) have undertaken to accomplish such results without giving to another any right to direct or control their ability or skill—including (1) transportation of persons (service); (2) transportation of things (service); (3) subsistence and support of persons (service); (4) subsistence and care of animals and storage and care of vehicles (service); (5) communication service; (6) printing, engraving, lithographing, and binding (service); (7) advertising and publication of notices (service); (8) furnishing of heat, light, power, and electricity (service); and other classes of service not personal in character, such as (*a*) repairs by contract or open market order, (*b*) storage not incident to transportation, (*c*) court or other public-office service, (*d*) commercial reference service, (*e*) clipping service, (*f*) computation and sta-

tistical service, (*g*) towel service, (*h*) bill-posting service, (*i*) rubbish, ash, and garbage removal service, (*k*) protective, preventive, and other services not personal in character and not otherwise classified.

290. *Advertising required.*—Section 3709, Revised Statutes, provides:

> 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.

291. *Advertising—How accomplished.*—As under section 3828, Revised Statutes, and authority thereunder delegated by the Secretary, no advertising, notice, or proposal for the General Land Office or any office therewith connected may be published in any newspaper whatever, except in pursuance of a written authority for such publication from the commissioner; and no bill for any such advertising or publication shall be paid, unless there be presented, with such bill, a copy of such written authority, the only method of advertising open to purchasing officers for the divisions, districts, or units under this office that Treasury Circular No. 52, July 29, 1907, recognizes is by the sending of circular letters to two or more dealers and the posting of notices in public places.

292. *Circular letter proposals.*—Two forms of circular letters (being in each case a letter inviting proposals and the proposal itself) are provided for this purpose, a general form (Form 4–117a) and a form for use in advertising for provisions, supplies, etc. (Form 4–117b). Except when the public exigencies require the immediate delivery of the articles or performance of the service all purchases or services other than personal will be advertised for by mailing or otherwise sending one of these forms properly executed (or other appropriate form describing the articles or services desired and inviting bids thereon) to two or more dealers and by posting a copy thereof in as public a place as is practicable. All the proposals received from the several dealers will be forwarded to this office with the voucher for the first purchase made or services secured under the proposal. If no bids are received (or only one) the names of the dealers to whom circular letters were sent must be shown in connection with the voucher.

293. *Method of or reason for absence of advertising to be shown.*—Purchasing agents or certifying officers must show over their signatures on the vouchers the method of advertising, or show the reason

for absence thereof, which they may do by inserting the appropriate one of the figures from 1 to 4 referring to the numbered sections on the reverse of the voucher under "Method of or absence of advertising," and by inserting the necessary additional information, if any, on the blank lines under the section so indicated. Purchasing agents should be careful to see that their certificates are in each case complete and that the exact facts are shown. If competition is solicited in any manner the voucher should set forth that fact and not, by the insertion of "3" in the blank, state that an exigency existed simply because the methods were not as formal as is contemplated or because the advertisement was not made in connection with that particular purchase.

294. *Advertising and contracts should not be confused.*—The sending out of circular-letter proposals constitutes advertising; the returned proposal, when accepted by the purchasing officer, becomes a contract. There may be advertising and purchase without a contract, and there may be a purchase and a contract without advertising.

295. *Contracts.*—Section 3744, Revised Statutes, provides:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; * * *

Contracts for services, as for rents, telephone service, etc., covering a considerable period must be executed in accordance with this statute, and a new contract should be executed at the beginning of each fiscal year.

296. *Form of contract to be shown.*—Purchasing agents or certifying officers must show over their signatures the character of contract entered into, which they may do by inserting in the second blank of the certificate the letters, A, B, or C, referring to the corresponding sections on the reverse of the voucher under "Form of contract," and indicating, respectively, a formal contract, an accepted proposal, or a less formal contract. The purchasing agent or certifying officer should show on the reverse of the voucher in connection with the indicated section the date of the formal contract or the character of the less formal agreement, and if an accepted proposal is filed therewith he should so state. If the accepted proposal is not filed with the particular voucher on which the indorsement appears, but with a former voucher, the disbursing officer should make specific reference on that voucher to the particular voucher with which the proposal is filed.

297. *Vouchers for purchases, etc.—how stated.*—Vouchers for purchases and services other than personal should show date of delivery of the article or articles, or date of termination of the service per-

formed, the description of the article or character of the service, dates inclusive of service where time is a factor, quantity of the particular article or service or number and size of container, rate per unit, the amount of each item, and the total of the items listed. Whenever practicable bills should be listed and fully itemized on the regular voucher form, but when this is not practicable itemized statements or invoices may be attached to the standard form and the voucher stated and certified for "Provisions and supplies (or other general heading descriptive of the bill purchased) as per itemized statement (or itemized invoice)—4 pages—attached hereto and made a part hereof."

298. *Vouchers for freight and express.*—Vouchers for freight and expressage should not ordinarily be paid by a disbursing officer, and when they are so paid (or any voucher containing freight or express charges) must be accompanied by the Government bill of lading covering the shipment or have appended thereto a certificate to the effect that no such bill of lading was used.

299. *Computing rents; monthly hire, etc.*—A claim for hire, keep, subsistence, etc., at monthly rates for certain days (less than a month) "inclusive" should be computed at as many 28ths, 29ths, 30ths, or 31sts (according to the number of days in the particular month) of the monthly rate as there are days from the first to the last of the dates, inclusive.

The method for computing compensations does not apply. (11 Comp. Dec., 494.)

300. *Vouchers for purchase by transfer.*—All vouchers for services rendered or supplies furnished by one department, bureau, or office to another must be transmitted through this office to the Auditor for the Interior Department for settlement and must not be paid by disbursing officers.

CASH.

301. *Cash payments.*—As hereinabove stated, payments must be made by check whenever practicable. To cover cases where it is impracticable to make payment in this manner it is provided by Treasury Circular No. 102, dated December 7, 1906, that any disbursing officer may draw his check in favor of himself, or "order," for such amount as may be necessary (1) to make payments of amounts not exceeding $20, (2) to make payments at a distance from a depositary, and (3) to make payments of fixed salaries due at a certain period, but in the first and last named cases the check must be drawn not more than two days before the payments become due.

302. *Cash receipts.*—Where payment by check is not practicable and payments are made in cash—that is, currency—the payment

must be evidenced by a cash receipt (Form 4–665c) or a receipt substantially the same in form acknowledging receipt from the particular disbursing officer in whose account the voucher appears, in his official capacity (disbursing clerk, special disbursing agent, surveyor general, etc.), on a specific date, a sum therein written in words, in full payment of a definitely indicated voucher. Cash receipts must be signed by the payee in whose name the voucher is stated, or, if an officer or agent receipts for his principal, evidence of his authority to receive the money and receipt therefor must accompany the voucher or be on file with the Auditor. There is no authority for cash payments except where the delivery of the receipt is simultaneous with the payment.

ABSTRACT OF EXPENDITURES.

303. *Expenditures to be listed.*—Every item of expenditure for which a disbursing officer claims credit must, as hereinabove indicated, be supported by a voucher properly stated and certified; and every such item must be listed in an abstract of expenditures (Form 4–104), in which, under a single series of numbers running through the entire fiscal year, vouchers will be listed in numerical order without reference to the character of service or appropriation chargeable, the voucher numbers and names of payees being shown in columns indicated and the amounts chargeable to the several appropriations distributed in the proper columns.

304. *What items to include.*—A distinction may here be noted between payments made by an employee from personal funds and payments made by a disbursing officer from public funds. An employee who advances personal funds for traveling and other expenses must include in his voucher for any month all expenses incurred during that month, whereas a disbursing officer should include in his abstract and carry to his account current only such amounts as are actually paid in cash during the period covered by the account or by check dated within such period, without reference to the period covered by the paid vouchers. As stated in paragraph 195, checks should bear the date on which they are drawn; they are not to be dated within a period unless they are actually drawn within that period in payment of vouchers then on hand properly stated and duly certified.

305. *Appropriation titles—Abbreviating on abstracts.*—As Treasury regulations require that the titles of appropriations, as shown in all estimates, disbursements, accounts, and vouchers, shall be exactly as such titles appear on the books of the Treasury (see par. 180), it is necessary that such titles be shown without abbreviation on requisitions, vouchers, and accounts current, but, on account of the limited space in which the titles of the appropriations must be shown at the

top of the columns in the abstract of expenditures, such titles may be there abbreviated, provided such abbreviations are in such form as will be readily recognized by any one familiar with the several appropriations. The following abbreviations are suggested for the appropriations more commonly used:

Salary Mont., 1918—Salaries, office of surveyor general of Montana, 1918.
Contg. Mont., 1918—Contingent expenses, office of surveyor general of Montana, 1918.
Sur. Pub. Lds., 1918—Surveying the public lands, 1918.
Pro. Pub. Lds., T., etc., 1918—Protecting public lands, timber, etc., 1918.
Sur. Land Grants (R.)—Surveying within land grants (reimbursable).
Open. Ind. Res. (R.), 1918—Opening Indian reservations (reimbursable), 1918.
Comp. Sur. R. R. Grants—Completing surveys within railroad land grants.
Sal. & Com., R. & R., 1918—Salaries and commissions, registers and receivers, 1918.
Contg. Ex. L. O.'s, 1918—Contingent expenses of land offices, 1918.
Ex. Deposit. Pub. Mon., 1918—Expenses of depositing public moneys, 1918.
Hearing Ld. Entries, 1918—Expenses of hearings in land entries, 1918.
Ex. Ins. G. L. O., 1918—Expenses of inspectors, General Land Office, 1918.
A. & S. A. M. R.'s, 1918—Appraisal and sale of abandoned military reservations, 1918.

306. *Extra columns—Additional abstract for.*—In cases where, as may happen during the first quarter of a fiscal year, a disbursing officer expends funds under more appropriations than there are columns of the abstract of expenditures, he will state an extra abstract on which will be listed vouchers representing payments under all appropriations that there is not room for on the regular abstract (preferably those appropriations from which the lesser number of payments are to be made). On the main abstract will be listed all the voucher numbers and the corresponding names of payees in numerical order. Each voucher chargeable to an appropriation not on the main abstract will be listed as to number and name on both the main and the extra abstract, the amount appearing only on the extra abstract in the proper column, the vouchers listed on the extra abstract being in solid rank. That is, if, for example, vouchers 3, 17, 36, 49, and 65 are chargeable to appropriations not on the main abstract, those numbers with the payees' names will appear in regular numerical order with the other vouchers on the main abstract, and they will be listed in full on the first, second, third, fourth, and fifth lines, respectively, of the extra abstract.

307. *Forward appropriate abstracts with all vouchers.*—Whenever a regulation requires the transmission of paid original vouchers original abstracts listing all such vouchers must be forwarded with them and whenever a regulation requires the transmission of memorandum copies of paid vouchers duplicate abstracts listing the copies so transmitted must accompany them. Never forward paid vouchers or copies without appropriate abstracts.

ACCOUNTS CURRENT.

308. *All fiscal transactions to be carried to.*—At the close of each quarter (or on closing an account under one bond on executing another, or on the termination of his services) each disbursing officer must bring all fiscal transactions completed within that quarter (or fractional period) into an account current (Form 4-103c, 4-103e, or 4-661a) in parallel columns by appropriation, showing under *credits:*

(*a*) All balances shown by the last account current to be due the United States, in the same amount in each case and under the same title;

(*b*) All accountable warrants dated within the period;

(*c*) All collections made or moneys received as disbursing officer;

(*d*) All debit differences found by the Auditor and conceded by the officer; and

(*e*) Any other corrections on account of which an appropriation should be credited;

and showing under *debits:*

(*f*) All expenditures made within the quarter (or fractional period) as shown by abstracts and vouchers;

(*g*) Such moneys received as disbursing officer as are returned to depositors during the period;

(*h*) All deposits to personal credit (that is, to the credit of the Treasurer of the United States—Form 1A) covered by certificates of deposit dated within the period;

(*i*) Any credit difference found by the Auditor and concurred in by the officer, or

(*j*) Any other correction on account of which an appropriation should be debited;

(*k*) Any balance due the disbursing officer brought forward from last account, in the same amount in each case and under the same title; and

(*l*) Any balance due the United States at the end of the period for which the account is rendered.

309. *Totals in.*—The total of the items in each line must in every case be carried to the total column and the total of debits in any column must in each case correspond with the total of credits in the corresponding column.

310. *Analysis of balance.*—The total net balance due the United States (ordinarily this is the "Balance due the United States" as shown on that line, but if there should be a balance due the disbursing officer under one or more appropriations, as on account of an overdeposit, the *net* balance will be the difference between the two "balances") at the close of the period for which an account is rendered must be analyzed as indicated in the space provided therefor at the bottom of the account current. If the depositary statement is not received in time to compute the balance therefrom and yet have time to mail the account within the period required by law, the balance must be computed from the check stubs and a statement made to the effect that the balance was so computed, and the analysis furnished in a separate communication.

311. "*Salaries paid in cash and claim for credit deferred.*"—When pay-roll vouchers are paid by checks there is no reason why all the checks should not issue on the same date, but when payments are made in cash it may happen that one or more employees will not receive pay until the next working day. In such cases credit for the full amount of such pay-roll voucher will be claimed under date of the final payment, and, if the last payment should be in a different quarter, the amount paid thereon during the first quarter will appear only in the analysis of balance in the account current and on the credit side of the cash account, under the heading in each case of "Salaries paid in cash and claim for credit deferred." The entire amount of a partly paid pay roll should be included in the monthly report of expenditures and liabilities (Form 4-163) as an outstanding liability under "unpaid voucher on hand."

(Treasury Circular No. 52, July 29, 1907.)

312. *Outstanding checks.*—Any check issued by a disbursing officer and remaining unpaid must be carried in his analysis of balance as an outstanding check for three full fiscal years, as is indicated by the following quotations from Treasury circulars and Revised Statutes:

"Any check drawn by a public disbursing officer still in the service, which shall be presented for payment within three full fiscal years from its date, will be paid in the usual manner by the officer or bank on which it is drawn, from funds to the credit of the drawer. Thus, any such draft or check issued on or after July 1, 1904, will be paid as stated above until June 30, 1908, and the same rule will apply for subsequent years."

"Every disbursing officer will, upon receipt of the statement of his disbursing account for the month of June of each year, from the office or bank in which his funds are kept, immediately make a return to the Secretary of the Treasury of all checks drawn by him which have been outstanding and unpaid for three full fiscal years on the 30th day of June of that year, as also required by section 310 (R. S.), stating the number of each check, its date, amount, in whose favor, on what office or bank, and for what purpose drawn, the number of the voucher in payment for which it was drawn, and, if known, the residence of the payee, and inclose in said return all checks described therein which may be in his possession." (Treasury Circular 42, 1907.)

"At the termination of each fiscal year all amounts of moneys that are represented by * * * checks, issued * * * by any disbursing officer of any department of the Government, upon the Treasurer or any assistant treasurer, or designated depositary of the United States * * * and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such * * * checks were * * * issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'" (306 R. S.)

313. *Cash account.*—If during any period for which an account is rendered a disbursing officer has cash in hand he must render a cash

account, for which space and form is provided on the reverse of the account current. The cash account is subsidiary to the regular account and must include, on the *debit* side:

(*a*) The cash on hand as shown by his last cash account;

(*b*) The checks drawn for cash under authority of Treasury Circular No. 102, to make payments in cash;

(*c*) Total collections (posted from abstract) and all cash receipts except on account of concessions, and

(*d*) Debit differences conceded (itemized);

and must show on the *credit* side:

(*e*) The total vouchered expenditures paid in cash during the period;

(*f*) Cash deposits made to personal credit (that is, to the credit of the Treasurer of the United States), or

(*g*) To official credit (that is, subject to his official check),

(*h*) Credit differences concurred in (itemized), and

(*i*) The cash on hand at the end of the period for which the account is rendered.

The cash on hand must agree with the amount of cash shown in the analysis of balance.

314. *Dates on account current.*—It is important that certain dates always be shown on accounts current, and they shall always be shown correctly:

(*a*) The first and last date of the period covered by the account shall be shown at the top of the account current and in the brief on the first fold of the reverse thereof;

(*b*) The date of the bond (which is shown on all copies of requisitions sent to disbursing officers as notice that advance of funds has been requested of the Treasury) shall be shown at the top of each account current;

(*c*) The date to which the account is rendered shall appear in the proper place under "debits";

(*d*) The date to which the next preceding account was rendered shall appear in the proper place under "credits";

(*e*) The date immediately above the disbursing officer's certificate must show the date on which the account is certified; and

(*f*) The date over the "first indorsement" on the reverse thereof must be that on which the account is forwarded to this office.

DUPLICATE, TRIPLICATE, AND OTHER MEMORANDUM COPIES.

315. *What copies should be furnished.*—Accounts current, abstracts of expenditures, and abstracts of collections must be stated in triplicate; the triplicate will be retained by the disbursing officer, the duplicate will be forwarded to this office to become a part of the office files, and the original will of course be forwarded to this office for administrative action and forwarding to the Auditor for the Interior Department. Two memorandum copies must be made of all vouchers for which a disbursing officer claims credit, the second memorandum copy for the disbursing officer, the first memorandum for this office, and the original for the auditor. Disbursing agents of this office who disburse funds for or on account of another bureau will furnish

additional copies of all the above-mentioned papers for the files of this office, it being necessary to forward the duplicate accounts current and abstracts and the memorandum copy of vouchers to the bureau whose funds are disbursed.

316. *Memorandum vouchers shall show what.*—Memorandum copies must show the same facts as the original vouchers, even as to name of certifying officer, and be as carefully itemized. On the memorandum vouchers the notation of check payment, etc. (showing voucher number, name of disbursing officer in whose accounts said voucher appears, check number, and date of payment) will be at the lower left-hand corner, and in form as follows:

Voucher 98. John Doe (name of disbursing officer, not name of payee).
Check 234, July 10, 1918.

For this purpose a rubber stamp will be used in form, as follows:

Voucher_____John Doe
Check_____ $_____

and the disbursing officers are authorized to purchase such stamp from the appropriation applicable in each case.

317. *No copies of subvouchers.*—No duplicate or memorandum copies of subvouchers need be taken; in fact, duplicate subvouchers should never be taken.

318. *Memorandum copies and monthly report.*—Within three days (Sundays and holidays excepted) after the close of each and every calendar month each disbursing office will transmit (without other inclosure than the papers here named) memorandum copies of all vouchers paid during the month just closed, together with a duplicate copy of the abstract of expenditures in which the several vouchers are listed, and a monthly report of expenditures, balances, and liabilities (Form 4–163), on the face of which shall be shown the period covered and the numbers of the first and last vouchers of which copies are transmitted and, on horizontal lines, by appropriation and in total:

(*a*) The amount expended during the month as shown by copies of vouchers and abstract transmitted;

(*b*) The amount represented by vouchers on hand when the report is transmitted that were not paid during the month closed and included in the "Amount disbursed" (without reference to whether such vouchers, designated in the report as "unpaid," have been examined or whether they have been paid in the meantime); and

(*c*) The estimated additional liabilities then outstanding on account of services rendered, purchases made, or expenses incurred in or prior to the month for which the report is rendered, but for which no vouchers have yet been received;

and on the reverse of which shall appear, in perpendicular columns by appropriation and in total, and in horizontal lines by classes, the

classification, required by Treasury Circulars 34 and 36, dated June 21, 1911. On the face of the report those appropriations from which expenditures have been made will be numbered in the order in which they there appear and corresponding numbers (beginning with No. 1 for the left-hand column and using as many consecutive numbers as there are appropriations) will be assigned to the necessary number of columns on the reverse, under the caption "Appropriation," as a means of identifying the appropriation on the face with the classification of expenditures on the reverse.

TRANSMITTING ACCOUNTS.

319. *Quarterly accounts.*—All disbursing officers are required by law to render their accounts quarterly, and to transmit them to the proper officer at Washington within 20 days after the period to which they relate. Should there be any delinquency in transmitting accounts no further advance of moneys can be made until the reasons for the delinquency have been fully explained to this office and a waiver thereof obtained from the Secretary of the Treasury. (26 Stat., 413; 28 Stat., 209, 807.)

Except in those cases in which disbursing officers have specific instructions to transmit certain original papers at an earlier date, each disbursing officer will, as soon as practicable after the close of each quarter and within 20 days transmit in an envelope separate from other matter:

(*a*) All original vouchers paid during the quarter;
(*b*) A quarterly abstract of expenditures listing such vouchers; and
(*c*) An original and duplicate account current for the quarter.

320. "*Other accounts.*"—In case a disbursing officer is required to close his account at a time other than at the close of a quarter (either on account of the execution of a new bond or the termination of his services under the appointment in connection with which he was designated a disbursing officer) he should immediately transmit his report of expenditures, balances, and liabilities (Form 4–163) for the fractional *month* ending with the date on which the account closes and within 20 days after said date he must transmit the original vouchers, original abstracts of expenditures, and original and duplicate account current for the fractional quarter terminating on that date.

NEW BONDS.

321. *Account under begins when.*—In case a fiscal officer is required to execute a new bond either on account of a new appointment or of a new designation, his account under his new bond (or under both bonds if the latter is additional or cumulative) will begin

on the date of the approval of such new bond by the Secretary. The fact that notice of such approval may not be immediately received by the officer is not material; he is accountable under the old bond for a proper disbursing of and accounting for the funds advanced thereunder and may continue to disburse such funds until he has received notice as to the date of approval of the new bond. This, however, does not change the fact that the account under the new bond must date from the approval thereof, notwithstanding the fact that a failure to receive prompt notice may result in the stating of two accounts for the intervening period, and notwithstanding the fact that no funds may have been received under the new bond until after the first account under such bond is due to be transmitted.

322. *Account under old to be closed.*—Immediately on receipt of notice of the Secretary's approval of a new bond the disbursing officer must deposit his admitted balance then on hand under the old bond, state his final account under such bond, and promptly transmit it to this office. Until the account under one bond is balanced by the deposit to the credit of the Treasurer of the United States of the admitted balance thereunder no advance may be made under a new bond.

323. *What may be paid under.*—The period covered by an account under a particular bond has no relation whatever to the period of service covered by vouchers which he may pay from funds advanced under that bond and, although the accounts under one bond are as separate and distinct from those rendered under another bond as though the accounts were rendered by separate individuals, a disbursing officer having executed a new bond and received an advance of funds thereunder may pay any voucher made up in prescribed form and chargeable to the appropriations so advanced notwithstanding the fact that part or all of the service represented was performed prior to the date of the new bond.

324. *Difference from old not to be brought into account under.*—Differences found in an account under one bond are in no case to be brought into or taken up in connection with an account under a new bond, or account under old and new bonds when the latter is additional or cumulative. Accounts under a new bond or (when an additional or cumulative bond is furnished) under new and old bonds jointly are as separate and distinct from those rendered under an old bond as though the accounts were rendered by separate individuals.

DIFFERENCES.

325. *A claimant's rights.*—Each claimant has a right to have his claim against the United States finally settled in the Treasury Department and must not be denied the right to state his claim in such

amount as he thinks is justly due him. Some certifying officers have assumed the right to dictate to a claimant the particular items or amounts he may claim in his voucher. Certifying officers, approving officers, or disbursing officers may advise a claimant as to what will be allowed (and the claimant may if he desires accept these suggestions and state a new voucher), but he must not be deprived of his right to state his claim for what items or amounts seem to him lawful and just. The adjudicating officers will certify or approve such of the items or amounts claimed as are proper, leaving untouched the statements and figures certified by the claimant. No one has any authority to make any changes in the amount certified by the claimant nor to insert any statement of difference over his signature. Suspensions made by a certifying officer or an approving officer should be itemized over their respective signatures, and the suspensions made by a disbursing officer may be made over his signature or by attaching a carbon copy of his letter to the claimant, in which appears an itemized statement of the difference between the amount claimed and the amount of the check issued in payment. In any case an itemized statement of the difference should appear on or be appended to both the voucher and the memorandum copy.

326. *Procedure—Jurisdiction.*—The successive steps in securing payment of vouchers or claims and the gradations of jurisdiction in the adjustment and settlement of claims and accounts are as follows:

The claim shall be:

(*a*) Stated in form and manner hereinabove prescribed;

(*b*) Sent to the proper certifying officer, who may:
- (1) Certify to the voucher as stated,
- (2) Suspend any item or items therein that are not properly stated or properly evidenced, or
- (3) Disapprove any item or items that he knows are not proper;

(*c*) Transmitted to the proper disbursing officer (usually by or through the certifying or approving officer), which disbursing officer may:
- (1) Pay the voucher as presented,
- (2) Pay a part and suspend a part,
- (3) Suspend payment on all and either return the voucher to the claimant for proper statement or forward to this office for instruction or for direct settlement;

(*d*) Claims (unpaid vouchers) transmitted to this office for direct settlement (either through a disbursing officer or by the claimant direct), or accounts of disbursing officers stated and transmitted in accordance with the foregoing instructions, receive here the administrative examination required by law, on which examination the entire account or claim (or any item or items therein) may be:
- (1) Approved,
- (2) Suspended, or
- (3) Disapproved;

(*e*) After which the account or claim is transmitted to the Auditor for the Interior Department for settlement, which officer may (as to any or all items approved or disapproved by this office):
(1) Allow,
(2) Suspend, or
(3) Disallow;

(*f*) A claimant on a voucher presented for direct settlement may refuse to accept payment on the auditor's settlement and appeal to the Comptroller of the Treasury for a revision of such settlement as to any item or amount disallowed therein and a disbursing officer may likewise appeal to the comptroller for a revision as to any item or items disallowed by the auditor in his account. (See also paragraphs 193, 331 and 336.)

Items *suspended* by this office are not before the auditor for consideration and the comptroller has no jurisdiction to revise an account or claim as to any items *suspended* by the auditor.

327. *Accepting check no bar to appeal.*—Any claimant who receives from a disbursing officer in payment of a claim against the Government a check for a lesser sum than the claim stated by him may thereafter present a supplemental voucher for the amount suspended before payment; his acceptance of the check in payment of a claim which has not been settled by the auditor does not bar him from right of appeal. As to acceptance of payment under a settlement by an auditor, section 8 of the act of July 31, 1894 (28 Stat., 208) provides:

> Any person accepting payment under a settlement by an auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; * * *.

328. *Supplemental voucher.*—New, or supplemental, vouchers must be stated for any amounts claimed on account of differences found before payment, or for items omitted from an original voucher, the employee designating it as supplemental for the particular month to which the expense pertains, and making the voucher as complete in every respect as is required of originals, except that items sworn to in an original voucher need not again be sworn to in a supplemental. As stated in paragraph 269, explanation must be made in connection with supplemental vouchers for items omitted from a voucher for services and traveling and other expenses as to why such items were not included in the original voucher.

329. *Disapprovals.*—Items disapproved by this office will not ordinarily thereafter be approved, but the disbursing officer is under no obligation to concede such items until they have been disallowed by the auditor.

330. *Disallowances.*—Items disallowed by the auditor may not again be considered by that officer within a year from the date of his settlement, nor will they be thereafter reconsidered by him except upon the presentation to him of newly discovered material evi-

dence, and a disbursing officer should, in the first account current rendered after the receipt of an auditor's certificate of settlement, concede all the suspended items appearing therein for which he does not intend to make further claim, and all items disallowed, or immediately appeal to the Comptroller of the Treasury for a revision of the auditor's settlement as to such disallowed items.

331. *Appeal to the comptroller.*—A decision of the comptroller is final and conclusive upon the executive branch of the Government and an appeal to him carries before him for revision not only the item or items on which the appeal is made but the entire account or claim excepting only such items as have been suspended. A disbursing officer should at once concede all items disallowed by the Comptroller on appeal. (See par. 193.)

332. *Answering differences—payees.*—In case a difference is found in an employee's voucher after payment by a disbursing officer the employee should, at the earliest practicable date after receipt through such disbursing officer of notice of a deduction, reimburse the officer for the amount erroneously paid or furnish him with the evidence necessary to relieve the suspension. Answers must in all cases be made within 15 days from receipt of notice, even though the employee may not at that time have received the necessary evidence.

333. *Answering differences—disbursing officers.*—Differences found in the adjustment of accounts by this office, or in the settlement thereof by the auditor, should be taken up by the disbursing officer, at the earliest practicable date, with the office making the deduction and such explanation offered or evidence furnished as will relieve the suspensions, no deposit being made on account of conceded items till the auditor's certificate of settlement covering such items has been received unless the disbursing officer is certain that the item or items can not be allowed. Ordinarily differences found by this office in connection with one account will not again be taken up until the next account is being adjusted, and disbursing officers should transmit answers to differences so that they will be received by that time even though they are not then able to answer all the differences then outstanding. Differences may be answered as long as they are carried by the auditor as suspensions.

334. *Answering differences—Abstract form in duplicate.*—The differences will be taken up in abstract form similar to that followed in the notice of adjustment sent to the disbursing officer, except that the reason for the suspension or disallowance need not be given, a brief statement being made in connection with each item as to whether a perfected voucher is transmitted, explanation offered, or amount conceded. Answers to differences to this office must in all cases be made in duplicate (including letters of explanation furnished by payees or other like evidence supplemental to the principal

letter), as the original is transmitted to the auditor and a duplicate is necessary for the files of this office.

335. *Adjusting differences—By deductions from vouchers.*—Unless it is impracticable to do otherwise, a disbursing officer should not adjust a difference found in the adjustment or settlement of his account by deducting the amount from a subsequent voucher presented by the employee; and in case adjustment must be made in that manner the disbursing agent should concede the original disallowance and should claim credit for the full amount of the new voucher, thus in effect applying in payment of the new voucher the amount of overpayment made to the same claimant on the voucher in connection with which the disallowance was made. A claimant from whose voucher an amount has been deducted on account of a difference found in a former voucher is entitled to state a supplemental claim for the amount so deducted and to have it transmitted through the usual channels for settlement notwithstanding the fact that the amount deducted represents items that have been disallowed by the auditor. (2 Comp. Dec., 4.)

336. *Adjusting differences—By concession in account.*—A debit difference conceded is adjusted by crediting the United States therewith on the face of the account current as "Corrections on account of disallowances conceded," a complete itemized statement of which must appear on the debit side of the cash account. A credit difference concurred in is adjusted by debiting the United States therewith on the face of the account current as "Corrections on account of credit difference, per ———"—(showing the particular certificate or paper by which the difference was found), the specific items of which should appear on the credit side of the cash account. There is one exception as to conceded items appearing in the cash account. In cases where in the auditor's settlement a transfer between appropriations is accomplished by debiting the disbursing officer under one and crediting him under another the adjustment will be made on the face of the account current by crediting the United States under the appropriation in connection with which the debit is found as "Corrections, amount chargeable per auditor's certificate No. ———," and by debiting the United States under the appropriation in connection with which the credit is found as "Corrections, amount credited per auditor's certificate No. ———."

337. *Concessions and deposits distinct.*—The concession of a difference harmonizes the disbursing officer's account with the auditor's settlement so far as that particular difference is concerned. The deposit of an amount conceded is a matter entirely separate and distinct from the action necessary to adjust the difference; an amount, conceded may, if it pertains to an appropriation then current, be carried as cash or deposited to the disbursing officer's official credit,

or if it pertains to some fund or appropriation not then current, to his personal credit.

DEPOSITS.

338. *Depositing balances at close of fiscal year.*—Unexpended balances of annual appropriations shall be repaid into the Treasury as soon as practicable after the close of the fiscal year for which they were made, and not later than September 30 of each year. Those appropriations that have no fiscal year attached are not annual appropriations and balances thereunder need not be deposited at the close of each fiscal year.

Credit for the amounts deposited should be claimed in the account for the period in which the certificate of deposit is dated. After the balances are deposited any vouchers that may be received chargeable to those appropriations will have to be sent to Washington for settlement. (Treasury Circulars Nos. 133, 1897 and 133, 1903.)

339. *Retain funds to cover liabilities outstanding.*—While it is advisable wherever practicable to complete payment at the close of business of June 30 of each year for services rendered or expenses incurred during the year then ending, it will not be practicable for most disbursing officers to do this, and, as hereinabove indicated, disbursing officers may complete such payments at any time within the three months after the close of the fiscal year; and it will therefore be necessary, when depositing balances at the end of a fiscal year, to retain in hand (until September 30 unless liabilities are paid before that) sufficient funds from appropriations belonging to the fiscal year just ended to pay outstanding liabilities thereunder.

340. *Overdeposit.*—In case a disbursing officer, at the end of the fiscal year or on closing his accounts, deposits to the credit of the Treasurer of the United States a greater amount than is due, he will simply claim credit in his account current for the amount so deposited (thereby showing a balance due from the United States under one or more appropriations); and on settlement of his account by the auditor, Treasury draft will be issued for the amount found due the disbursing officer, or the amount will be transferred to his credit in the Treasury.

341. *Certificates of deposit to show what.*—Every deposit made by a disbursing officer to the credit of the Treasurer of the United States (personal credit) should show:

(*a*) The title, or titles, of the appropriation or fund to be credited;

(*b*) The date of the bond under which the deposit is made; and

(*c*) A brief reference made as to the character, source of receipt, etc., of such deposits, such as "Balance," "Collections," "Concessions," "Proceeds Government property," etc., the property being listed in detail in connection with the latter.

342. *Duplicate certificates of deposit.*—The same facts should be shown on the duplicate certificate as is required of the original, and, in case any of the required facts are omitted from the original, such facts should be indorsed by the disbursing officer on the reverse of the duplicate certificate; and, in all cases of deposits on account of debit differences conceded, the disbursing officer will list the conceded items in detail on the reverse of such duplicate certificate. On the reverse of each duplicate certificate of deposit on account of "Miscellaneous receipts—Proceeds of Government property" must be indorsed a complete list of the property sold. Duplicate certificates of deposit must in each case, immediately on receipt thereof, be forwarded to this office; and if in any case the disbursing officer is not furnished with a triplicate it will be necessary for him to make a copy for his own files.

343. *Report to Secretary of Treasury on closing account.*—"Whenever any disbursing officer of the United States shall cease to act in that capacity he will at once inform the Secretary of the Treasury whether he has any public funds to his credit in any office or bank, and, if so, what checks, if any, he has drawn against the same which are still outstanding and unpaid. Until satisfactory information of this character shall have been furnished the whole amount of such moneys will be held to meet the payment of his checks properly payable therefrom."—Treasury Circular No. 42, 1907.

INDEX TO CIRCULAR NO. 616.

METHODS OF KEEPING RECORDS AND ACCOUNTS RELATING TO PUBLIC LANDS, PAGES 513 TO 600, INCLUSIVE.

[For index to this volume see p. 618.]

(Numerals refer to paragraphs, not pages. Hyphen indicates numbers are "inclusive.")

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, August 9, 1918.

THE SECRETARY OF THE INTERIOR.

SIR: I submit herewith a complete revision, prepared by our Accounts Division, of the General Land Office circular relating to the method of keeping records and accounts of transactions affecting the public lands. The revision is in harmony with existing law, Comptroller's Decisions, and current departmental and General Land Office regulations; it covers the necessary detailed instructions and information relative to records and accounts for the use of all officers and employees of this bureau. I have the honor to recommend that same receive your approval.

Respectfully,

CLAY TALLMAN,
Commissioner.

Approved, August 9, 1918:
FRANKLIN K. LANE,
Secretary of the Interior.

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1. Under the excepting clause in the grant to the Central Pacific by the act of July 1, 1862, as amended by the act of July 2, 1864, the term "iron land" will be construed in its ordinary meaning; that is, land not only valuable for iron, but as between iron and other mineral content, chiefly valuable for iron 476

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3. To entitle the Northern Pacific Railway Co. to make selection under the act of March 2, 1899 (30 Stat., 993), it must not only appear that the land is not of known mineral character at the date of the selection but it must have been returned as nonmineral at the date of actual Government survey; and a return by the surveyor that "mining operations are now being carried on to a great extent; mineral indications are found in nearly all parts of the township," does not constitute a nonmineral return, and land so returned is not subject to selection under that act ---- 1

4. Selections by the Northern Pacific Railway Co. under the act of March 2, 1899 (30 Stat., 993), are limited to "nonmineral lands so classified as nonmineral at the time of the actual Government survey"; and where the surveyor reported that "there are many indications of the presence of mineral, gold, copper, and silver, though no veins have been located," the land, not being of the class named, is not subject to selection under that act, even though it be in fact nonmineral ---- 4

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1. Where entry is made of land not intended to be taken, and amendment is rendered impossible because the land desired has been disposed of, the entryman, upon relinquishment, is entitled, under section 2 of the act of March 26, 1908 (35 Stat., 48), to return of all moneys paid in connection with such entry ---- 60

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