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PREFACE

In 1883 the Department of the Interior began publication of the important decisions of the Land Department with the view to preserving in authentic manner and in permanent form convenient for reference a line of consistent precedents in departmental rulings illustrating the land laws of the United States. Prior to that time the only published decisions of the department were those by private reporters, the more familiarly known being Brainard, Copp, and Lester. As originally conceived the publication entitled "Decisions of the Department of the Interior relating to the Public Lands," and thereafter referred to as the "Land Decisions," pertained almost exclusively to matters coming under the jurisdiction of the General Land Office. Gradually the jurisdiction of the department has been enlarged by the creation of new bureaus, among them being the Bureau of Reclamation, the Geological Survey, and the National Park Service. Many new laws have been enacted and policies established relating to the Indians and Indian affairs. Many new and important problems are constantly arising for solution. Consequently, there has been an increasingly growing demand for the publication of decisions by the Secretary, his Assistant Secretaries, and opinions by the Solicitor relating to other matters than those pertaining to the public lands. On July 7, 1930, the Secretary issued an order amending the title so as to read "Decisions of the Department of the Interior," and directing that thereafter leading decisions and important opinions relating to all activities of the department be published in future volumes. Including this volume, 53 volumes have been published, covering a period from July, 1881, to June 30, 1932. Volumes 1 to 52 are referred to as the "Land Decisions" (L. D.). The abbreviation "I. D." when used in cited decisions of the department and in the opinions of the Solicitor has reference to volume 53 and future volumes of this work.

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- Dudymott *v.* Kansas Pacific R. R. Co. (5 C. L. O. 69); overruled, 1 L. D. 345.
- Dumphy, Elijah M. (8 L. D. 102); overruled, 36 L. D. 561.
- Dyche *v.* Beleele (24 L. D. 494); modified, 43 L. D. 56.
- Dysart, Francis J. (23 L. D. 282); modified, 25 L. D. 188.
- East Tintic Consolidated Mining Co. (41 L. D. 255); vacated, 43 L. D. 80.
- Easton, Francis E. (27 L. D. 600); overruled, 30 L. D. 355.
- El Paso Brick Co. (37 L. D. 155); overruled so far as in conflict, 40 L. D. 199.

- *Elliott v. Ryan (7 L. D. 322); overruled, 8 L. D. 110. (See 9 L. D. 360.)
- Emblem v. Weed (16 L. D. 28); modified, 17 L. D. 220.
- Epley v. Trick (8 L. D. 110); overruled, 9 L. D. 360.
- Erhardt, Finsans (36 L. D. 154); overruled, 38 L. D. 406.
- Esping v. Johnson (37 L. D. 709); overruled, 41 L. D. 289.
- Ewing v. Rickard (1 L. D. 146); overruled, 6 L. D. 483.
- Falconer v. Price (19 L. D. 187); overruled, 24 L. D. 264.
- Fargo No. 2 Lode Claims (37 L. D. 404); modified, 43 L. D. 128.
- Farrill, John W. (13 L. D. 713); overruled so far as in conflict, 52 L. D. 473.
- Febes, James H. (37 L. D. 210); overruled, 43 L. D. 183.
- Ferrell *et al.* v. Hoge *et al.* (18 L. D. 81); overruled, 25 L. D. 351.
- Fette v. Christiansen (29 L. D. 710); overruled, 34 L. D. 167.
- Field, William C. (1 L. D. 68); overruled so far as in conflict, 52 L. D. 473.
- Fish, Mary (10 L. D. 606); modified, 13 L. D. 511.
- Fisher v. Heirs of Rule (42 L. D. 62, 64); vacated, 43 L. D. 217.
- Fitch v. Sioux City and Pacific R. R. Co. (216 L. and R. 184); overruled, 17 L. D. 43.
- Fleming v. Bowe (13 L. D. 78); overruled, 23 L. D. 175.
- Florida, State of (17 L. D. 355); reversed, 19 L. D. 76.
- Florida, State of (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
- Florida Mesa Ditch Co. (14 L. D. 265); overruled, 27 L. D. 421.
- Florida Railway and Navigation Co. v. Miller (3 L. D. 324); modified, 6 L. D. 716; overruled, 9 L. D. 237.
- Forgeot, Margaret (7 L. D. 280); overruled, 10 L. D. 629.
- Fort Boise Hay Reservation (6 L. D. 16); overruled, 27 L. D. 505.
- Freeman, Flossie (40 L. D. 106); overruled, 41 L. D. 63.
- Freeman v. Texas Pacific R. R. Co. (2 L. D. 550); overruled, 7 L. D. 18.
- Fry, Silas A. (45 L. D. 20); modified, 51 L. D. 581.
- Galliber, Marie (8 C. L. O. 57); overruled, 1 L. D. 17.
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L. D. 304.
- Garlis v. Borin (21 L. D. 542); see 39 L. D. 162, 225.
- Garrett, Joshua (2 C. L. O. 1005); overruled, 5 L. D. 153.
- Garvey v. Tuiska (41 L. D. 510); modified, 43 L. D. 229.
- Gates v. California and Oregon R. R. Co. (5 C. L. O. 150); overruled, 1 L. D. 336.
- Gauger, Henry (10 L. D. 221); overruled, 24 L. D. 81.
- Gleason v. Pent (14 I. D. 375; 15 L. D. 286); vacated, 53, I. D. 447.
- Gohrman v. Ford (8 C. L. O. 6); overruled, 4 L. D. 580.
- Golden Chief "A" Placer Claim (35 L. D. 557); modified, 37 L. D. 250.
- Goldstein v. Juneau Town Site (23 L. D. 417); vacated, 31 L. D. 88.
- Gotebo Town Site v. Jones (35 L. D. 18); modified, 37 L. D. 560.
- Gowdy v. Connell (27 L. D. 56); vacated, 28 L. D. 240.
- Gowdy v. Gilbert (19 L. D. 17); overruled, 26 L. D. 453.
- Gowdy *et al.* v. Kismet Gold Mining Co. (22 L. D. 624); modified, 24 L. D. 191.
- Grampian Lode (1 L. D. 544); overruled, 25 L. D. 495.
- Gregg *et al.* v. State of Colorado (15 L. D. 151); modified, 30 L. D. 310.
- Grinnell v. Southern Pacific R. R. Co. (22 L. D. 438); vacated, 23 L. D. 489.
- *Ground Hog Lode v. Parole and Morning Star Lodes (8 L. D. 430); overruled, 84 L. D. 568. (See R. R. Rousseau, 47 L. D. 590.)
- Guidney, Alcide (8 C. L. O. 157); overruled, 40 L. D. 399.
- Gulf and Ship Island R. R. Co. (16 L. D. 236); modified, 19 L. D. 534.
- Gustafson, Olof (45 L. D. 456); modified, 46 L. D. 442.
- Halvorson, Halfor K. (39 L. D. 456); overruled, 41 L. D. 505.
- Handsborough, Henry C. (5 L. D. 155); overruled, 29 L. D. 59.
- Hardee, D. C. (7 L. D. 1); overruled, 29 L. D. 698.
- Hardee v. United States (8 L. D. 391; 16 L. D. 499); overruled, 29 L. D. 698.
- Hardin, James A. (10 L. D. 313); revoked, 14 L. D. 233.
- Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
- Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216.
- Harrison, W. R. (19 L. D. 299); overruled, 33 L. D. 539.
- Hart v. Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
- Hastings and Dakota Ry. Co. v. Christenson *et al.* (22 L. D. 257); overruled, 28 L. D. 572.
- Hayden v. Jamison (24 L. D. 403); vacated, 26 L. D. 373.
- Heilman v. Syverson (15 L. D. 184); overruled, 23 L. D. 119.
- Heinzman *et al.* v. Letrodec's Heirs *et al.* (28 L. D. 497); overruled, 38 L. D. 253.
- Heirs of Davis (40 L. D. 573); overruled, 46 L. D. 110.
- Heirs of Philip Mulnix (33 L. D. 331); overruled, 43 L. D. 532.
- *Heirs of Stevenson v. Cunningham (32 L. D. 650); modified, 41 L. D. 119. (See 43 L. D. 196.)
- Heirs of Talkington v. Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
- Heirs of Vradenburg *et al.* v. Orr *et al.* (25 L. D. 323); overruled, 38 L. D. 253.
- Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.

- Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
- Hénning, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
- Herman *v.* Chase *et al.* (37 L. D. 590); overruled, 43 L. D. 246.
- Herriek, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
- Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
- Hickey, M. A., *et al.*, (3 L. D. 83); modified, 5 L. D. 256.
- Hildreth, Henry (45 L. D. 464); vacated, 46 L. D. 17.
- Hindman, Ada I. (42 L. D. 327); vacated in part, 43 L. D. 191.
- Hoglund, Swan (42 L. D. 405); vacated 43 L. D. 538.
- Holden, Thomas A. (16 L. D. 493); overruled, 29 L. D. 166.
- Holland, G. W. (6 L. D. 20); overruled, 6 L. D. 639; 12 L. D. 436.
- Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
- Holman *v.* Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 580.
- Hon *v.* Martinas (41 L. D. 119); modified, 43 L. D. 197.
- Hooper, Henry (6 L. D. 624); modified, 9 L. D. 86, 284.
- Housman, Peter A. C. (37 L. D. 352); modified, 48 L. D. 629.
- Howard, Thomas (3 L. D. 409); see 39 L. D. 162, 225.
- Howard *v.* Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
- Howell, John H. (24 L. D. 35); overruled 28 L. D. 204.
- Howell, L. C. (39 L. D. 92); see 39 L. D. 411.
- Hoy, Assignee of Hess (46 L. D. 421); overruled, 51 L. D. 287.
- Hughes *v.* Greathead (43 L. D. 497); vacated, 49 L. D. 413. (See 260 U. S. 427.)
- Hull *et al. v.* Ingle (24 L. D. 214); overruled, 30 L. D. 258.
- Huls, Clara (9 L. D. 401); modified, 21 L. D. 377.
- Hyde, F. A. (27 L. D. 472); vacated, 28 L. D. 284.
- Hyde, F. A., *et al.* (40 L. D. 284); overruled, 43 L. D. 381.
- Hyde *et al. v.* Warren *et al.* (14 L. D. 576; 15 L. D. 415); see 19 L. D. 64.
- Ingram, John D. (37 L. D. 475); see 43 L. D. 544.
- Inman *v.* Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
- Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262); overruled so far as in conflict, 53 L. D. 228.
- Iowa Railroad Land Co. (23 L. D. 79; 24 L. D. 125); vacated, 29 L. D. 79.
- Jacks *v.* Belard *et al.* (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. *v.* Southern Pacific R. R. Co. (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson *v.* South Dakota (17 L. D. 411); overruled, 41 L. D. 22.
- Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
- Jones *v.* Kennett (6 L. D. 688); overruled, 14 L. D. 429.
- Kackmann, Peter (1 L. D. 86); overruled, 16 L. D. 464.
- Kemper *v.* St. Paul and Pacific R. R. Co. (2 C. L. L. 805); overruled, 18 L. D. 101.
- King *v.* Eastern Oregon Land Co. (23 L. D. 579); modified, 30 L. D. 19.
- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 L. D. 228.
- Kinsinger *v.* Peck (11 L. D. 202); see 39 L. D. 162, 225.
- Kiser *v.* Keech (17 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., *et al.* (30 L. D. 227); overruled, 31 L. D. 64.
- Knight *v.* Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
- Kniskern *v.* Hastings and Dakota Ry. Co. (6 C. L. O. 50); overruled, 1 L. D. 362.
- Kolberg, Peter F. (37 L. D. 453); overruled, 43 L. D. 181.
- Krigbaum, James T. (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L. (52 L. D. 282, 295); vacated, 53 L. D. 42, 45. (See 280 U. S. 306.)
- Lackawanna Placer Claim (36 L. D. 36); overruled, 37 L. D. 715.
- Lamb *v.* Ullery (10 L. D. 528); overruled, 32 L. D. 331.
- Largent, Edward B., *et al.* (13 L. D. 397); overruled 42 L. D. 321.
- Larson, Syvert (40 L. D. 69); overruled, 43 L. D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C. L. O. 10); overruled, 14 L. D. 278.
- Las Vegas Grant (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.
- Laughlin, Allen (31 L. D. 256); overruled, 41 L. D. 361.
- Laughlin *v.* Martin (18 L. D. 112); modified, 21 L. D. 40.
- Law *v.* State of Utah (29 L. D. 623); overruled, 47 L. D. 359.
- Lemmons, Lawson H. (19 L. D. 37); overruled, 26 L. D. 389.
- Leonard, Sarah (1 L. D. 41); overruled, 16 L. D. 464.
- Lindberg, Anna C. (3 L. D. 95); modified, 4 L. D. 299.
- Linderman *v.* Wait (6 L. D. 689); overruled, 13 L. D. 459.
- *Linhart *v.* Santa Fe Pacific R. R. Co. (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
- Little Pet Lode (4 L. D. 17); overruled, 25 L. D. 550.
- Lock Lode (6 L. D. 165); overruled, 26 L. D. 123.
- Lockwood, Francis A. (20 L. D. 361); modified, 21 L. D. 200.
- Lonergan *v.* Shockey (33 L. D. 238); overruled, 34 L. D. 314; 36 L. D. 199.
- Louisiana, State of (8 L. D. 126); modified, 9 L. D. 157.
- Louisiana, State of (24 L. D. 231); vacated, 26 L. D. 5.
- Louisiana, State of (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
- Louisiana, State of (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- Lucy B. Hussey Lode (5 L. D. 93); overruled, 25 L. D. 495.

- Luton, James W. (34 L. D. 468); overruled, 35 L. D. 102.
- Lyman, Mary O. (24 L. D. 493); overruled, 43 L. D. 221.
- Lynch, Patrick (7 L. D. 33); overruled, 13 L. D. 713.
- McBride v. Secretary of the Interior (8 C. L. O. 10); modified, 52 L. D. 33.
- McCalla v. Acker (29 L. D. 203); vacated, 30 L. D. 277.
- McCornick, William S. (41 L. D. 661, 666); vacated, 43 L. D. 429.
- *McCraney v. Heirs of Hayes (33 L. D. 21); overruled, 41 L. D. 119. (See 43 L. D. 196.)
- McDonald, Roy, et al. (34 L. D. 21); overruled, 37 L. D. 285.
- *McDonogh School Fund (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.
- McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.
- McGrann, Owen (5 L. D. 10); overruled, 24 L. D. 502.
- McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.
- McKernan v. Bailey (16 L. D. 368); overruled, 17 L. D. 494.
- *McKittrick Oil Co. v. Southern Pacific R. R. Co. (37 L. D. 243); overruled, 40 L. D. 528. (See 42 L. D. 317.)
- McNamara et al. v. State of California (17 L. D. 296); overruled, 22 L. D. 666.
- McPeeck v. Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- Madigan, Thomas (8 L. D. 188); overruled, 27 L. D. 448.
- Maginnis, Charles P. (31 L. D. 222); overruled, 35 L. D. 399.
- Maginnis, John S. (32 L. D. 14); modified, 42 L. D. 472.
- Maher, John M. (34 L. D. 342); modified, 42 L. D. 472.
- Mahoney, Timothy (41 L. D. 129); overruled, 42 L. D. 313.
- Makela, Charles (46 L. D. 509); extended, 49 L. D. 244.
- Makemson v. Snider's Heirs (22 L. D. 511); overruled, 32 L. D. 650.
- Malone Land and Water Co. (41 L. D. 138); overruled in part, 43 L. D. 110.
- Maney, John J. (35 L. D. 250); modified, 48 L. D. 153.
- Maple, Frank (37 L. D. 107); overruled, 43 L. D. 181.
- Martin v. Patrick (41 L. D. 284); overruled, 43 L. D. 536.
- Mason v. Cromwell (24 L. D. 248); vacated, 26 L. D. 369.
- Masten, E. C. (22 L. D. 337); overruled, 25 L. D. 111.
- Mather et al. v. Hackley's Heirs (15 L. D. 487); vacated, 19 L. D. 48.
- Maughan, George W. (1 L. D. 25); overruled, 7 L. D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L. D. 301); modified, 48 L. D. 88.
- *Mee v. Hughart et al. (23 L. D. 455); vacated, 28 L. D. 209. In effect reinstated, 44 L. D. 414, 487; 46 L. D. 434; 48 L. D. 195; 346, 348; 49 L. D. 260, 662.
- *Meeboer v. Heirs of Schut (35 L. D. 335); overruled, 41 L. D. 119. (See 43 L. D. 196.)
- Mercer v. Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.
- Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.
- Meyer v. Brown (15 L. D. 307); see 39 L. D. 162, 225.
- Miller, Edwin J. (35 L. D. 411); overruled 43 L. D. 181.
- Miller v. Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton et al. v. Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner v. Mariott et al. (2 L. D. 709); modified, 28 L. D. 224.
- Minnesota and Ontario Bridge Company (30 L. D. 77); no longer followed, 50 L. D. 359.
- *Mitchell v. Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)
- Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
- Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
- Morgan v. Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
- Morgan v. Rowland (37 L. D. 90); overruled, 37 L. D. 613.
- Moritz v. Hinz (36 L. D. 450); vacated, 37 L. D. 382.
- Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
- Morrow et al. v. State of Oregon et al. (32 L. D. 54); modified, 33 L. D. 101.
- Moses, Zelmer R. (36 L. D. 473); overruled, 44 L. D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.
- Mt. Whitney Military Reservation (40 L. D. 315); see 43 L. D. 33.
- Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
- Muller, Esberne K. (39 L. D. 72); modified, 39 L. D. 360.
- Mulnix, Philip, Heirs of (33 L. D. 331); overruled, 43 L. D. 532.
- Nebraska, State of (18 L. D. 124); overruled, 28 L. D. 358.
- Nebraska, State of, v. Dorrington (2 C. L. L. 647); overruled, 26 L. D. 123.
- Neilsen v. Central Pacific R. R. Co. et al. (26 L. D. 252); modified, 30 L. D. 216.
- Newbanks v. Thompson (22 L. D. 490); overruled, 29 L. D. 108.
- Newton, Robert C. (41 L. D. 421); overruled, 43 L. D. 364.
- New Mexico, State of (46 L. D. 217); overruled, 48 L. D. 98.
- Newton, Walter (22 L. D. 322); modified, 25 L. D. 188.

- New York Lode and Mill Site (5 L. D. 513); overruled, 27 L. D. 373.
- *Nickel, John R. (9 L. D. 388); overruled, 41 L. D. 129. (See 42 L. D. 313.)
- Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled, 29 L. D. 550.
- Northern Pacific R. R. Co. (21 L. D. 412; 23 L. D. 204; 25 L. D. 501); overruled, 53 I. D. 242. (See 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.)
- Northern Pacific Ry. Co. (48 L. D. 573); overruled so far as in conflict, 51 L. D. 196. (See 52 L. D. 58.)
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D. 238); modified, 18 L. D. 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D. 21); overruled, 20 L. D. 191.
- Northern Pacific R. R. Co. *v.* Loomis (21 L. D. 395); overruled, 27 L. D. 464.
- Northern Pacific R. R. Co. *v.* Marshall *et al.* (17 L. D. 545); overruled, 28 L. D. 174.
- Northern Pacific R. R. Co. *v.* Miller (7 L. D. 100); overruled, 16 L. D. 229.
- Northern Pacific R. R. Co. *v.* Sherwood (28 L. D. 126); overruled, 29 L. D. 550.
- Northern Pacific R. R. Co. *v.* Symons (22 L. D. 686); overruled, 28 L. D. 95.
- Northern Pacific R. R. Co. *v.* Urquhart (8 L. D. 365); overruled, 28 L. D. 126.
- Northern Pacific R. R. Co. *v.* Walters *et al.* (13 L. D. 230); overruled so far as in conflict, 49 L. D. 391.
- Northern Pacific R. R. Co. *v.* Yantis (8 L. D. 58); overruled, 12 L. D. 127.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L. D. 396); overruled, 6 L. D. 750.
- O'Donnell, Thomas J. (28 L. D. 214); overruled, 35 L. D. 411.
- Olson *v.* Traver *et al.* (26 L. D. 350, 628); overruled, 29 L. D. 480; 30 L. D. 382.
- Opinion A. A. G. (35 L. D. 277); vacated, 36 L. D. 342.
- Oregon and California R. R. Co. *v.* Puckett. (39 L. D. 169); modified, 53 I. D. 264.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L. D. 480); overruled, 18 L. D. 543.
- Owens *et al.* *v.* State of California (22 L. D. 369); overruled, 38 L. D. 253.
- Pacific Slope Lode (12 L. D. 686); overruled, 25 L. D. 518.
- Papini *v.* Alderson (1 B. L. P. 91); modified, 5 L. D. 256.
- Patterson, Charles E. (3 L. D. 260); modified, 6 L. D. 284, 624.
- Paul Jones Lode (28 L. D. 120); modified, 31 L. D. 359.
- Paul *v.* Wiseman (21 L. D. 12); overruled, 27 L. D. 522.
- Pecos Irrigation and Improvement Co. (15 L. D. 470); overruled, 18 L. D. 168, 268.
- Pennock, Belle L. (42 L. D. 315); vacated, 43 L. D. 66.
- Perry *v.* Central Pacific R. R. Co. (39 L. D. 5); overruled so far as in conflict, 47 L. D. 304.
- Phebus, Clayton (48 L. D. 128); overruled so far as in conflict, 50 L. D. 281.
- PHELPS, W. L. (8 C. L. O. 139); overruled 2 L. D. 854.
- Phillips, Alonzo (2 L. D. 321); overruled, 15 L. D. 424.
- Phillips *v.* Breazeale's Heirs (19 L. D. 573); overruled, 30 L. D. 93.
- Pieper, Agnes C. (35 L. D. 459); overruled, 43 L. D. 374.
- Pierce, Lewis W. (18 L. D. 328); vacated, 53 I. D. 447.
- Pietkiewicz *et al.* *v.* Richmond (29 L. D. 195); overruled, 37 L. D. 145.
- Pikes Peak Lode (10 L. D. 200); overruled so far as analogous, 20 L. D. 204.
- Pikes Peak Lode (14 L. D. 47); overruled, 20 L. D. 204.
- Popple, James (12 L. D. 433); overruled, 13 L. D. 588.
- Powell, D. C. (6 L. D. 302); modified, 15 L. D. 477.
- Premo, George (9 L. D. 70); see 39 L. D. 162, 225.
- Prescott, Henrietta P. (46 L. D. 486); overruled, 51 L. D. 287.
- Pringle, Wesley (13 L. D. 519); overruled, 29 L. D. 599.
- Provensal, Victor H. (30 L. D. 616); overruled, 35 L. D. 399.
- Prue, widow of Emanuel (6 L. D. 436); vacated, 33 L. D. 409.
- Pugh, F. M., *et al.* (14 L. D. 274); in effect vacated, 232 U. S. 452.
- Puyallup Allotments (20 L. D. 157); modified, 29 L. D. 628.
- Rancho Alisal (1 L. D. 173); overruled, 5 L. D. 320.
- Rankin, James D., *et al.* (7 L. D. 411); overruled, 35 L. D. 32.
- Rankin, John M. (20 L. D. 272); reversed, 21 L. D. 404.
- Rebel Lode (12 L. D. 683); overruled, 20 L. D. 204; 48 L. D. 523.
- *Reed *v.* Buffington (7 L. D. 154); overruled, 8 L. D. 110. (See 9 L. D. 360.)
- Region *v.* Rossler (40 L. D. 93); vacated, 40 L. D. 420.
- Rialto No. 2 Placer Mining Claim (34 L. D. 44); overruled, 37 L. D. 250.
- Rico Town Site (1 L. D. 556); modified, 5 L. D. 256.
- Rio Verde Canal Co. (26 L. D. 381); vacated, 27 L. D. 421.
- Roberts *v.* Oregon Central Military Road Co. (19 L. D. 591); overruled, 31 L. D. 174.
- Robinson, Stella G. (12 L. D. 443); overruled, 13 L. D. 1.
- Rogers, Fred B. (47 L. D. 325); vacated, 53 I. D. 649.
- Rogers, Horace B. (10 L. D. 29); overruled, 14 L. D. 321.
- Rogers *v.* Atlantic and Pacific R. R. Co. (6 L. D. 565); overruled, 8 L. D. 165.
- *Rogers *v.* Lukens (6 L. D. 111); overruled, 8 L. D. 110. (See 9 L. D. 360.)
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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume, edition of 1882, 2 volumes, edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "I. D." to Decisions of the Department of the Interior, vol. 53; "L. and R." to records of the former division of Lands and Railroads in the General Land Office; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52.—Editor.

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DECISIONS

OF THE

DEPARTMENT OF THE INTERIOR

INTERPRETATIONS OF CERTAIN PROVISIONS OF THE BOULDER CANYON PROJECT ACT

Opinion, January 6, 1930

WATER POWER—BOULDER CANYON PROJECT—"PUBLIC INTEREST"—WORDS AND PHRASES—STATUTES.

The term "public interest" as used in subsection (c) of section 5 of the Boulder Canyon Project Act, in conjunction with section 7 of the Federal Water Power Act, has reference to the Government's responsibility, financial and otherwise, to all the people of the United States for the greatest good to be derived from the project and excludes confinement of the benefits of Boulder Dam power to one locality out of the many that comprise the "region" capable of service.

WATER POWER—BOULDER CANYON PROJECT—PUBLIC INTEREST—REIMBURSE- MENT—PREFERENCE RIGHT.

The primary "public interest" in contracts for the reimbursement of the United States for its investment in the project required by subsection (b) of section 4 of the Boulder Canyon Project Act is in the soundness of the contracts and the solvency of the contractor, and the rights of certain States or municipalities to be preferred in the award of contracts is subordinate to that public interest.

WATER POWER—BOULDER CANYON PROJECT—PUBLIC INTEREST—AWARD OF CONTRACTS—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

The Boulder Canyon Project Act and the "policy of the Federal Water Power Act" make the "public interest" the dominant consideration in the award of contracts and as a consequence thereof a State, as an applicant, does not have an absolute right to all or any part of Boulder Dam power, but it is within the discretion of the Secretary of the Interior to make allocation among various claimants where the public interest requires it.

WATER POWER—BOULDER DAM PROJECT—AWARD OF CONTRACTS—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

In the award of a contract under subsection (a) of section 5 of the Boulder Canyon Project Act the Secretary of the Interior is not required to accept the highest bid if that bid is in excess of the price that can be realized for the power under competitive conditions at competitive centers.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—MUNICIPAL CORPORATIONS.

The preference of a State or municipality for allocation of power in conflict with a privately-owned public utility under subsection (c) of section 5 of the Boulder Canyon Project Act and in conformity with the policy expressed in the Federal Water Power Act is a preference in consumptive right within the borders of the State or municipal corporation, but outside of their respective limits the State or municipality is merely on a parity with any other public utility company furnishing power in that territory.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—MUNICIPAL CORPORATIONS—STATUTES.

The purpose of subsection (c) of section 5 of the Boulder Canyon Project Act was not to bestow upon a State two separate preference rights, one under the exception clause of that subsection, and another under section 7 of the Federal Water Power Act, but merely to place a State in a preferred position, as opposed to a competing municipality, in view of the possible parity of these two classes of applicants under the latter act.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—MUNICIPAL CORPORATIONS.

The preference conferred by subsection (c) of section 5 of the Boulder Canyon Project Act is limited to the States named therein, but aside from that preference those States are merely on a parity with municipalities under the Federal Water Power Act, except as between a State and one of its own municipalities in which event the State's right is paramount.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—MUNICIPAL CORPORATIONS—LIMITATION FOR FILING APPLICATION.

The time limit fixed by subsection (c) of section 5 of the Boulder Canyon Project Act within which a State may contract under the preference accorded to it has reference to the special exception in that subsection which gives preference to a State over a competing municipality, but no time limit is placed upon the power of a State to contract where that preference is not invoked.

WATER POWER—BOULDER CANYON PROJECT—PUBLIC INTEREST—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

The discretionary authority of the Secretary of the Interior under the Boulder Canyon Project Act is to be controlled by the public interest which requires conservation and utilization of the navigation and water resources of the region, the financial security of the United States, and equality of access to Boulder Dam power by areas comprising the region in proportion to the needs of the applicants, provided that their plans for its utilization and conservation are equally well adapted.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—MUNICIPAL CORPORATIONS—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

The Secretary of the Interior is not required to grant a preference to a municipality applying for power if the plan for utilization of power which it presents conflicts with a plan presented by another applicant which he regards as better adapted to conserve and utilize the power capable of development, and the determination of this feature is entirely within the discretion of that officer.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—MUNICIPAL CORPORATIONS—LOS ANGELES.

The Boulder Canyon Project Act does not grant a preference to the city of Los Angeles over other municipalities in the award of power.

WATER POWER—BOULDER CANYON PROJECT—SECRETARY OF THE INTERIOR—RULES AND REGULATIONS.

That portion of section 5 of the Boulder Canyon Project Act which provides for general and uniform regulations contemplates that one of the primary responsibilities of the Secretary of the Interior shall be the fixing of financial requirements and rigid examination of the financial status of competing bidders, whether municipalities or privately-owned public utilities.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—STATE OWNED CORPORATIONS.

The fact that all of the stock of a corporation is owned by a State is not a sufficient reason for bringing the corporation within the preference right provision of subsection (c) of section 5 of the Boulder Canyon Project Act.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—CONTRACTS—STATES—ASSIGNMENT.

The preference right accorded a State by subsection (c) of section 5 of the Boulder Canyon Project Act is not assignable either before or after the execution of a contract by a State, but a contract obtained in exercise of the preference is assignable, subject, however, to all restrictions and conditions contained in the original contract, and without diminution of the State's liability to the United States and without waiver of the requirement of financial and legal capacity of the assignee.

WATER POWER—FEDERAL WATER POWER ACT—PREFERENCE RIGHT—STATES—MUNICIPAL CORPORATIONS.

A State and a municipality of another State stand on a basis of equality under section 7 of the Federal Water Power Act, but the right of a State thereunder is superior to a municipality of the same State.

WATER POWER—FEDERAL WATER POWER ACT—PUBLIC INTEREST—STATES—MUNICIPAL CORPORATIONS—ALLOCATION—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

Where conflicting applications are presented under section 7 of the Federal Water Power Act by a State and a municipality of another State, the Secretary of the Interior may make an equitable allocation between them in accordance with the public interest and with what, in his discretion, appears the best method of conserving and utilizing the water resources of the region.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—ALLOCATION—SECRETARY OF THE INTERIOR.

The preference accorded a State is limited to power which the State proposes to use within its borders, whether the application be presented under section 7 of the Federal Water Power Act or under subsection (c) of section 5 of the Boulder Canyon Project Act and the Secretary of the Interior may incorporate in the allocation to the State a stipulation to that effect.

WATER POWER—BOULDER CANYON PROJECT—PREFERENCE RIGHT—STATES—BOND ISSUE—SECRETARY OF THE INTERIOR.

The proviso to subsection (c) of section 5 of the Boulder Canyon Project Act which protects a State or political subdivision thereof from foreclosure of its right to file an application because of nonauthorization of or failure

to market a bond issue, until the expiration of a reasonable time therefor, does not preclude the Secretary of the Interior from determining what is a reasonable time or of granting an application to another during the interval so long as the right of the preference claimant to contract is preserved.

WATER POWER—BOULDER CANYON PROJECT—WORDS AND PHRASES.

The terms "formulating a comprehensive scheme" and "comprehensive plan formulated hereafter," as used in sections 15 and 16, respectively of the Boulder Canyon Project Act, both relate to the same thing.

WATER POWER—BOULDER CANYON PROJECT—STATE COMMISSIONERS—SECRETARY OF THE INTERIOR—RECORDS.

The right conferred by section 16 of the Boulder Canyon Project Act upon commissioners duly authorized under the laws of any ratifying State is that of advising and coordinating in the correlation of the present Boulder Dam undertaking with reference to future development, and to have access to the records with that end in view, but they are not to direct the Secretary of the Interior in the administration of the present work nor is that officer in any wise obligated to act upon their advice contrary to his own judgment.

FINNEY, Solicitor:

You [Secretary of the Interior] have asked me to consolidate in one memorandum my views on the following 16 questions, the majority of which have been covered in separate memoranda submitted to you from time to time as the problems arose.

Your questions and my opinions on them follow:

(1) What is meant by the term "public interest" as used in the act? What body of people comprises the public as the act uses the term? Is the "interest" referred to as "public" the Government's responsibility to the whole people of the United States, or is it the interest of the area to be immediately served by Boulder Dam power, or is it the interest of a particular part of that area?

The term "public interest" is used in section 5(c) of the Boulder Canyon Project Act (act of December 21, 1928, 45 Stat. 1057) as follows:

* * * In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, *with due regard to the public interest*, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada, shall be given equal opportunity as such applicants. (Italics supplied.)

The same term "public interest" is used in the Federal Water Power Act (act of June 10, 1920, 41 Stat. 1063, sec. 7) as follows (U. S. C., Tit. 16, section 800):

Preferences in issuance of preliminary permits or licenses.— * * * the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission

be made equally well adapted, to conserve and utilize in the *public interest* the navigation and water resources of the region; * * *. (Italics supplied.)

“Public interest” is one of those broad terms like “public policy” capable of different legitimate interpretations in the discretion of the officer called upon to administer it. The “interest” referred to is, primarily, the Government’s responsibility, financial and otherwise, to all the people of the United States for the greatest good to be derived from this project, the cost of which is to be advanced from the Public Treasury. Secondly, the term excludes confinement of the benefits of Boulder Dam power to one locality out of the many which comprise the “region” capable of service. The term “public interest” is the dominant consideration, a check upon the preferences mentioned in the two acts. It is necessarily a source of broad discretionary power in the Secretary.

(2) Does “public interest” include the necessity for making a good business contract which will guarantee the return of the investment within fifty years? If the “preference right” of States and municipalities would require the making of a contract which is less sound as a matter of business than a contract offered by a privately owned public utility, which consideration is the Secretary required to regard as dominant, the public interest or the preference right of the State or municipality?

To the first question I answer, Yes! Money provided by taxes from the entire United States constitutes the sum placed at risk by this Federal investment. When contracts are made for its repayment as required by section 4(b) the primary “public interest” is in the soundness of the contracts and the solvency of the contractor, not in the corporate or municipal character of that contractor. If one bidder can obligate itself by a contract whose enforceability is unquestionable, and the financial future of another bidder is uncertain or its legal capacity is questionable, public interest obviously requires acceptance of the sounder bidder. All preferences are subordinate to this public interest. It is only when two bidders can both offer a satisfactory contract from a business viewpoint that the Secretary must or should base his choice between them on claimed preferences.

(3) Is the Secretary required to accept the highest bid made for power by a reputable bidder, or must he take into consideration what constitutes a reasonable return under all attendant circumstances including “competitive conditions at distributing points or competitive centers?”

The Secretary is not required to accept the highest bid if that bid is in excess of the price which can be realized for the power under competitive conditions at competitive centers.

The act specifically provides (Sec. 5(a))—

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every

ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

The selling standard is to be "reasonable returns," not "all the traffic will bear." The phrase "shall be made with a view to obtaining reasonable returns" was in fact a specific amendment to this section (Cong. Rec. Senate, Dec. 14, 1928, p. 618), and clearly indicates the selling basis deemed to be feasible and most in line with public interest and the equitable distribution of benefits of Boulder Dam power. In deciding what a "reasonable return" may be it is proper to look to the language of the same section respecting renewals; 15 years from the date of execution of the original contract it may be renewed at a price revised "either upward or downward," as the Secretary of the Interior may find to be "justified by competitive conditions at distributing points or competitive centers." If this is to be the standard 15 years after execution, it is just to assume that it would also be a fair standard at the time of execution. Indeed, it is the only standard consistent with sound business and the execution of an enforceable contract with a solvent bidder. If the bidder can not sell his power in competition with other sources he is not a desirable source for reimbursement of the Federal expenditure. A "reasonable return" must be justified by "competitive conditions" or it is not reasonable. An unreasonably high return at the risk of bankruptcy of the bidder is not a sound basis for a contract required to be made in the "public interest."

(4) Does a municipality or a State have a preference for power which it proposes to sell outside its boundaries, as against a bid for power by a privately-owned utility proposing to sell in the same area outside the boundaries? May an allocation of power to a municipality be conditioned on use within the city limits?

The preference of either a State or municipality for allocation of power in conflict with a privately-owned public utility must rest upon section 5(c) of the Boulder Canyon Project Act. That section provides—

* * * In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant shall be given, first, to a State for the generation or purchase of electric energy for

use in the State, and the States of Arizona, California and Nevada shall be given equal opportunity as such applicants.

By this section the policy of the Federal Water Power Act is made the standard, with one exception in favor of States. The Water Power Act's (41 Stat. 1063, Sec. 7) provisions regarding preferences are again quoted below for convenience, (U. S. C., Tit. 16, section 800) :

"Preferences in issuance of preliminary permits or licenses.—In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this chapter the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

The exception may be disposed of first. It is: "preference * * * shall be given, first to a State for the generation or purchase of electric energy for use in the State and the States of Arizona, California and Nevada shall be given equal opportunity as such applicants." As this exception specifically confines the State's preference to "energy for use in the State" it is clear that a State is entitled to no preference for power which it proposes to sell outside its borders unless that preference can be found in the Federal Water Power Act.

What is the "policy" of that act, as regards preferences? It is clear that certain conditions precedent are to be met by any preference claimant before the preference will be recognized:

(1) The "public interest" is the paramount consideration, to which the preference is subordinate and with which it must not conflict. The meaning of "public interest" has been suggested in answer to your first question.

(2) The preference applicant's "plans" must be "equally well adapted" or within a reasonable time "made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region."

When a body of citizens organized as a municipality or State indicate, by establishment of a publicly-owned power system, their preference to buy power from themselves for use in the State or city, as against buying it from a public utility owned by others, it is clear that the "public interest" should sanction that choice.

But does the "public interest" require that consumers living outside the municipality or State should be required to obey the choice

of those living within it and buy power from that source rather than from a privately-owned public utility? The "preference" of the municipality is a preference in consumptive right, not in merchandizing advantage. Outside its own borders, a State or municipal corporation, reselling power, is on a parity with any other public utility selling in that territory. It is not entitled to elect, on behalf of consumers who are not its citizens, whether those consumers shall buy from it or from another company. If it does seek to make that election for them, its decision has not the dignity of a "preference" within the "policy of the Federal Water Power Act," but has the status of a competitive offer. That "policy" is to conserve and utilize in the public interest the navigation and water resources "of the region;" consumers outside the State or city limits, but within the "region" accessible to Boulder Dam power, are as much within the protection of that policy as consumers within it. It is open to question whether, if all the power available were requested by a municipality for its own use, on the one hand, and all the power were requested by a public utility for use outside the city limits, on the other hand, whether the "public interest" would permit the water resources "of the region" (the "region" including by hypothesis both municipal and suburban territory) to be preempted by the urban body of citizens as against the suburban simply on the ground that the first body was organized as a municipal corporation, whereas the second body of consumers is served by a privately-owned public utility. Certainly as between these two bodies of consumers the Secretary has discretion to make an equitable apportionment of the power if it is not sufficient to satisfy the demands of both. *A fortiori*, if a city claims the right, in addition to serving its own citizens, to demand power for resale outside its borders to consumers now served by a public utility which is applying for the same power, no preference need be recognized.

See *Mono Power Co. et al. v. City of Los Angeles, et al.* (284 Fed. 784, C. C. A., 9th, 1922; Certiorari denied, 262 U. S. 751). In that case, the city of Los Angeles brought condemnation proceedings against water rights and rights of way owned by the Mono Power Co. and the Southern Sierras Power Company, all outside the city limits, for use of the city. It was alleged by the city that "it is necessary for the city to provide additional electric energy for the present and future needs of said city and its inhabitants, for the purpose of heat, light and power," and that the "public interest" required the city to condemn all rights to the waters of the Owens River, and also the company's right of way adjoining it. The company, in answer, alleged that the right of way sought to be condemned had been appropriated by the company as a public utility to the use of other towns to which it furnished electricity. The trial

court permitted condemnation of the water rights and right of way. The Circuit Court of Appeals reversed this decision.

After citing code sections, including Code Civ. Proc., section 1240, to the effect that property appropriated to the use of a county, city and county, incorporated city or town, or municipal water district, can not be taken by any other county, etc., while such property is so appropriated and used for public purposes, the Circuit Court of Appeals said (p. 793)—

The theory upon which a municipal corporation may condemn and appropriate to a public use the property of a private corporation engaged in serving such municipality or its inhabitants is that the private corporation is using its property for a public use for a profit, and that the municipality has the right, in the interest of itself and its inhabitants, as an economical administrator of municipal affairs, to perform this public service itself and thus eliminate the profits of the private corporation.

That is not this case. The defendant is not rendering any public service to the city of Los Angeles or its inhabitants, and it does not propose to do so. Defendant's transmission and distributing lines do not extend into the city of Los Angeles, and it has not proposed to so extend them. The property of the defendant has been appropriated to the public use of other counties, municipalities, incorporated cities and towns, and the inhabitants thereof, and not for the city of Los Angeles or its inhabitants.

* * * * *

In other words, it was held [by the trial court] that the public use of a municipal corporation for the city of Los Angeles was a more necessary use than the public use of a private corporation for any other county, municipality, incorporated city or town.

Counsel for the plaintiff stated their contention upon this question very succinctly as follows:

"The law of the state presumes that the use of property by a municipality is a higher use than the use of it by a private corporation."

The court asked: "Suppose that they (referring to the defendant) 'show that their use is for a municipality?' to which counsel replied:

"We anticipated that counsel would urge that point, and we are prepared to show your honor that that is not the law as we conceive it, and confidently believe that the preference is between a private corporation and a public corporation, regardless of who that private corporation may be serving."

Referring to the trial court's decision, the court said (p. 795)—

* * * we are of the opinion that the Legislature recognized the distinction, and purposely used the broader phrase, "property appropriated to the use of" to include an appropriation by a private corporation, as well as an appropriation by a county, city and county, etc.

In short, this case holds that the statutes of California specifically prohibit condemnation by a municipality of property owned outside its borders by a privately-owned public utility, which property is already appropriated to the use of other counties or incorporated cities by the company. If the statutes of California, in a case where the city of Los Angeles claims a preference to water rights outside its borders, as against a privately-owned public utility serving other

communities, specifically prohibit the recognition of such a preference, it is not clear why the "policy of the Federal Water Power Act" should grant a greater preference in a similar "region." It is true, of course, that in the case of *Mono Power Co. v. City of Los Angeles*, the city endeavored to condemn a vested right of the public utility, whereas in this case the city and the utility are competing for a right not yet vested in either of them. But the policy to be honored in either case is the same: If the city may not even by due process of law and for adequate compensation, take away the power resources by which a public utility serves other communities, no reason appears why it should have a preference for their acquisition in the first instance. If the "public interest" will not divest other municipalities of the service of a privately-owned public utility, it is not apparent why it should prevent them from acquiring that service. The theory in the one case, says the court is that "the municipality has the right, in the interest of itself and its inhabitants, as an economical administrator of municipal affairs, to perform this public service itself and thus eliminate the profits of the private corporation." But a preference right to eliminate the profits of the private corporation exacted from the municipality's citizens is not a preference right to go outside the municipal boundaries and substitute itself for the corporation as a profit taker, no saving being worked to the benefit of the suburban area. That area has no interest in increasing the revenues of Los Angeles in preference to maintaining the revenues of the public utility now serving them under State regulation.

In conclusion, although a municipality, like any other corporation, may be allocated power for resale in the Secretary's discretion, it is not entitled to any preference as a matter of right for power which it proposes to sell outside the city limits. The allocation of power by the Secretary to the municipality may therefore be conditioned on use within the city limits, and, indeed, should be, as against a competing bidder which already has a distribution system in the area in which the city would have to dump the power unused by itself. There may be cases in which this limitation should be relaxed and the city permitted to resell small fluctuating excesses, in order to equalize the load. Such a relaxation would not extend to granting the city a preference for the full amount of its peak load. A municipality, like any marketer of power, must expect to provide adequate stand-by service for the protection of its consuming public. The suburban consuming area of its public utility rival is not a legitimate dumping ground for unused power. So much for municipalities, in view of the cited decision. As for States, their rights appear to be coupled by the language of the Federal Water Power Act with those of municipalities. The same two conditions

precedent, "public interest" and conservation of the "water resources of the region" must be met. Having met them, a State would appear to be in the same shoes as a municipality as far as any of the preceding discussion goes, except that in the case of conflict between a State and one of its own municipalities it seems that the State would have a preference, because it would have the capacity by legislation to deprive the municipality of legal capacity to compete with it as a bidder.

But as between a State and a municipality of any other State, the two would be on a parity. And neither the State nor the municipality would have a preference against one another or against a public utility as to power which the State or municipality may propose to sell outside its borders.

(5) Does Section 5 (c) of the act give the States of Nevada, Arizona, and California, or any other State, two separate and independent preference rights, as follows: (a) One under Section 7 of the Federal Water Power Act, under which power purchased may be sold either within the State or outside wherever a market may be found; and (b) Another under the clause beginning with the word "except" occurring about the middle of this subsection?

No.

A strong reason would be required to justify a conclusion that in one act the one subject of preference to States should be treated in two independent and parallel channels, one being the normal one adopted from the Federal Water Power Act and the other a new preference, and that the restrictions of the act as to the exercise of States' preference should be meant to apply only to this new creature.

The Boulder Canyon Project Act's language is as follows (Sec. 5 (c)):

In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

This is followed by the qualification—

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary.

Whatever preference is given to the States by the Federal Water Power Act is carried over into the Boulder Canyon Project Act; and

clearly this would be the only preference which might be claimed if the language quoted stopped with the word "except." This exception is in favor of a State for generation or purchase of electric energy *for use in the State*. It is claimed that this *exception* constitutes an *addition*; or entirely separate preference in favor of Arizona, California and Nevada, unrelated to that granted by the Federal Water Power Act, and that the restriction "for use in the State" applies only to the exception; that the State may, if it wishes, ignore this new preference and apply for power in accordance with the preference given by the Federal Water Power Act; and that that preference is unrestricted as to the place where the power may be used.

Such a construction is strained and unnecessary. The primary intention of the exception was apparently to place a State in a preferred position, as opposed to a competing municipality, in view of the possible parity of these two classes of applicants under the language of the Federal Water Power Act, previously quoted.

The words "for use in the State" provided as assurance that the State, by this concession, was not to be enabled to embark on the power distribution business outside its borders and indicated an intent by Congress to devote power secured under this preference to intrastate development and benefit. It has been argued that the addition of this phrase here means that the preference conferred by the Water Power Act is not so limited, and therefore that there are two preferences available, one unrestricted as to use and the other restricted. If so, the preference specifically created by the project act, restricted as to use, is less valuable than that previously available. Analysis thus indicates that the importance of the new preference language lies in its distinction between States and municipalities, not in any distinction as to place of use. This distinction was important in view of the fact that competing applications were expected from the States of Arizona and Nevada, on the one hand, and the municipality of Los Angeles, organized under the laws of California, on the other hand. Had the only anticipatable conflict been between a municipality and a State to which it was subject, this exception would have been unnecessary, the State being in such case unquestionably dominant. This language preserved the rights of Arizona and Nevada as superior to those of Los Angeles, provided both should meet the conditions of the Federal Water Power Act. But to indicate that no greater concession from the policy of the Federal Water Power Act was intended the restriction "for use in the State" was added.

(6) If two separate and independent preference rights are given to the States as outlined in the preceding question, does not any State in the Colorado River basin, or elsewhere, possess the same preference right that Nevada, Arizona

and California may claim? Under this provision do not all States and all municipalities stand on a parity? To what extent, if any, are such rights qualified by the requirement that "due regard must be given to the public interest?"

As indicated in replies to other questions it is my opinion that two separate and independent preference rights are not conferred upon the States interested. It appears to have been the intent of the language of section 5 (c) following the word "except" to convey a limited preference upon the three lower basin States. The compact divided the Colorado basin into two parts, the upper and the lower basin. The lower basin comprised the three States named in said paragraph. The upper basin, the remaining four. A division of the water was effected by the upper and the lower basin. The upper basin has its own power possibilities and certain provisions of the Boulder Dam Act look to the ultimate utilization and development of those possibilities. Possibly for this reason as well as the relative remoteness of the other States, Congress confined the preference given in section 5 (c) to the three lower basin States. Outside of the preference so conferred the three States as well as the upper basin States are on a parity with municipalities under the provisions of the Federal Water Power Act, subject to the limitations and conditions expressed in the answer to question 4.

As "the public interest" is made the dominant consideration in any event by the Boulder Canyon Project Act and by the "policy of the Federal Water Power Act," the above language should not be construed to mean that any State as an applicant has an absolute right to all or any part of Boulder Dam power. If "the public interest" requires an allocation among various claimants, the Secretary is free to make it.

(7) Within what time must contracts be executed with States claiming a preference right? Does the word "such" in line 1, second paragraph, subsection 5 (c) refer to all preference rights that may be claimed by a State, whether asserted under the Federal Water Power Act or the special preference right given by subsection 5 (c), if it be held that two separate and independent preference rights may be claimed by States?

The language of the Boulder Canyon Project Act, referred to, is as follows (Sec. 5(c)):

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary.

It may be assumed at the outset that a State is entitled to the same time within which to contract as is a municipality. No time limit is placed upon the power of a municipality to contract. The quoted time limitation against the State must therefore be construed to apply against the special exception made in favor of the State. This

exception, as stated above, refers to a case of conflict between a State and a municipality outside the State. In other words, within six months, a State presenting plans equally well adapted as those of the competing municipality and equally consistent with the public interest, might claim power in preference to the municipality. After six months, the State reverts to the parity with outside municipalities established by the Federal Water Power Act. The State, after the lapse of six months may, nevertheless, assert whatever preference a municipality might claim; prior to that time its preference right is superior to that of a competing municipality.

(8) In general, what discretion is permitted to the Secretary by the preference clauses of the act?

This general question is answered specifically under the foregoing questions. In general, the Secretary must be controlled by the public interest; the public interest requires the "conservation and utilization of the navigation and water resources of the region;" the "region" is the region having physical access to Boulder Dam. The public interest requires, first, financial security of the United States, and, second, equality of access to Boulder Dam power by areas composing the region in proportion to the needs of the applicants, provided their plans for its utilization and conservation are equally well adapted. Once these conditions are met and the question is one of apportionment between the applicants whose demands for power are equally consistent with the public interest (meaning by that term the financial security of the United States and the equable distribution of Boulder Dam benefits within the "region"), and only then, does the allocation of power pass from the realm of the Secretary's discretion into the area of rigid legal rights.

In view of the contention submitted by the State of Nevada that it is entitled to preference for one-third of the power for sale where it pleases, as against the Secretary's tentative allocation to that State of 18 per cent of the power to be used within the State, it is interesting to refer to the following committee amendment offered in the House (Cong. Rec. May 25, 1928, p. 10232), as an amendment to section 8:

Page 13, line 9, strike out the period, insert a colon, and the following: "*Provided further*, That in the event no such compact is entered into prior to June 1, 1928, then there shall be reserved for acquisition by the States of Arizona and Nevada, their respective agents, licensees, or assignees, at the switchboard, at the plant or plants operated through the use of water impounded by said dam for each, electrical energy equivalent to 15 per cent of the total electrical energy made available by the use of such impounded water, to be contracted for by said respective States, or their agents, licensees, or assignees, within six months after notice by the Secretary of the Interior, and to be paid for as and when said electrical energy is ready for delivery. If said plant or plants are operated by the Government, then said electrical energy

shall be delivered on the terms and charges provided in the general regulations for delivery of electrical energy at the switchboard to municipal corporations and political subdivisions."

Mr. SWING. Mr. Chairman, the committee amendment just reported by the Clerk has been recalled by the committee, and we wish to have that amendment voted down.

The CHAIRMAN. The question is on agreeing to the committee amendment. The committee amendment was rejected.

Rejection by Congress of an amendment which would have substituted a specific allocation in lieu of the Secretary's discretion is some indication of the extent of the discretionary power to make allocations which the act intended to vest in him. If Congress declined to allocate 15 per cent of the total to Nevada, and the Secretary in his discretion has tentatively allocated 18 per cent, no good reason appears for reading into the act a mandate that Nevada shall be entitled to 33 $\frac{1}{3}$ per cent.

(9) Need a municipality applying for power be granted a preference if the plan for utilization of power which it presents conflicts with a plan presented by another applicant, which the Secretary regards as better adapted to conserve and utilize the power capable of development? In considering which plan is better adapted for such utilization and conservation, what factors should be considered: Production, transmission, distribution (i. e., meeting the needs of the region), financing, or only some of these elements?

The first part of this question can be answered categorically "No," in view of the discussion above. All preferences are conditioned under the Federal Water Power Act upon satisfaction of the public interest, and equal adaptability to conservation and utilization of the navigation and water resources of the region. If the plan of one applicant in these respects is superior to the other the question of preference does not arise, because conditions precedent to its exercise have not been discharged. As to the second part of the question, the Secretary has the broadest possible discretion in deciding which of two conflicting plans is better adapted for such utilization and conservation. If they are identical in financial security to the United States, the contest between them may be as to their economic value to the "region." Decision of this question, of course, is entirely within the discretion of the Secretary. If one applicant proposes to use all the power at the dam in promoting new industries and another applicant proposes to use a part of the power for distribution of water for human use, and a third applicant wishes to use the power for irrigation, pumping and the needs of established industries, and a fourth asks the power for use of an urban population, manifestly there is no rule of thumb which will dictate what allocation to each of these purposes best "utilizes and conserves" the "water resources" assuming that the "region" means the region having physical access to Boulder Dam power.

If, in the Secretary's discretion, the competing plans are equal as to finances and economic justification, their physical features may be his reason for choice between them. Examining these features, even if the plans are identical in generating equipment, it does not necessarily follow that they are "equally well adaptable" to conserve the power, for they may differ in plans for transmission, distribution, etc. It has been suggested that if the dam and the power plant are erected by the United States and the electrical machinery must meet United States specifications, then the "plans" are identical, and the question is resolved into one of rigid legal preferences as between applicants, based on the Federal Water Power Act. To state this contention is to refute it; it would require complete elimination of the "public interest" as a factor, whereas it is clear that under both acts it is the dominant factor.

(10) Is there any distinction between the preference to which the city of Los Angeles, on the one hand, and other municipalities, on the other hand, are entitled?

No. Any distinction between the city of Los Angeles, on the one hand, and other municipalities, on the other, would have to be clearly stated in the act before it could be recognized. No such distinction appears and the city of Los Angeles is nowhere mentioned by name. Both the city and other municipalities must meet the test of public interest and adaptability of their plans to conserve and utilize the water resources of the region. If municipalities were, for any reason, entitled to all of the power available, save for the preference of a State, Los Angeles and the other municipalities would be required to yield pro rata to make up the allocation taken for the competing State.

(11) Is the Secretary authorized to fix reasonable requirements as to financing, which must be met by all applicants, whether municipalities or privately-owned public utilities?

Yes. If, as assumed above, the dominant public interest is the obligation of the United States to the whole people, it necessarily follows that the financial obligation of the United States to secure the refunding of Federal moneys, as provided by the act, is one of the Secretary's primary responsibilities. The fixing of financial requirements and rigid examination of the financial status of competing bidders is not only within the Secretary's discretion but is an absolute obligation resting upon him; see section 5, providing for "general and uniform regulations." If a bidder can not meet the reasonable financial requirements of the Secretary, can not meet scrutiny of its organization or legal capacity, it does not satisfy the public interest and its claimed preference may be and should be ignored.

(12) Is a corporation whose stock is held by a State entitled to whatever preference the State would have if applying directly?

A corporation is not a state; it is a separate entity though all its stock be owned by a state. Specific preferences not granted to corporations are granted to States by the two acts. An amendment to include "legal subdivisions" along with "States" in the preference provision for States in section 5 (c) adopted in the House (Cong. Rec. p. 10024, May 24, 1928) does not appear in the act as passed. And a State-owned corporation performing non-governmental functions is scarcely to be "preferred" to a State-created legal subdivision distributing power to its citizens as a quasi-administrative function.

The Secretary, in receiving the bid of a corporation, would not be required to go back of the corporate entity to discover who its stockholders might be, nor to grant the corporation a preferred status if such examination should disclose that a State is one stockholder or the only stockholder. Without specific recognition in either act of such an unusual creature we may assume that a State, wishing to claim the benefits granted by the act to "States" should claim them in its own right and not in the right of its creature.

(13) Are the preference rights of the States or municipalities assignable? May an assignment of such preference rights be made before a valid, binding contract is executed with the State for the power claimed as a preference right?

This question must be answered in the negative. A preference right accorded a State is a preference "for the use of water and appurtenant works and privileges" or, in the alternative, "for delivery at the switchboard * * * of electric energy." (Sec. 5(c).) As to the manner by which such right shall be acquired see the first sentence of the same subsection (5(c)). That subsection begins "*Contracts* for the use of water * * * or for sale and delivery of electric energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary * * *." [Italics supplied.] These "applicants" are applicants for *contracts*. Manifestly, until a contract has been offered by an "applicant" who is a member of a preferred class no preference right has arisen. The whole policy of the Federal Water Power Act in granting preferences to States and municipalities was to protect them in their right to eliminate private profit in the furnishing to their citizens of services which they could themselves supply if given the opportunity. No intent is shown to pass this preference privilege on to corporations or private persons for their private profit. As such classes are not beneficiaries of the express policy of the Federal Water Power Act they can not be made so by the wish

of the State expressed in an assignment. Moreover it is a well-established principle that preference rights are not assignable.

So much for the situation before the State has actually executed a contract with the Secretary. After execution of such a contract the "policy of the Federal Water Power Act," and the dominant public interest, remain in as full force as before. The State may assign its contract or resell its power; but the Secretary is not obligated to recognize in any assignee, sublessee, or purchaser, any rights superior to those of the original contractor as to place of use, quantity of power, or any other conditions which have been accepted by the State in the contract.

The preference right itself is not assignable either before or after the execution of a contract by the State. A contract obtained in exercise of this preference right is assignable, subject to all restrictions and conditions contained in the original contract, and without diminution of the State's liability to the United States and without waiver of the requirement of financial and legal capacity of the assignee.

(14) If a State presents an application under section 7, of the Federal Water Power Act, which is in conflict with that of a municipality, is there any difference in status between the two applicants? If the plans are identical, is the Secretary required to allocate the power to the State? If so, would he be required to insert a stipulation that the power should be used within the State?

This question has been discussed in detail in answer to Questions 4, 5 and 6 above. The answer may be summarized: A State, and a municipality of another State, both presenting applications under section 7 of the Federal Water Power Act, stand on a basis of equality. If the conflict is between applications of a State and a municipality of that same State, the right of the State is superior, inasmuch as the municipality is its creature and possesses the capacity to make application only by sufferance of the State. If the conflict is between a State and a municipality foreign to it, the Secretary may make an equitable allocation between them in accordance with the public interest and in accordance with what, in his discretion, appears the best method of conserving and utilizing the water resources of the region. If the municipality lies within the competing State, and these two are the only bidders, the power should be allocated in full to the State. Whether some or all the power is claimed by a State no preference right exists save as to power which the State proposes to use within its borders, whether the application is presented under section 7 of the Federal Water Power Act or under a supposed distinct preference, arising out of section 5 (c) of the Boulder Canyon Project Act. The Secretary consequently may incorporate in the

allocation to the State a stipulation that the power be used within the State.

(15) If Los Angeles and other municipalities, including the Metropolitan Water District, can not now execute enforceable contracts meeting reasonable financial requirements of the Secretary, what would be the duty of the Secretary under the provisions of the act that an application is not to be denied because of necessity for a bond issue, and providing for reasonable time for passage of such bond issue? Would he be authorized to make contracts with other bidders preserving to the preference claimants the right to contract for part of the power if enforceable contracts are tendered within a designated time?

Section 5 (c) contains the following proviso:

Provided, however, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary has been given to such applicant to have such bond issue authorized and marketed.

This proviso does not relieve either the State or a political subdivision from the necessity for compliance of its application with the public interest nor from adaptability of its plans to the conservation and utilization of the water resources of the region. If these conditions have been met and the State or political subdivision has proved its right to an allocation, whether for power purposes or electrical energy, this proviso protects the State or political subdivision from foreclosure of such right on the ground of non-authorization of a bond issue or failure to market a bond issue until the expiration of a reasonable time therefor is determined by the Secretary. As to what a reasonable time may be, probably the minimum time now provided by the laws of the State may be looked to. This proviso, however, is not designed to tie the hands of the Secretary pending the authorization and marketing of the bond issue, so long as the right of the preference claimants to contract for the power allocated to them is preserved. He can not grant "any other application in conflict therewith." As an "application" is an application for a contract, the prohibition against granting another application is a prohibition against execution of another contract "*in conflict therewith.*" [Italics supplied.] But, if another applicant offers a contract which preserves in full the right of the preference claimant to contract within a reasonable time, when, as and if the necessary bond issue is authorized or marketed, the two applications are not "in conflict." The necessity for flood control makes it to the interest of all parties that the project be initiated and completed at the

earliest possible date. To the furtherance of this end the Secretary is plainly empowered to make the necessary contracts required by section 4 (b) at the earliest possible date. Contracts to that end which specifically reserve to the Secretary the power to make further contracts with the preference claimants for the power which he has allocated to them, since they are not "in conflict therewith," are within his authority.

(16) What is the proper construction of Section 16 of the act?

Section 16 of the act must be construed in connection with section 15. These two sections read—

SEC. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of \$250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections and shall be entitled to have copies of said records on request.

Section 15 authorizes investigations with a view to "*formulating a comprehensive scheme* of control and improvement and utilization of the water of the Colorado River and its tributaries" [italics supplied] and authorizes appropriation therefor. Section 16 provides certain steps in furtherance of any "*comprehensive plan formulated hereafter* for the control, improvement and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit of such control, improvement and utilization." [Italics supplied.] The phrases "comprehensive scheme" and the "comprehensive plan formulated hereafter" both relate to the same thing.

The purpose of the two sections is to provide liaison between the present undertaking, administered by the Secretary of the Interior and future development of the river during formulation of plans for such developments. It was not the intention of section 16 to superimpose upon the authority and discretion of the Secretary of the Interior, everywhere else made the basis of administration, the con-

trol and supervision of a group of commissioners whose number, place and time of meeting, responsibility and authority, are unprovided for. The right of the commissioners is to advise and cooperate in the correlation of the present undertaking with future undertakings; it is not a right to direct the Secretary in the administration of the present work. He is not required to convene these commissioners, nor to seek their approval or ratification for any act of his. He is only required to grant them access to the records of his department. They may tender him advice but he is in nowise obliged to act thereon contrary to his own judgment.

DONALD K. McLENNAN

Decided January 10, 1930

DESERT LAND—IMPROVEMENTS—RECLAMATION—WITHDRAWAL—FINAL PROOF—STATUTES.

Section 5 of the act of June 27, 1906, which provides that the time that a desert-land entryman is hindered or prevented from making improvements on or from reclaiming the lands in his entry by reason of the fact that the land has been within a reclamation withdrawal, shall not be computed in determining the period within which he must complete his entry, is not applicable where the method of irrigation is by the use of water to be procured from wells sunk on the land, and the failure to make timely reclamation is due solely to lack of funds.

DESERT LAND—RECLAMATION—EXTENSION OF TIME—LAND DEPARTMENT.

The Land Department has no authority to grant extension of time for reclamation of the land embraced within a desert-land entry beyond the period authorized by the act of February 25, 1925.

EDWARDS, Assistant Secretary:

Appeal has been made by Donald K. McLennan from the decision of April 25, 1929, by the Commissioner of the General Land Office, rejecting his application for further extension of time for reclamation of the land embraced in his desert-land entry and the submission of final proof and holding the entry for cancellation because of default.

The entry was made on January 30, 1913, for the SE $\frac{1}{4}$ Sec. 20, T. 5 S., R. 8 E., S. B. M., California, under the amended desert land act of March 3, 1891 (26 Stat. 1095), which allowed a period of four years within which to make satisfactory proof of the reclamation and cultivation of the land and the payment of the final purchase price of \$1 per acre. The act also required an annual expenditure of at least \$1 per acre for three years for the purpose of such reclamation and cultivation. The necessary yearly proofs have been made.

Various remedial acts have been passed authorizing extension of time for the making of final proof on desert-land entries.

Section 5 of the act of June 27, 1906 (34 Stat. 519), provides that where a desert-land entryman has been hindered or prevented from making improvements on or from reclaiming the lands in his entry by reason of the fact the land has been embraced within the exterior limits of any withdrawal under the reclamation act of June 17, 1902 (32 Stat. 388), the time during which he has been so hindered shall not be computed in determining the time within which he is required to make improvements or reclaim the land. That act appears to have no application in this case, although the land was embraced within the exterior limits of a reclamation withdrawal October 19, 1920, because no hindrance on that ground is alleged and none is indicated. The method of proposed irrigation is by the use of water to be procured from wells to be sunk on the land, and the record indicates that the plan is feasible by reason of the plentiful supply of underground water available in that region. The excuse given for failure to make timely reclamation is lack of funds. Therefore, the act of June 27, 1906, *supra*, may be eliminated from further consideration in this connection.

Section 3 of the act of March 28, 1908 (35 Stat. 52), authorized an extension of time for an additional period not to exceed three years upon proper showing as therein required.

The act of April 30, 1912 (37 Stat. 106), authorized further extension of time not exceeding three years, in addition to the extension authorized by prior laws, upon proper showing, provided however that the total extension of the statutory period for making final proof that may be allowed in any one case shall be limited to six years in the aggregate.

Section 5 of the act of March 4, 1915 (38 Stat. 1138, 1161), authorized still further extension not to exceed three years from the date of allowance thereof. That act, as amended by the act of March 21, 1918 (40 Stat. 458), was limited to entries made prior to March 4, 1915.

The next and final act authorizing extension of time for making final proof on desert-land entries, is the act of February 25, 1925 (43 Stat. 982), which permitted still further extension of time not to exceed three years in addition to the time authorized by prior laws.

This entryman has had the full benefit of these respective laws. He had the original four-year period allowed by the act of 1891, *supra*, and he has been granted four extensions of time. His third extension carried the period to May 22, 1926. His fourth extension was made to expire on January 30, 1929, whereas it could have been formally allowed up to and inclusive of May 22, 1929. But the

latter date was the ultimate limit of time which could have been granted, and that time has passed. The entry has stood considerably beyond the legal limit, and the department is without authority to extend further indulgence.

The decision appealed from is

Affirmed.

SCRIBNER v. LOVE

Decided January 10, 1930

HOMESTEAD ENTRY—ENLARGED HOMESTEAD—STATUTES.

The enlarged homestead act is part of the general provisions of the homestead laws and is subject to the practice, regulations and decisions applicable under those laws.

HOMESTEAD ENTRY—ENLARGED HOMESTEAD—APPLICATION—SEGREGATION—PREFERENCE RIGHT—STATUTES.

The purpose of the segregation provided for in the enlarged homestead act was merely to protect the rights of the senior applicant for land not designated at the date of the application, but it does not prevent the filing of a junior application to be received and suspended to await action on the prior application.

HOMESTEAD ENTRY—ENLARGED HOMESTEAD—APPLICATION—SETTLEMENT.

Where a senior application, filed for 320 acres under the enlarged homestead act, was rejected because the land was not subject to entry under that act an allowable intervening junior application becomes the senior right and will prevail over a later settlement and claim for 160 acres under section 2239, Revised Statutes, by the original applicant.

EDWARDS, *Assistant Secretary*:

Sophia L. Love has appealed from the decision of the Commissioner of the General Land Office dated July 18, 1929, rejecting her homestead application, Phoenix 060679, because of conflict with the prior desert-land application of Hunter A. Scribner.

On March 23, 1925, Love filed homestead application, Phoenix 057888, under the enlarged homestead act (act of February 19, 1909, 35 Stat. 639) for the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 23, NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 26, T. 8 S., R. 20 W., G. & S. R. M. The land was not designated as of the character subject to entry under that act, and in connection with her application to enter the applicant filed petition for designation and also an application for restoration of her homestead right, she having made a prior homestead entry which had been abandoned.

Upon consideration of the petition for designation of the land the Geological Survey found that it is susceptible of irrigation by pumping from wells, and even if that method of irrigation were impracticable, the lands must be regarded as potentially irrigable under the Parker-Gila Valley project involving the proposed use of the Colorado River. In the light of that report Love's application

was held for rejection by the General Land Office on June 17, 1926. No appeal was taken from that action but the applicant filed supplemental application to make entry under section 2289, Revised Statutes, for the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 23, and N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 26, said township, which the General Land Office considered as a withdrawal of the former application under the enlarged homestead act, and by decision of January 4, 1927, the latter was finally rejected and the new application was returned to the local office for appropriate action, it being observed, however, that the new or supplemental application was under a different act and could not be treated as an application to amend the first filing, but should be considered as a new application and given a current serial number. In response to that notice the register by letter of January 18, 1927, advised the General Land Office that there was an adverse claim of record which had been suspended awaiting final action on the original application of Love to make enlarged homestead entry. The adverse claim referred to was the desert-land application of Hunter A. Scribner filed April 23, 1925, for the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 23, and NE $\frac{1}{4}$ Sec. 26, said township.

By decision of May 18, 1927, the General Land Office held that Scribner's application had priority over the new application of Love, and that the latter should be suspended awaiting final action on the said desert-land application.

On December 24, 1927, Love filed in the local land office an affidavit alleging that about May 1, 1925, she made settlement on the land and built a house on the N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 26 at a cost of \$300 and cleared about 60 acres and had resided upon the land for 14 months; that she had expended more than \$500 in improving the land.

In the decision appealed from it was held that Scribner had the prior and superior right, as his application was filed prior to the new application of Love and prior to the date of her alleged settlement. The appeal urges that the first application of Love under the enlarged homestead act, with petition for designation, completely segregated the land until final action thereon; that no other intervening application could have been properly received, and that the application of Scribner was of no force or effect. This contention is based on the provisions of the amendatory act of March 4, 1915 (38 Stat. 1162), which provides that application may be filed for undesignated land upon *prima facie* showing of its character under the enlarged homestead act, such application to be suspended until it shall have been determined by the Secretary of the Interior whether the land is actually of that character and—

* * * that during such suspension the land described in said application shall be segregated by the said register and receiver and not subject to entry until the case is disposed of; and if it shall be determined that such land is

of the character contemplated by the said Acts, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

The regulations of April 17, 1915 (44 L. D. 68), for administration of that act provides in subdivision (e) of section 3, as follows:

The filing of an affidavit, as above indicated, will not be conclusive as to the character of the land therein described, and the applicant may be required by the Geological Survey to furnish additional evidence with regard thereto. Moreover, the filing of an application and petition does not give the party the right to fence the land or place other improvements thereon, and the erection of improvements will not confer upon him any right to equitable consideration of the application in the event the land is found not to be of the character contemplated by those provisions of the enlarged homestead act under which the claim is filed.

And section 5 of the regulations further provides—

No other appropriation of the land will be allowed before the application has been finally disposed of. However, later applications therefor should be received and suspended.

It always has been recognized that the purpose of the segregation required by the act was merely to protect the rights of the senior applicant in case the land be subsequently designated, and not to prevent the filing of junior applications subject to the prior application. The enlarged homestead act is part of the general provisions of the homestead laws and is subject to the practice, regulations and decisions applicable under said laws, including the right to file junior applications to be received and suspended awaiting action on a prior application. See *Shreffler v. Smelcer* (45 L. D. 34).

In the case of *Ohmer V. Hensel* (45 L. D. 557), the local officers had rejected a junior application because of conflict with a prior suspended application under the enlarged homestead act. The department stated that no grievous error was committed by such rejection in view of the fact that the senior application was subsequently allowed, but that the junior application properly should have been suspended until final action was taken on the prior application.

The segregation provided for in the enlarged homestead act for the benefit of applicants for land not designated at the date of application is similar to the privilege accorded certain States by the act of August 18, 1894 (28 Stat. 372, 394), which requires withdrawal and reservation of unsurveyed lands from any adverse appropriation in cases where the States apply for survey in order that the States may have a preferred right of selection for a period of 60 days, in satisfaction of various grants to the said States. It has been held that during the preference right period applications tendered by others should not be rejected but should be received and suspended to await the event of the State's action. *Verdine R. Hall*

(45 L. D. 574). See also *Hall v. Payne* (254 U. S. 343); *Edward Rutledge Timber Co. et al. v. Farrell* (255 U. S. 268).

It appears that the application of Scribner was properly received and suspended awaiting action on the prior application of Love under the enlarged homestead act. That application having been rejected, the Scribner application was next in order, and it was filed prior to the alleged settlement of Love on the land.

There is some suggestion in the record that a hearing might be ordered on the application of Love, but no basis therefor is seen, as she does not allege settlement prior to the date of Scribner's application, and the record indicates that the land is desert in character and susceptible of irrigation. No issue of fact is presented in the present record.

The rejection of the application of Love is

Affirmed.

HENRIETTA C. STEELE

Decided January 11, 1930

MINING CLAIM.

An interest in a mining claim is real estate, vendible and inheritable.

MINING CLAIM—PATENT—RECORD TITLE—EVIDENCE.

The Land Department will not insist upon a perfect record title as a prerequisite to a patent to a mining claim if, under the circumstances disclosed by the record, it is probably not susceptible of documentary proof, and where, from the evidence, there is no probability that the patent will be attacked by a stranger, or, if attacked, the patentee has at hand the means of showing that the attack can not be sustained.

MINING CLAIM—PATENT—DESCENT AND DISTRIBUTION—TITLE—EVIDENCE.

Where the evidence is sufficient to hold that the right, title to and estate in a mining claim passed by the law of descent and distribution of the State in which the property is located to the applicant in whose name the patent proceedings were initiated and prosecuted, and there has been a considerable lapse of time since the death of the decedent, final certificate and patent will issue in the name of the applicant, and not to the heirs generally, notwithstanding that a cloud on the title may arise from failure to administer the estate.

EDWARDS, Assistant Secretary:

A communication to Senator Carl Hayden of Arizona from Mrs. J. B. Rudert of Prescott, Arizona, was upon his suggestion treated by the Commissioner of the General Land Office as an appeal from his decision of October 29, 1929, in the matter of mineral application, Las Cruces 032068, filed by Henrietta C. Steele in her own behalf.

The decision mentioned directed notice to Mrs. Rudert to the effect that the final certificate issued to Henrietta C. Steele in connection with her application for the Schoyerlafe lode claim would be

amended to read to the heirs of R. L. Steele, and patent would be issued in accordance with the amended certificate, unless within 30 days from notice Mrs. Rudert showed at the time of the filing of the application that the mining title to the claim was in Henrietta C. Steele. The action taken by the commissioner under the facts disclosed by the record fully warrants consideration of such communication as an appeal.

Mrs. Steele filed her application April 5, 1926. She prosecuted the patent proceedings to completion and final certificate was issued to her June 25, 1926. Her application set forth that R. L. Steele became the sole owner of the claim December 16, 1916, and that he died in January (later corrected to read March 5) 1920, intestate and without issue, leaving the applicant, his wife, sole heir to his estate, whereupon by operation of law she became possessed of the claim and was its present sole owner. The abstract of title showed that title became vested in R. L. Steele as alleged, but there was no documentary evidence showing the transfer of title to the applicant. By decision of October 5, 1926, an order of like tenor and effect as that above recited was laid upon Mrs. Steele. In response, Mrs. Steele filed personal affidavit to the effect that upon the death of her husband she consulted counsel learned in the law as to the disposition of his estate both real and personal and was advised by them that as she was the only heir and distributee of his estate and was in full possession thereof, no administration was necessary, as the real estate passed to her by operation of law and there could be no conveyance to her of property that became hers by the law of the land. Supporting affidavits were filed to the effect that Henrietta C. Steele was the wife and sole heir of R. L. Steele, deceased. She later supplemented these affidavits by statements containing additional averments that her husband, R. L. Steele, always paid his debts, left no children and that no administration of his estate was attempted because unnecessary under the circumstances and because she did not desire to incur the incidental costs thereof.

January 18, 1927, the commissioner held that the affidavits mentioned could not be accepted as evidence of title to the claim in Henrietta C. Steele and affirmed his previous ruling. As the result of subsequent notices to applicant, communications were received from Mrs. Rudert setting forth that Henrietta C. Steele died intestate April 18, 1928, and that she was her only child and heir; that R. L. Steele was her stepfather, who left brother and sisters that still survive; that the account of the estate of R. L. Steele showed it consisted of but a few hundred dollars. She expressed an opinion to the effect that the issue of a patent to the heirs of R. L. Steele would place the brothers and sisters of R. L. Steele in a position to claim the property that rightfully belonged to her, and

requested that the patent issue to the heirs of Henrietta C. Steele, or if that request should not be granted that she be permitted either to withdraw the application or that it be held in abeyance until she could secure evidence of title by court order or process of administration. In the decision complained of, the commissioner held he was without authority to grant a patent to the heirs of Henrietta C. Steele, and by letter of June 30, 1927, he advised the applicant, "If you are your husband's only heir and entitled under the laws of New Mexico to all of his property, the fact that the patent will issue to the heirs will not affect your rights in any way. You will take the lode claim under the laws of New Mexico in the same way that you took any other property that he left."

The department is clearly of the opinion that there is no authority under the circumstances disclosed for the issuance of a patent in the name of the heirs of R. L. Steele. R. L. Steele is not the applicant and claimant of the title. Henrietta C. Steele is the applicant and claimant. R. L. Steele is shown to be merely the owner of the claim at the time of his death. The general rule that where it is disclosed that a public-land claimant has died before completion of his entry, patent should issue to his heirs generally has no application to the facts here presented. The question of heirship and descent of real estate is exclusively governed by the *lex rei sitae*. *Hutchinson Investment Co. v. Caldwell* (152 U. S. 65, 69); *Powell v. Powell* (22 Idaho 531, 126 Pac. 1058); *Whittenbrock v. Wheadon* (128 Cal. 150, 60 Pac. 664). And the determination as to what persons were the heirs mentioned in such patent would be for the courts. It would not necessarily follow that the courts would adjudge that Henrietta C. Steele or her successors in interest was the person intended in the use of the words heirs of R. L. Steele in the patent. The commissioner's opinion that such would be the result is no more than prediction and does not justify the action he contemplates taking.

The issuance of such a patent might possibly result in the investment of title to the claim in strangers to the application who could assert no rights by virtue of such application and who had paid no part of the expenses of the patent procedure or the purchase money. If the applicant can show no title to the claim, the proper procedure is to reject the application, leaving it to those who can show title to seek a patent in their own right.

However, the department does not agree with the holding that the applicant has not shown sufficient and competent evidence that she was invested with title to the claim. The commissioner clearly had authority to determine whether she had such a title be the evidence such as showed she acquired by purchase or by descent. A title is not necessarily doubtful simply because it requires support from parole testimony. As a general rule, for example, title by inheritance

depends principally upon matters *in pais*, or facts resting in the knowledge of witnesses. If those facts be clearly sufficient to establish the right of the vendor as heir, it is apprehended that the purchaser could not object to the title simply because it could not be established by record evidence. Sugden on Vendors, 8th Amer. Ed. 24, and cases cited; Maupin on Marketable Title to Real Estate, 795. Where a break in a record title is satisfactorily explained so as to leave no imputation on the title, as where the estate passes by descent, instead of purchase from one of the vendor's predecessors in title to another, the title is not rendered unmarketable by the fact that parole evidence must be resorted to for the purpose. Maupin on Marketable Title to Real Estate, 796.

In view of the above-stated principles respecting the sufficiency of title to real estate, it is not believed that the department should insist upon a perfect record title to a mining claim, where under the circumstances disclosed by the record it is probably not susceptible of documentary proof, and where from the evidence before it, there is no probability that the title of the patentee will be attacked by a stranger under color of title, or that, if attacked, the patentee must, of necessity, have at hand the means of showing that the attack can not be sustained.

The evidence before the department is sufficient to establish that R. L. Steele died without issue and intestate, leaving as his widow the applicant, Henrietta C. Steele. Under the laws of New Mexico, the entire estate of a married man, who dies intestate with a surviving widow and without issue, descends to the widow. Section 1845, Compiled Statutes 1915; *Girard v. Girard*, (221 Pac. 801). The real estate of a decedent passes directly to the heirs or devisees and not to the executor or administrator (Section 2257). The administrator may apply to the probate court to sell the realty when it appears the personalty is insufficient to pay debts and legacies (Section 4398). It is well settled that the interest in a mining claim is real estate, vendible and inheritable.

The evidence is sufficient to hold that the right, title to and estate in the claim passed by the law of descent and distribution to the applicant, affected, however, with a cloud arising from the failure to administer the estate and thereby definitely have determined whether there were claims against the estate that would warrant the sale of the realty to satisfy them. This cloud, however, is gradually dissipated by lapse of time and the operation of statutes of limitation. The abstract furnishes negative evidence that no claim affecting the property was of record at the time it was filed in March, 1926. No adverse proceeding or protest has been filed at any time, which fact, though not conclusive against those claiming rights under or claims against this location, is strongly persuasive that none

such exists. If, as asserted by the applicant, R. L. Steele left no debts, the administration proceedings upon his estate would not determine any matter of heirship or descent of the property here involved. And if such proceedings involved determinations as to descent and heirship, it would not be necessarily conclusive against the heirs' title to the real estate. Thompson, Title to Real Property, section 737. The question for determination in this case is not, who are the heirs of the person who is seeking the title from the United States under the application, but whether the applicant has shown sufficiently that she has a mining title to the location for which the patent is sought. It appears with reasonable certainty that the applicant took title under the laws of descent of the State of New Mexico as the statutory heir of R. L. Steele, her husband. After the lapse of nearly ten years no person has arisen to question her title or possession of the claim. There is no good reason therefore for requiring her to resort to litigation to establish her rights of inheritance in the local court or submit further evidence of her title of any other character.

As a general rule, final certificate and patent for a mining claim should issue to the applicant in whose name the patent proceedings were initiated and prosecuted; and in the event of his death, certificate and patent should, nevertheless, issue in his name and not to his heirs. *Woodman v. McGilvary* (39 L. D. 574). In accordance with the views above expressed, the final certificate should stand in the name of Henrietta C. Steele and patent issued accordingly in her name. The decision of the commissioner is therefore reversed and his order to show cause vacated.

Reversed.

SCHOOL LANDS—ACT OF JANUARY 25, 1927, CONSTRUED

Instructions, January 15, 1930

SCHOOL LANDS—MINERAL LANDS—LEASE—FORFEITURE—STATUTES.

The act of January 25, 1927, passed but a conditional fee title to the mineral lands granted thereby with a possibility of reverter to the United States in the event the States fail to observe the conditions of the grant, and in effect created a trust by implication whereunder the States are required to lease the minerals and use the rents and royalties derived therefrom for the benefit of the public schools.

SCHOOL LANDS—MINERAL LANDS—STATUTES.

The act of January 25, 1927, extending the common school land grants to the various States to include sections containing coal and other minerals, does not affect lands title to which passed to the States under the original grants by reason of it not being known at the time such grants became effective that they were mineral in character, although they were discovered at a later date to contain such minerals.

SCHOOL LANDS—MINERAL LANDS—STATUTES.

The act of January 25, 1927, which extended the grants of common school sections to the various States to include mineral sections, did not except from the operation of its provisions lands theretofore sold, conveyed, or patented by the States, which were expressly excepted from the original grants by reason of their known mineral character.

SCHOOL LANDS—MINERAL LANDS—STATUTES.

Lands within designated sections that did not pass to the States under the original school land grants by reason of their known mineral character at the time those grants would otherwise have become effective, can be disposed of by the States only in accordance with the terms of the additional grant of January 25, 1927, and the States have no power by legislation or otherwise to alienate the mineral deposits in such lands or to have their prior conveyances of those minerals considered as alienations.

SCHOOL LANDS—MINERAL LANDS—PURCHASERS—ESTOPPEL.

As the act of January 25, 1927, did not invest the States with an absolute, unrestricted title to the minerals in the lands granted, prior purchasers from the States of absolute fee simple title to such lands can acquire no greater rights therein under the doctrine of estoppel than those acquired by the States under the act.

EDWARDS, Assistant Secretary:

Reference is made to the letter of the State Land Board of Utah, dated July 17, 1929, addressed to the Commissioner of the General Land Office, requesting the construction of the department of the act of January 25, 1927 (44 Stat. 1026), as to its effect upon the title of transferees of the State to the minerals in the lands affected by the act, which lands had been sold to them by the State absolutely and without mineral reservation prior to the passage of said act.

The letter adverts to the fact that thousands of acres of State lands had been sold, and that thereafter with knowledge of such sales the department had held in a number of such instances, that the lands so sold, were known to be valuable for mineral at the time the State's rights would have otherwise attached under its original grant (act of July 16, 1894, 28 Stat. 107), and therefore did not pass under its original grant, and it is stated that parties interested in State lands "request an expression of the department, in order that these parties can feel secure in their title and in the development that they may desire to undertake."

The department's attention is invited to section 4879 of the Compiled Laws of Utah (1917) which provides—

If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

And to a statement in Report No. 1761 of the House of Representatives on Senate Bill No. 564, 69th Congress, which reads—

The bill also requires the States to reserve and to withhold unto themselves all minerals of whatsoever character, in any and all lands which they shall hereafter transfer or sell, giving to them, however, the right to lease the minerals in the lands and to utilize the proceeds received as rentals or royalties for the benefit of their common public schools.

The language in the act and report above quoted is cited as supporting the view expressed in the letter that any title acquired by the State of Utah under the act of January 25, 1927, vests in the State's prior grantee, and that subsection (b) of said act "applies only to sales and transfers after the passage of the act, and does not affect grants where the title passes from the State by virtue of its prior patent."

The provisions of subsection (b) are as follows:

That the additional grant made by this Act is upon the express condition that all sales, grants, deeds or patents for any of the lands so granted shall be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded or patented, together with the right to prospect for, mine and remove the same. The coal and other mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, that any lands or minerals disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the district in which the property or some part thereof is located.

Obviously, where title did in fact pass from the State by virtue of its prior patent, which would only be in instances where the lands involved passed to the State under its original grant, the act of January 25, 1927, does not affect such lands and sales and conveyances of the same. This would be true under long settled rules of the department as to lands in fact mineral in character, which had been sold and patented as lands passing under the original grant, if the lands were not known to be mineral at the time they were identified by survey, or at the time when the State was admitted to the Union, if the survey preceded the admission.

As to lands, however, that in fact were known to be mineral in character at the date the State's rights would have otherwise attached, and which by reason of such knowledge did not pass under the original grant, the lands pass to the State only by virtue of the act of January 25, 1927, and the purchasers thereof obtained nothing by their purchase prior to the act, and if disposal of the coal deposits in such lands is not made in accordance with the terms of the latter act, recommendations to the Attorney General to institute forfeiture proceedings would be warranted. *Louis A. Lawyer v. State of Utah*,

United States Intervener, decided by the department June 6, 1928 (unreported); *Shores v. State of Utah et al.* (52 L. D. 503, 507).

The title asserted by purchase under State patents for such lands would be necessarily void. *Ivanhoe Mining Co. v. Keystone Consol. Min. Co.* (102 U. S. 167, 176); *Hermocilla v. Hubbell et al.* (89 Cal. 5, 26 Pac. 611); *Nevada Exploration & Mining Co. v. Spriggs* (41 Utah 178, 124 Pac. 770, 772).

Nothing has been presented that warrants any change from the views above expressed.

The act of 1927 makes no exception from the operation of its provisions lands theretofore sold, conveyed or patented by the State, and certainly there is no room for the construction that it validated the unauthorized prior sale of known mineral lands. Subsection (b) authorizes sales, grants, deeds or patents for the lands so granted upon the express condition of a reservation of the minerals to the State. The minerals are to be retained by the State for a particular public purpose to use the revenues derived therefrom for the support, or in aid of, public schools, and a particular mode of disposition of such minerals is specified, to wit, by lease providing for rents and royalties, and power is conferred on the Attorney General to institute appropriate proceedings to forfeit the grant in the event "any lands or minerals are disposed of contrary to its provisions." Under the construction placed by the United States Supreme Court on grants to a State for particular public purposes, see *United States v. Michigan* (190 U. S. 379, 398); *Ashburner v. California* (103 U. S. 575); *Ervien v. United States* (251 U. S. 41); 25 R. C. L. 389, it is believed the grant in question created a trust in the States by implication to lease the minerals and use the rents and royalties therefrom for the benefit of the public schools, so that the State by legislation or otherwise has no power to alienate its title to mineral deposits or consider its previous conveyances of such minerals as alienations, and if they shall ever be diverted from the use expressed in the grant in any respect, the United States may be called upon to determine whether proceedings shall be instituted in some appropriate form to enforce the forfeiture provided for upon breach of the conditions of the grant.

The effect attributed in the State Land Board's letter to Sec. 4879, Comp. Laws of Utah, in that it would operate to invest the title to the minerals granted to the State under the act of 1927 in prior purchasers who obtained a contract to purchase, certificate, or patent purporting to grant an absolute fee simple title, is not perceived by the department. The grant under the act of 1927 has been held by the department in the *Lawyer* and *Shores* cases to pass but a conditional fee title with a possibility of reverter to the United States in

the event that the State fails to observe the conditions of the grant, and as above observed, a title in trust for certain specified public uses and purposes. As the additional grants of 1927 did not invest the States with an absolute unrestricted title to the minerals in the lands granted, the State has, therefore, not acquired such an estate as it purported to grant to its purchasers. This being so, conceding *arguendo*, that the State dealt with such purchasers in its proprietary capacity, that the statute mentioned applies to transfers by the State of its lands, that the patents or other muniments of title issued by the State would not be void because they were in contravention of a then existing policy of Congress to except mineral lands from such grants, and that the other requisites ordinarily creating an estoppel by deed are present, nevertheless, as one who relies upon an estoppel for an after-acquired title can have no greater right than the grantor against whom the estoppel is claimed (see estoppel, 21 C. J., Sec. 39), it is difficult to perceive what avail this statute would be to transferees asserting title by estoppel to the minerals under its terms, putting aside any question of the repugnancy of such a contention with the terms of subsection (b) of the grant.

The rule in the Utah statute quoted has been held as in no manner conflicting with any statute of the United States, and consistent with well settled principles of equity. *Ketchum v. Pleasant Valley Coal Co.* (257 Fed. 274), and no conflict is perceived between such statute and the State's grant of 1927 as construed by the department.

Neither does it seem necessary to imply from the above-quoted language from the report of the public lands committee of the House of Representatives, that the committee regarded the mineral lands in the odd-numbered school sections that were excepted from the grant and erroneously sold by the State as not thereafter subject to sale under the conditions and restrictions of the grant of 1927.

But whatever may have been the thought of the committee, the department is unable to find warrant for interpolating unto the grant of 1927 an intent to confirm the titles granted by the State to lands expressly excepted from its original grant by reason of their known mineral character and deprive the public schools of the State of the benefits of the act in favor of such purchasers.

The objection to the view above expressed, that the necessity continues of having a determination made in the case of every section sold by the State prior to 1919 without mineral reservation, of whether or not the land was known mineral land at the time the State's rights under the original grant would have attached in the absence of known mineral character, must be answered with the statement that the grant of 1927 does not appear to have removed that necessity.

The duties and responsibilities that devolve upon the State, under the additional grant of 1927, and its effect on the functions theretofore exercised by the department in the administration of the original grant of sections in place, and the degree of concern that the department has in the State's disposition of lands affected by the additional grant, received consideration in the *Lawyer case* above cited, and the following is quoted therefrom in conclusion:

So far as adjudications affecting title are concerned, it is well settled that the functions of the Land Department necessarily cease when title has passed from the Government. *Moore v. Robbins*, 96 U. S. 530, 533; *Frasher v. O'Connor*, 115 U. S. 102; *State of California v. Boddy*, 9 L. D. 636; *Reid v. State of Mississippi*, 30 L. D. 230, 235. Nor have the officers of the department jurisdiction to review transactions between the State and its purchasers or the State and its locating agents and determine whether such purchasers and locating agents comply with the provisions of its laws relating to the sale of the land. *Frasher v. O'Connor*, *supra*. Furthermore, it is plain that under the provisions of paragraph (b) of said act the question whether the State complies with the express conditions thereof in reserving to itself the mineral deposits granted under said act and disposing of them only under leases, is a matter for adjudication in the Federal courts in proceedings brought by the Attorney General. It follows that any determination that the department might make as to whether the lands did or did not pass under the original grant, would not bind or control the State's discretion in considering whether its disposition of the coal deposits on this tract was lawful by a sale as land passing under the original grant, or would be lawful only in the manner provided in the additional grant.

Nevertheless, as there is an important distinction in the nature of the two grants, the former being an absolute fee and the latter contingent upon the performance of a condition subsequent with a possibility of reversion of title to the grantor upon failure to comply with such condition, and as it always has been one of the functions of the Land Department to make recommendations to the Attorney General to institute suits for the recovery of lands improperly and invalidly disposed of and to recover lands where the titles are subject to forfeiture for breaches of conditions in grants, it is deemed advisable to set forth herein the conclusions of the department as to whether the State obtained title under the original grant which inured to intervener or whether the title passed only under the additional grant, rendering any attempted disposition by the State prior thereto void and of no effect.

TAXATION OF RECLAMATION HOMESTEADS WITHIN THE FLATHEAD INDIAN RESERVATION

Opinion, January 15, 1930

RECLAMATION HOMESTEAD—FLATHEAD INDIAN LANDS—FINAL PROOF—TAXATION.

The act of April 21, 1928, authorizing local taxation of reclamation homesteads after acceptance by the General Land Office of satisfactory proof of residence, improvements, and cultivation, is applicable to lands in the ceded portion of the Flathead Indian Reservation entered under the act of April 23, 1904, and amendatory acts thereof, including the act of July 17, 1914,

after final proof and compliance with the ordinary requirements of the homestead law have been made.

RECLAMATION HOMESTEAD—TAX TITLE—LIEN FOR RECLAMATION CHARGES.

The title to or interest in a reclamation homestead conveyed by tax sale pursuant to the act of April 21, 1928, is subject to a prior lien reserved to the United States for all unpaid reclamation charges.

COURT DECISION CITED AND HELD INAPPLICABLE.

Case of *Irwin v. Wright* (258 U. S. 219), cited and held inapplicable.

EDWARDS, Assistant Secretary:

Reference is made to your [Mr. Christian F. Petterson, St. Ignatius, Montana] letter of October 11, 1929, asking for information as to the legal effect of a mortgage on your homestead entry for farm unit "F," NE $\frac{1}{4}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 12, T. 19 N., R. 20 W., M. M., No. 064752, Great Falls series; and also raising the question whether the entry is subject to taxation.

The records show that you made the said entry on April 14, 1913, and submitted final proof thereon June 24, 1918. Final certificate was issued on June 26, 1918, reciting that you had paid the full purchase price of the land, being appraised ceded Indian land, and that you would be entitled to patent 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 to date have been paid.

This land is a portion of the ceded Flathead Indian lands opened to entry under the act of April 23, 1904 (33 Stat. 302) and amendatory acts, including the act of July 17, 1914 (38 Stat. 510), which reads as follows:

That the provisions of the Act of June twenty-third, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and ninety-two), authorizing the assignment under certain conditions of homesteads within reclamation projects, and of the Act of August ninth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page two hundred and sixty-five), authorizing under certain conditions the issuance of patents on reclamation entries, and for other purposes, be, and the same are hereby, extended and made applicable to lands within the Flathead irrigation project, in the former Flathead Indian Reservation, Montana, but such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), as amended by the Act of Congress approved May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight): *Provided*: That the lien reserved to the United States on the land patented, as provided for in section two of said Act of August ninth, nineteen hundred and twelve, shall include all sums due or to become due to the United States on account of the Indian price of such land.

The acts of June 23, 1910, and August 9, 1912, mentioned in the statute above quoted, were acts supplemental to the original Reclamation Act of June 17, 1902 (32 Stat. 388), and, since their provisions

were extended to the ceded Flathead Indian lands, a homestead entry, such as yours upon which final proof and compliance with the ordinary requirements of the homestead law have been made, comes within the purview of the recent act of April 21, 1928 (45 Stat. 439), allowing local taxation of lands of any homestead entryman under the Reclamation Act or any act amendatory thereof or supplemental thereto, after satisfactory proof of residence, improvements, and cultivation, and acceptance of such proof by the General Land Office. The latter act further provides that all such taxes legally assessed shall be a lien upon the lands and may be enforced by sale the same as if they were in private ownership, but the title or interest conveyed by tax sale shall be subject to a prior lien reserved to the United States for all the unpaid reclamation charges.

You will observe that the recent act allowing taxation renders inapplicable to your entry that part of the decision of the Supreme Court referred to by you (*Irwin v. Wright*, 258 U. S. 219), wherein it was held that a reclamation homestead entry was not subject to taxation until submission of proof of reclamation and payment of water charges due at the time of final proof. Said act would not, of course, validate illegal assessments, if any, made prior to the enactment.

In respect to right to place a mortgage on the entry, you are advised that a homestead entryman is not prohibited from doing so, and such right was expressly recognized in the Supreme Court decision to which you referred. It has also been held that a purchaser at a mortgage foreclosure sale of a reclamation homestead entry upon which satisfactory final proof has been made is entitled to have the foreclosure deed treated as an assignment of the entry under the act of June 23, 1910, *supra*. See case of *Powell, Transferee of Benner* (50 L. D. 4).

YOSEMITE VALLEY RAILROAD

Opinion, January 18, 1930

JURISDICTION—OFFICERS—THE PRESIDENT—SUPERVISORY AUTHORITY.

Where a statute places responsibility for its administration upon a head of an Executive department that responsibility will not be curtailed by an attempted shifting thereof to the President, although the latter, if he sees fit, may, by virtue of his supervisory control in respect to any administrative matter, advise or control the heads of the various Executive departments in the performance of duties primarily committed to them.

RIGHT OF WAY—NATIONAL FORESTS—NATIONAL PARKS—ANNUAL RENTALS—PAYMENTS.

Where an existing contract requires the payment of annual rentals in advance for the use of privileges granted by the Government in the exercise

of certain specific authority conferred by an act of Congress, a release from the contract or reduction in the rate of payment can not be allowed if the obligation had accrued before petition is filed.

FINNEY, Solicitor:

My opinion has been requested as to the legality of the action proposed in a letter prepared for submission to the President for his approval of a recommendation that the Yosemite Valley Railroad be relieved of the payment of \$1,000 per year for the use of its right of way over lands in the Sierra Forest Reserve in California under its contract, dated September 5, 1905.

The act of February 7, 1905 (33 Stat. 702), excluded certain lands from the Yosemite National Park and included them in the Sierra Forest Reserve, and provided—

That the Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land herein segregated from the Yosemite National Park and made a part of the Sierra Forest Reserve accorded under the Act approved February fifteenth, nineteen hundred and one, relating to rights of way over certain parks, reservations, and other lands, and other acts concerning rights of way over public lands; and the moneys received from the privileges accorded on the lands herein segregated and included in the Sierra Forest Reserve shall be paid into the Treasury of the United States, to be expended, under the direction of the Secretary of the Interior, in the management, improvement, and protection of the forest lands herein set aside and reserved, which shall hereafter be known as the "Yosemite National Park."

A right of way over certain of the said lands was granted to the said railroad on September 5, 1905, and a special contract was entered into between the company and the Acting Secretary of the Interior, providing certain conditions for the use of the right of way, including the following:

First, that it shall pay or cause to be paid to the Receiver of the United States Land Office at Stockton, California, or to such other person as may be designated by the Secretary of the Interior, in advance, upon the execution of this instrument, the sum of One Thousand Dollars, (\$1,000), each year; *Provided*, however, that after the expiration of three years the President of the United States may adjust, fix and establish any other rate in lieu thereof which he may deem equitable and just.

It will be observed that the contract purports to shift the responsibility from the Secretary of the Interior to the President after the expiration of three years in making any change in the rate of payment named in the contract. Under the act the Secretary had full authority to fix the price and to change the price as to future use, and I believe that he is still vested with that authority. He could not, by the contract, confer any power on the President. Whatever power the President might see fit to exercise in the matter would be by virtue of his position as head of the Executive Department of the Government, and not under the contract. As the

Executive head he has general supervisory control in respect to any administrative matter, and it would seem to be within the scope of his Executive power to advise or control any of the heads of the various Executive Departments in the performance of duties primarily committed to them. Therefore I am not disposed to question the legality of the proposed procedure, but I am of opinion that legal requirements do not necessitate submission of the matter to the President. If it be thought advisable to do so, however, as a measure of caution or administrative policy, there will certainly be no infraction of the law in following that course.

But there is one feature of the proposed action open to grave question, and, in my opinion, beyond the authority of any Executive officer. The existing contract required payment of \$1,000 in advance for the year beginning September 5, 1929. That obligation had accrued before the petition for reduction was filed. Any reduction in the rate of payment or the full release thereof could have application only as to installments which have not accrued.

In this connection it may be mentioned that any change in the terms of payment required by the contract should be made of record in the General Accounting Office (6 Comp. Gen. 642).

Attention is also called to the action of Secretary Ballinger under dates of March 11, 1909, and February 12, 1910, rejecting similar requests for release of the contract obligation.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

MARSHALL McD. WILLIAMS, JR.

Decided January 22, 1930

SETTLEMENT—SETTLERS—RECORDS—NOTICE—LEAVE OF ABSENCE.

A settler on unsurveyed public land, who has placed his claim of record as authorized by the act of July 3, 1916, and the departmental regulations of July 27, 1916, has brought his claim within the purview of section 3 of the act of March 2, 1889.

EDWARDS, *Assistant Secretary:*

This is an appeal by Marshall McD. Williams, Jr., from the decision of the Commissioner of the General Land Office dated July 8, 1929, disapproving the action of the register of the district land office granting his application for leave of absence from a settlement claim for a period of one year commencing March 1, 1929.

It appears from the record that Williams, an officer of the United States Army, who served in the World War and was retired December 31, 1922, for disability in line of duty, settled and established resi-

dence September 4, 1928, upon a tract of unsurveyed land supposed to contain 640 acres in Secs. 1 and 12, T. 13 S., R. 14 E., G. & S. R. B. and M, Arizona, the boundaries of which he marked "with proper notices in monuments of stone." March 22, 1929, he applied for leave of absence of one year, stating in substance and effect that he was suffering from chronic pulmonary tuberculosis and it was necessary for him to go where he could have medical attention in case of a hemorrhage. The application was supported by a physician's certificate. The register granted the application, evidently assuming that the case was governed by the provisions of the act of March 2, 1889 (25 Stat. 854).

The action of the General Land Office rests upon the ground that the leave of absence accorded by section 3 of the act mentioned does not apply to settlers who have no claim of record, and such is the interpretation given to the statute by the decisions and regulations of this department. *Irons v. Baldock* (27 L. D. 317); subsection (b), paragraph 35, Circular No. 541 (48 L. D. 389, 403). In the decision in *Irons v. Baldock* the department said:

Section 3 of said act provides that the register and receiver, for any of the reasons therein specified, may grant leave of absence to any settler "from the claim upon which he or she has filed." The fact that one is simply a settler without any claim of record, does not bring him within the purview of the statute.

A settler, however, who has placed his claim of record by filing in the district land office the notice authorized by the act of July 3, 1916 (39 Stat. 341), and regulations thereunder of July 27, 1916 (45 L. D. 320), has brought himself within the purview of section 3 of the act of March 2, 1889, *supra*. The act of 1916, above mentioned, is entitled, "An Act authorizing leave of absence to homestead settlers upon unsurveyed lands," and provides in effect that any qualified person who in good faith makes settlement upon unsurveyed, unreserved, and unappropriated public lands of the United States, with intention, upon survey, of entering them under the homestead law, shall be entitled to a leave of absence during each residence year, after establishing residence, in the same manner and upon the same conditions as persons having entries of record, provided that he shall have plainly marked on the ground the exterior boundaries of the lands claimed, and have filed in the local land office notice of the approximate location of the lands settled upon and claimed.

The showing made by the applicant in the instant case apparently meets the requirements imposed by the statute, and for the reasons stated the action of the General Land Office is

Reversed.

PROCEDURE ON GEOLOGICAL REPORTS UNFAVORABLE TO NONMINERAL ENTRIES

Instructions, January 23, 1930

HOMESTEAD ENTRY—FINAL PROOF—OIL AND GAS LANDS—RESERVATION—GEOLOGICAL SURVEY—PRACTICE—HEARING—EVIDENCE—BURDEN OF PROOF.

The proper procedure in cases of nonmineral entries where, after the submission of acceptable final proof, the Geological Survey classifies the land as known to be valuable for oil and gas as of the date of final proof, is to allow the entrymen thirty days to furnish consent under the act of July 17, 1914, or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing if reclassification be denied, in which latter event the burden will be upon the Government to prove that the land was known to be valuable for oil and gas at the date of final proof.

THE SECRETARY OF THE INTERIOR:

A question has arisen as to the correct or proper procedure to be followed in considering nonmineral entries where the Geological Survey reports that the land involved is in an area in which valuable deposits of oil and gas may occur, and because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, it is reported that the land is valuable at a certain date, the date of acceptance of final proof, for those deposits within the meaning of the act of July 17, 1914 (38 Stat. 509).

Where the Geological Survey makes a report on a case where final proof has not been submitted, the proceedings thereon have been uniform in this office. In such case the entryman is allowed 30 days to furnish consent under the act of July 17, 1914, or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He is advised that if a hearing is ordered the burden of proof will be upon him, and also that if he fails to take one of the actions indicated, his entry will be canceled.

As to the cases in which final proof has been submitted, one line of action in this office has been to require the entryman to furnish consent under the act of July 17, 1914, with the advice that if he fails to do so within the time stated an investigation will be made to determine the known mineral character of the land at the time of submission of acceptable final proof, and if such investigation discloses evidence to sustain the charge that the land is valuable for oil and gas and was so known at a certain date, proceedings with a view to hearing would be directed, the burden of proof being upon the Government. This action involves a field investigation at the outset in every case where the entryman fails to waive under the act of 1914, and in the aggregate would increase the field service work to a con-

siderable extent. In the other line of action where final proof has been submitted the same requirement is made and penalty imposed as in those cases where no final proof has been submitted, the only difference being that the party is told that the burden of proof is on the Government.

After considering the entire situation, I believe it will be the better practice to allow the entryman 30 days to furnish consent under the act of July 17, 1914, or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing, in event reclassification is denied. He should be advised that if a hearing is ordered the burden will be upon the Government to prove that the land was known to be valuable for oil and gas at the time of final proof, and that if he fails to take one of the actions indicated, further action will be taken by this office as the law and the facts require. Action of this kind makes unnecessary field investigation until after the party has failed to meet the requirements made or when action becomes necessary on his application for a hearing upon the denial of the application for reclassification. Thus the number of cases to be investigated in the field would evidently be very much lessened by this line of action.

If you agree with the views herein expressed and approve this letter, such action will hereafter be taken by this office.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

STANDARD SHALES PRODUCTS COMPANY (ON REHEARING)

Decided January 27, 1930

OIL SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—DEFAULT—RESUMPTION OF WORK—STATUTES.

An oil shale claimant under section 2324, Revised Statutes, maintains his claim after temporary default in the performance of annual assessment work within the meaning of the excepting clause of section 37 of the Leasing Act by a resumption of work, unless some form of challenge on behalf of the United States to the valid existence of the claim has intervened.

COURT DECISION APPLIED—PRIOR DEPARTMENTAL DECISIONS OVERRULED IN SO FAR AS IN CONFLICT.

Case of *Wilbur v. Krushnic* (280 U. S. 306), cited and applied; cases of *Standard Shales Products Company* (52 L. D. 522), and *Emil L. Krushnic* (52 L. D. 282, on rehearing, 295), overruled in so far as in conflict.

EDWARDS, *Assistant Secretary:*

By decision of December 12, 1928 (52 L. D. 522), the department held that mineral entry, Denver 038111, made January 19, 1928, by

the Standard Shales Products Company, embracing 69 oil shale placer locations covering lands in T. 6 S., R. 99 W., and T. 7 S., Rs. 98; 99 W., 6th P. M., Colorado, should be clearlisted for patenting, except as to the G. M. locations, Nos. 39 to 44, inclusive, certain tracts that theretofore had been patented and tracts reported to be nonmineral in character, if the record was otherwise found regular, and remanded the case for proceedings accordingly. It was held that, as to the G. M. locations, Nos. 39 to 44, inclusive, if, as reported by the field inspectors, the claimants thereof failed to perform the annual assessment work for the year 1919, or in lieu of the performance of such work failed to file notice of intention to hold the claims as provided in public resolution of November 13, 1919 (41 Stat. 354) or failed to resume the assessment work thereon prior to February 25, 1920, the date of the passage of the general leasing act, the claims were not valid existent claims within the meaning of section 37 of said act, and, therefore, were not subject to entry and purchase under the mining law. Direction was therefore given to formulate suitable charges against said claims specifying the defaults as alleged. It was found and held that affidavits in lieu of labor were filed for the year 1919 for all the claims except the six mentioned and that the annual assessment work in the nature of exploratory cuts to facilitate determinations of the oil content of the shale deposit upon which the claims as a group were located was performed in good faith, was reasonably adapted to such purpose, tended to benefit the claims involved as a group, and was acceptable as group development work; that the annual assessment work for the group was performed for the years succeeding 1919 down to and ending July 1, 1926, and that the aggregate value of such work in each of said years when prorated among 71 claims, claims 39 to 44 being among this number, showed the required expenditure of \$100 for each claim for each year.

Notwithstanding the fact appeared that claimants had resumed work as to all of the claims involved in the application subsequent to the default in the performance thereof in 1919, and had performed the required work down to and including July 1, 1926, and no other default appeared prior to the issuance of final certificate on January 19, 1928, by the register, the department applied its construction of the effect of the provisions of section 37 of the act of February 25, 1920 (41 Stat. 437) upon section 2324, Revised Statutes, as set forth in *Emil L. Krushnic, on rehearing* (52 L. D. 295), which was to the effect that where the locators failed to perform the annual assessment work upon oil shale locations within the period prescribed by section 2324, Revised Statutes, under the provisions of section 37 of the act of 1920, *supra*, all their rights against the Government in and to the locations were extinguished and the locator or his successors in interest could not revive or initiate any rights under the loca-

tion by resumption of work subsequent to the passage of said act; that no affirmative act by the Government such as a physical reentry or the institution of proceedings against the claim so in default was necessary before work was resumed in order to terminate the claimant's rights in the claim. The views of the department as to the effect of section 37 of the leasing act as above stated were assailed in the courts by petition upon the part of Krushnic for a writ of mandamus to compel the issuance of a patent to him for the claim involved in the departmental decision. The questions presented were carried ultimately to the Supreme Court of the United States upon a writ of certiorari and decision was rendered by that court January 6, 1930.¹

The claimants in the instant case on January 26, 1929, filed a motion for rehearing of the department's decision in so far as it affected the G. M. claims 39 to 44, and by letter of February 1, 1929, the department acceded to the request of the claimants to withhold consideration of the motion until final decision of the *Krushnic case* was rendered in the courts.

Claimants now request that their motion be taken up for consideration and action in the light of the Supreme Court's opinion in the *Krushnic case*. The part of the opinion of the Supreme Court in *Wilbur v. Krushnic*, according to an attested copy thereof, which is deemed material to consider in the disposition of claimants' motion is as follows:

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever \$500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. *P. Wolenberg et al.*, 29 L. D. 302, 304; *Nielson v. Champagne Mining and M. Co.*, 29 L. D. 491, 493.

It being conceded that the Spad No. 3 "was a valid claim existent on February 25, 1920," the only question is whether, within the terms of the excepting clause of section 37, the claim was "thereafter maintained in compliance with the laws under which initiated." These words are plain and explicit, and we have only to expound them according to their obvious and natural sense.

It is not doubted that a claim initiated under section 2324, R. S., could be maintained by the performance of annual assessment work of the value of \$100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; for as this court said in *Belk v. Meagher, supra*, at page 283, "His rights after

¹ See *Wilbur v. Krushnic* (280 U. S. 306).—Ed.

resumption were precisely what they would have been if no default [that is, no default in the doing of assessment labor] had occurred." Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is "maintained" no less than it is by performance of the annual assessment labor. Such resumption does not restore a lost estate—see *Knutson v. Fredlund*, 56 Wash. 634, 639; it preserves an existing estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.

The record here shows that subsequent to the default in 1919 in the doing of assessment work on the six claims here in question, work was resumed thereon by the claimants and that labor and improvements of the value of \$100 was performed on or for the benefit of said claims in succeeding years which in the aggregate exceeds in value the sum of \$500 for each claim, that the default occurring in 1919 was not challenged in any form by the United States prior to the resumption of such work, nor does it appear that any similar defaults have occurred that would subject the claims to challenge. Applying the law as expounded by the court, it must be held that claimants' right to patent is not affected by the temporary default in the year 1919, and therefore the order directing adverse proceedings against the claims on account of such default was unauthorized and is hereby vacated and the case is remanded with directions to clearlist the claims for patent, all else being found regular. The case of *Emil L. Krushnic* and all others in so far as they are in conflict with this decision are overruled.

Prior decision overruled so far as in conflict.

EMIL L. KRUSHNIC (ON RECONSIDERATION)

Instructions, January 31, 1930

PRIOR DEPARTMENTAL DECISIONS VACATED.

Departmental decisions in *Emil L. Krushnic* (52 L. D. 282, on rehearing, 295), recalled and vacated. See *Wilbur v. Krushnic* (280 U. S. 306).

EDWARDS, Assistant Secretary:

On October 3, 1927, the department affirmed your [Commissioner of the General Land Office] decision holding the mineral application, then Glenwood Springs serial 022364, now Denver 033259, of Emil L. Krushnic for patent to the Spad No. 3 oil shale placer location for rejection and adjudging the claim to be null and void. The application was rejected and the claim held void for the reason that the owners thereof had defaulted in the performance of assessment work for the assessment year 1920 (52 L. D. 282). The department's decision was affirmed on rehearing February 8, 1928 (52 L. D. 295). Petition by the applicant for the exercise of supervisory authority by

the Secretary was denied March 13, 1928. On March 26, 1928, you promulgated the decision denying said petition and closed the case. Thereupon the applicants applied by petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary to issue a patent to the claimant. Proceedings on this writ were ultimately carried to the Supreme Court of the United States on a petition for certiorari by the Government to the Court of Appeals for the District of Columbia. The Supreme Court of the United States in its decision entitled *Wilbur v. Krushnic* (280 U. S. 306), rendered January 6, 1930, held that—

A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of Sec. 2324, Revised Statutes of the United States.

Although no writ has yet been served upon the Secretary, no reason for delay is perceived for disposing of the application in accordance with the law as stated by the Supreme Court. The departmental decisions above mentioned are accordingly hereby recalled and vacated. The record in the case is herewith transmitted with instructions to reinstate the application and entry and to dispose of the same unaffected by the default in the performance of assessment labor for the assessment year 1920, and if all else is found regular, to clearlist the application for patent.

Prior decisions vacated.

SANTA FE PACIFIC RAILROAD COMPANY (ON REHEARING)

Decided February 28, 1930

REPAYMENT—RAILROAD LAND—SELECTION—RELINQUISHMENT—MINERAL LANDS— WORDS AND PHRASES—STATUTES.

The term "erroneously allowed" as used in the act of June 16, 1880, has reference solely to erroneous action on the part of the Government, and furnishes no authority for repayment where a railroad selection list was canceled on relinquishment filed by the company after it was ascertained that the lands were not of the character represented at the date the lists were tendered to the district land office.

REPAYMENT—FEES AND COMMISSIONS—STATUTES.

The final location fee referred to in paragraph 7 of section 2238, Revised Statutes, does not come within the purview of the act of March 26, 1908, as limited by the act of December 11, 1919.

DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Fritz Helmke* (52 L. D. 415), distinguished.

EDWARDS, *Assistant Secretary*:

December 16, 1929, the department affirmed the action of the Commissioner of the General Land Office, dated July 19, 1929, denying repayment of certain filing fees paid by the Santa Fe Pacific Railroad Company in connection with its selection lists Nos. 47, 54 and 55, in the State of Arizona.

The lands involved were canceled from the selection lists as it was charged, after field investigation, that the lands contained mineral, other than coal and iron. The company filed withdrawal of its denial of the mineral charges and the lists as to the lands were canceled, respectively, on April 9, 1924, May 2, 1924, and June 5, 1926. The company's applications for repayment were received on August 15, 1928, and October 30, 1928.

The department held that the applications were not made within two years from final rejection of the entries and allowance was barred by the act of December 11, 1919 (41 Stat. 366), which provides that repayment in claims of the character therein specified may not be allowed unless application therefor be filed within a period of two years after rejection of the application, entry, or proof upon which the payment was made. It was stated that repayment in this case would have been allowable under the act of June 16, 1880 (21 Stat. 287), had application been timely made. For the reasons hereinafter stated it is clear that this statement was erroneous.

In a motion for rehearing it is urged that the decision of the department is in conflict with the ruling in the case of *Fritz Helmke* (52 L. D. 415), and reference is made to the case of *North and South Alabama Railroad Company* (2 L. D. 681).

Paragraph 7 of section 2238, Revised Statutes, provides—

In the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

Sections 1 and 2 of the acts of March 26, 1908 (35 Stat. 48), and December 11, 1919, *supra*, are identical in terms, except that there are provisos to the first two sections of the latter act which contain the requirement that application shall be filed within two years. The provisions of these laws comprehend the repayment of purchase moneys, commissions, and excess payments.

The act of June 16, 1880, *supra*, specifies the repayment of "fees and commissions, amount of purchase money, and excesses paid."

The final location fee recited in paragraph 7 of said section 2238, is not within the purview of the act of March 26, 1908, *supra*, as limited by the act of December 11, 1919, *supra*.

The case of *Fritz Helmke*, *supra*, cited by counsel, is not authority in the determination of the case at bar for the reason that the ques-

tion presented to the department in that case was whether repayment of *purchase money* paid on an erroneously allowed coal entry, application for the repayment having been filed after two years had elapsed from date of cancellation, came under the act of June 16, 1880, *supra*, or the act of December 11, 1919, *supra*.

The selection lists were filed under the grant made by the act of July 27, 1866 (14 Stat. 292), the applicant being the successor in interest.

Section 3 of the act of July 27, 1866, *supra*, provides in part—

* * * That all mineral lands be, and the same are hereby, excluded from the operations of this Act * * * And provided further, That the word 'mineral,' when it occurs in this Act, shall not be held to include iron or coal.

The second section of the act of June 16, 1880, *supra*, authorizes repayment where "the entry has been erroneously allowed and can not be confirmed." There is no limit of time under the provisions of this act within which application for repayment must be filed.

The general term "entry" signifies an appropriation of public land. *North and South Alabama Railroad Company, supra*.

It is well settled that the expression, "the entry has been erroneously allowed," denotes some mistake or error on the part of the Government. General circular of January 1, 1889 (Copp's Public Land Laws, 1890, Vol. 2, page 1212); *William E. Creary* (2 L. D. 694); *William H. Irvine* (28 L. D. 422); *Adolph Nelson* (27 L. D. 272); *Marie Steinberg* (37 L. D. 234); *Olive M. Harrison* (50 L. D. 418); *United States v. Colorado Anthracite Company* (225 U. S. 219).

In the instant case, the selection lists were canceled as to the lands involved, on relinquishments filed by the company after it was ascertained that the lands were not of the character represented at the date the lists were tendered to the district land office. The selection lists, therefore, were not erroneously allowed within the meaning of the act of June 16, 1880, *supra*. *Arthur L. Thomas* (13 L. D. 359), *Henry Cannon* (30 L. D. 362).

The motion is

Denied.

STEALER WILSON

Opinion, March 3, 1930

INDIAN LANDS—ALLOTMENT—RESTRICTIONS UPON ALIENATION.

Restrictions upon alienation of lands allotted in severalty to Indians do not constitute irrevocable covenants but are more in the nature of personal disabilities imposed by Congress under its power to enlarge or restrict as and when it sees fit.

INDIAN LANDS—ALLOTMENT—VESTED RIGHTS—EXEMPTION FROM TAXATION.

Exemption from taxation of allotted Indian lands once attached becomes a vested property right protected from impairment or abrogation by the provisions of the Federal Constitution to the same extent as any other property right.

INDIAN LANDS—CHEROKEE NATION—ALLOTMENT—EXEMPTION FROM TAXATION—WAIVER.

The right of exemption from taxation of an Indian allottee of the Cherokee Nation in Oklahoma which attached prior to the act of May 10, 1928, is neither abrogated nor modified by the taxable provisions of that act, but he may, if he so chooses, surrender his right under prior acts and accept the conditions fixed by the later legislation.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to the rights of Stealer Wilson a three-fourths blood member of the Cherokee Nation in Oklahoma with respect to the taxability of his lands under the provisions of the act of May 10, 1928 (45 Stat. 495), as amended by the act of May 24, 1928 (45 Stat. 733).

Before discussing the provisions of the legislation in question, it may prove helpful to refer briefly to certain well-known facts and also to prior legislation bearing upon the taxability and alienability of lands allotted to members of this tribe and the powers of Congress with respect thereto.

The Five Civilized Tribes of which the Cherokee Nation is one, originally owned extensive areas of land in the territory now embraced within the limits of the State of Oklahoma. They existed, broadly speaking, as political governmental entities, holding their lands in communal ownership, controlled mainly by their own laws and customs with the definite right of excluding practically all nontribal members from their territory. The somewhat anomalous condition thus existing presented a serious obstacle to the creation of a State which Congress desired to organize for the government and development of that part of the country. This, coupled with changing conditions and necessities which the tribes were unable or unwilling to meet, led to the enactment of legislation by which Congress inaugurated a policy looking to termination of the tribal existence and government and the allotting of their lands in severalty through agreements to be negotiated with the several tribes by a commission created for that purpose (Secs. 15 and 16, act of March 3, 1893, 27 Stat. 612, 645). Separate agreements were negotiated with each tribe but all were substantially the same in general outline and purpose and provided in the main for relinquishment by the members of all claims to tribal property in consideration of

which they were to receive allotments of land in severalty to be nontaxable and inalienable for specified periods.

The Cherokee agreement ratified by the Indians August 7, 1902, is found in the act of July 1, 1902 (32 Stat. 716). Under it, each member received an allotment of land equal in value to 110 acres of the average allotable land of the Cherokee Nation (Sec. 11). The act further provides—

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

Pursuant to the foregoing provisions the lands allotted to members of the tribe as homestead were inalienable during the life of the allottee not exceeding 21 years from the date of allotment. But "during the time said homestead is held by the allottee" the same is nontaxable. The remainder of the lands allotted to each member commonly termed the surplus, was inalienable for a period of five years from the date of patent. While the statute does not expressly so provide, it is clear that the surplus was also nontaxable for the five-year period because the restrictions against alienation as therein imposed prohibits both voluntary and involuntary alienation, and hence the lands while so restricted are not subject to levy, sale, or execution for debts, whether for taxes or otherwise. See Solicitor's opinion of November 13, 1922 (49 L. D. 348).

By later legislation as found in the acts of April 26, 1906 (34 Stat. 137), and May 27, 1908 (35 Stat. 312), Congress set up a new and uniform set of restrictions applicable alike to all of the Five Civilized Tribes. Without discussing the provisions of this later legislation in detail, it is sufficient for present purposes to point out that the restrictions against alienation of lands allotted to certain members of these tribes, including full-bloods and three-fourth bloods, not theretofore removed by or under any prior law, were continued to April 26, 1931, and the restrictions as to certain other lands were removed with the provision that such lands should thereupon become subject to taxation by the State.

It is now settled law that the extension and removal of restrictions against alienation effected by these acts was within the powers of Congress and that such statutes are valid and constitutional. *Heckman v. United States* (224 U. S. 413); *Brader v. James* (246 U. S. 88); *Talley v. Burgess* (246 U. S. 104). But with respect to the exemption from taxation a different rule obtains. The Supreme Court of the United States in *Choate v. Trapp* (224 U. S. 665), had occasion to consider the effect of the provision in the act of May 27, 1908, *supra*, declaring that the lands from which the restrictions were removed should thereupon become subject to taxation in relation to lands of the Choctaws and Chickasaws on which the period of exemption from taxation had not expired under the original agreement with those Indians. It was there held that the exemption from taxation was a vested property right which the Indians had acquired for the consideration in part of their release of all their claims as individuals to the tribal property and that such rights were protected from abrogation by the provisions of the fifth amendment to the Federal Constitution. To the same effect is *Gleason v. Wood* (224 U. S. 679), and *English v. Richardson* (224 U. S. 680). See also *Carpenter v. Shaw* (280 U. S. 363). In the *Choate-Trapp* case, the Supreme Court pointed out the clear distinction between the exemption from taxation and the restrictions on alienation and defined the powers of Congress in relation thereto as follows (p. 673):

But the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation * * *. The right to remove restrictions was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

See also *Welch v. First Trust and Savings Bank* (15 Fed., 2d Series, 184).

It is thus apparent that the provisions of the foregoing legislation imposing restrictions upon alienation of the lands allotted in severalty to the members of the Five Civilized Tribes do not constitute irrevocable covenants but are more in the nature of personal disabilities imposed upon the Indians which Congress has power to enlarge or restrict as and when it sees fit so to do. The exemption from taxation on the other hand rests upon a much different footing. Such exemption once attached becomes a vested property right protected from impairment or abrogation by the provisions of the Federal Constitution to the same extent as any other property right. With this in mind, we turn to the provisions of the act of 1928, the first section of which extends for an additional period of 25 years, the existing restrictions otherwise expiring on April 26, 1931. Sec-

tion 4, as amended, is of most importance here and is quoted below in full:

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *Provided further*, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The language of the statute as just quoted is free from ambiguity. In so far as it was within the power of Congress to so provide, the plain effect is to limit the tax-exempt acreage of these Indians to not exceeding 160 acres which are to be designated from his restricted, allotted, inherited and devised lands in the manner therein provided for. Turning to the facts at hand, however, we find that the Indian whose lands are involved in the present inquiry received an allotment of 649.44 acres of land, of which 240 acres were designated as his homestead, and the remainder, 409.44 acres as surplus. With the surplus lands we are not here so much concerned because as to that land the restrictions against alienation and the exemption from taxation run concurrently for a period expiring on April 26, 1931. As to the homestead, however, section 13 of the original Cherokee agreement declared that "during the time said homestead is held by the allottee, the same shall be nontaxable." Under this provision it is plain that the homestead of the allottee is exempt from taxation so long as it is held and owned by him and that such exemption is protected by the Federal Constitution on principles stated and applied in *Choate v. Trapp, supra*. Manifestly, therefore, this right of exemption from taxation can not be forcibly struck down in whole or in part and the act of 1928 must be considered as ineffective in

so far as it purports so to do. While this is true, it by no means follows that the allottee is entitled to select and hold under the act of 1928 additional tax-exempt lands, as that would clearly contravene both the spirit and letter of the statute.

It is to be observed, however, that the exemption from taxation attaching to the 160 acres selected and designated under the act of 1928 is broader in its scope than that attaching to the homestead under the original Cherokee agreement in that the benefit of the exemption inures to the heirs and devisees of the allottee. In view of this it may well be that the allottee in the instant case, or others similarly situated, may prefer the exemption from taxation extended by the act of 1928 rather than stand on their rights under the original agreement. No legal reason is seen why they should not be permitted so to do. As said by the Supreme Court of the United States in *Sweet v. Schock* (245 U. S. 192), "the right or privilege of exemption from taxation can not be taken from an allottee's land while he retains the title. Its surrender may not be forced from him but he may yield it in bargain for another right or privilege."

It follows from what has been said that the allottee here involved and other members of the Cherokee Tribe in like position, may do one of two things: *First*, they may retain the right of nontaxability attaching to their lands under the original agreement with the Cherokee Tribe or *second*, they may if they so desire, waive that right in favor of the exemption extended by the act of 1928, which may be accomplished by selection and designation in the manner provided for therein.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

**OFFERINGS AT PUBLIC SALE—PARAGRAPH 15, CIRCULAR NO. 684,
AMENDED**

[Circular No. 1207]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 5, 1930.

THE SECRETARY OF THE INTERIOR:

Circular No. 684, approved April 7, 1928 (52 L. D. 340), provides regulations for the offering of lands at public sale under section 2455, Revised Statutes, as amended. The second subparagraph, paragraph 15, of this circular, reads as follows:

No person will be allowed more than one application under this proviso, except that two or more applications may be allowed to the same person if

all the lands sought adjoin the same body of land owned by the applicant or included in his pending entry. An application under the first proviso will be rejected in all cases where the applicant has purchased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

It is suggested that the paragraph be amended to read as follows:

No person will be allowed more than one application under this proviso, nor for more than 160 acres, except that two or more applications may be allowed to the same person if all the lands sought adjoin the same body of land owned by the applicant or included in his pending entry; nor will one who has purchased lands sold upon the application of another under the proviso be permitted to secure the offering under said proviso in his own right of an area exceeding the difference between that of the land purchased and 160 acres. The purchase of lands under the proviso will not disqualify the purchaser as an applicant for the offering of tracts actually isolated, provided the tracts sought, together with the lands so acquired, shall not exceed 320 acres in area, nor will the purchase of isolated tracts disqualify the purchaser from becoming an applicant for offering under the proviso subject to the same limitation as to aggregate area.

The proposed amendment is deemed necessary for the reason that the present regulation is somewhat confusing in its operation and there is no apparent reason why a person should not be permitted to secure the offering of 320 acres so long as not more than 160 acres is under the proviso.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assisant Secretary.

EXCHANGE OF LANDS IN SAN JUAN, MCKINLEY, AND VALENCIA COUNTIES, NEW MEXICO—CIRCULAR NO. 850, AMENDED

INSTRUCTIONS

[Circular No. 1208]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 6, 1930.

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

The following three paragraphs are hereby substituted for the first three paragraphs on page 3 of joint Circular No. 850, dated September 19, 1922 (last three paragraphs on page 283 as it occurs in volume 49 of the Land Decisions), governing the exchange of lands under the act of March 3, 1921 (41 Stat. 1225, 1239):

Privately-owned or State school land held in fee, mineral or nonmineral, may be exchanged for other land, mineral or nonmineral, if they are of approximately equal value. Upon the filing of an application, a report will be obtained from the Geological Survey as to the approximately equal values including coal, oil, gas, or other minerals of the surrendered and selected lands.

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

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

C. C. MOORE,

Commissioner of the General Land Office.

C. J. RHOADS,

Commissioner of Indian Affairs.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

**EXTENSION OF TIME ON OIL AND GAS PROSPECTING PERMITS—
ACT OF JANUARY 23, 1930**

INSTRUCTIONS

[Circular No. 1209]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 7, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

The act of Congress approved January 23, 1930 (46 Stat. 58), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any oil or gas prospecting permit issued under the Act of February 25, 1920 (Forty-first Statutes, page 437), or extended under the Act of January 11, 1922 (Forty-second Statutes, page 356),

or as further extended under the Acts of April 5, 1926 (Forty-fourth Statutes, page 236), and March 9, 1928 (Forty-fifth Statutes, page 252), may be extended by the Secretary of the Interior for an additional period of three years in his discretion on such conditions as he may prescribe.

Sec. 2. Upon application to the Secretary of the Interior, and subject to valid intervening rights and to the provisions of section 1 of this Act, any permit which has already expired because of lack of authority under existing law to make further extensions, may be extended for a period of three years from the date of this Act.

Applications for extensions of time coming within the provisions of this act will be governed by Order No. 338 of March 20, 1929 (52 L. D. 580), and the subsequent order of May 3, 1929 (52 L. D. 584), and may be filed with the register of the district land office or with the Commissioner of the General Land Office, Washington, D. C. The application should give full and definite information regarding expenditure of money for development work under the permit and for reliable geological surveys of the lands involved. The showing must be by affidavit and state in detail the amounts and dates of such expenditures, purposes for which made, and to whom the payments were made. If the permittee has secured geological surveys of the lands, copies of the reports and maps thereof should be filed. Any other facts which the permittee believes will show equities in support of his application should be included in the showing.

In any case where the permittee has filed bond to protect a surface claimant of lands included in the permit, or because the lands are in a reclamation project, consent of the surety to remain bound during the extension period must be furnished, except where the bond by its terms covers extensions of time that may be granted. Also such bond as may be considered necessary and sufficient may be required conditioned on the abandonment, under the supervision of the supervisor of oil and gas operations, of any wells drilled on the permit lands.

C. C. MOORE, *Commissioner.*

Approved:

RAY LYMAN WILBUR,
Secretary.

JOHN TREANOR

Decided March 15, 1930

MINING CLAIM—PATENT—PUBLICATION OF NOTICE—EXCESSIVE CHARGES.

Under the authority imposed in him by section 2334, Revised Statutes, the Commissioner of the General Land Office may designate any newspaper published in a land district where mines are situated for the publication of mining notices and fix the maximum rates to be charged for such publication, and that officer may compel a publisher charging in excess of those

rates to refund the excess under penalty of being barred from future designation for failure to do so.

EDWARDS, *Assistant Secretary*:

In the adjudication of the mineral entry of John Treanor, Phoenix 063617, the Commissioner of the General Land Office found that notice of application for patent had been published in the Miami Evening Bulletin, a daily newspaper printed and published in the city of Miami, Arizona, from August 27, to November 6, 1928; that publication of said notice, which occupied 98 lines of space, had cost the claimant \$261.54; and that under departmental regulations pursuant to the mining laws the maximum charge allowable for publication of notice in the case was \$98.

By decision of January 3, 1930, the commissioner instructed the register of the land office at Phoenix as follows:

You are accordingly directed to notify the publisher of the Miami Evening Bulletin that the charge for publication is in excess of the rate established by the Commissioner of the General Land Office under authority of section 2334, Revised Statutes, and that 30 days are allowed within which to furnish sufficient evidence that a refund has been made to the mineral claimant of \$163.54, in default of which and in the absence of appeal its publication, the Miami Evening Bulletin, will be barred from the publication of notices hereafter issued by your office.

The publisher has appealed. He states that during their 10 years of experience in publishing land and patent notices they have found that many land attorneys do not agree on what the laws are regarding the number of times a patent notice shall be published; that 61 insertions were ordered, which made a cost of \$261.54, whereas if only nine insertions had been required the cost would have been \$38.50. He further states—

We inform all patent publishers that we do not know the law and surely the Commissioner of the General Land Office does not expect us to interpret the land laws to our customers.

It is not clear that the publisher fully understands the situation. Section 2334 of the Revised Statutes provides—

The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper.

In the mining regulations of April 11, 1922 (49 L. D. 15, 71, paragraph 45), the commissioner with the approval of the department has prescribed—

* * * When the notice (of mineral application for patent) is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily*

newspaper, the notice must appear in each issue for 61 consecutive issues. [Parenthetical matter supplied.]

On June 18, 1924 (Circular No. 943, 50 L. D. 556), the commissioner with the approval of the department amended a portion of paragraph 89 of the mining regulations approved April 11, 1922, *supra*, so as to read as follows:

The charge for the publication of notice of application for patent in a mining case in all districts shall not exceed the legal rates allowed by the laws of the State for the publication of legal notices wherein the notice is published, and in no case shall the charge exceed \$10 for each 10 lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication, \$7.50 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

The appellant had at least constructive knowledge of the mining laws and the regulations thereunder. If the maximum charge allowed was too low the appellant should have declined to publish the notice.

The decision appealed from is

Affirmed.

YAKUTAT AND SOUTHERN RAILWAY COMPANY

Decided April 29, 1929

POSSESSION—RIGHT OF WAY—TRADE AND MANUFACTURING SITE—ADVERSE CLAIM—COURTS—PROTEST—ALASKA.

Where the question of prior possessory rights to public lands has been relegated by law to the courts a protest based upon allegations of prior and superior rights to the possession will not lie.

TRADE AND MANUFACTURING SITE—ALASKA—ADVERSE CLAIM—POSSESSION—COURTS—PATENT.

The question as to whether one claiming a trade and manufacturing site in the Territory of Alaska under section 10 of the act of May 14, 1898, or an adverse claimant has a better and prior right of possession is by the provisions of that section made determinable by the courts in an action to quiet title, and any patent issued for the land by the Land Department must be in accordance with the final decree of the court.

RAILROAD LANDS—RIGHT OF WAY—TRADE AND MANUFACTURING SITE—ALASKA. Allegations that a railway company had not complied with the terms of its right of way grant over the lands involved are not material in considering its application for a trade and manufacturing site for the same lands.

TRADE AND MANUFACTURING SITE—ALASKA—APPLICATION—CORPORATIONS—RESTRICTIONS—INDIRECT INTEREST.

Under the restriction in section 10 of the act of May 14, 1898, limiting a person, association, or corporation, as the case may be, in the purchase of a trade and manufacturing site to one claim only for any such person, association, or corporation, an application by a corporation must be denied

if a majority interest in it be owned by another corporation which had acquired a site under the act, or if the persons holding the majority interest in the stock of the corporation applying for a site are also the holders of the majority stock interest in another corporation which had exhausted its rights, and the applicant's status in this respect is to be adjudged as of the time of the filing of the application.

DIXON, *First Assistant Secretary*:

June 24, 1925, the Yakutat and Southern Railway Company, a corporation, filed application, Anchorage 06449, for a trade and manufacturer's site under the provisions of section 10 of the act of May 14, 1898 (30 Stat. 409, 413), covering the identical land included in applicant's grant under section 2 of said act of a right of way for terminal grounds, etc., 04567, designated Terminal Tract No. 1, map and plat of which were approved by the Secretary of the Interior January 4, 1905. Supplemental application was filed June 18, 1928, for an additional adjoining tract.

As a result of a conference with applicant's representatives October 10, 1925, the department exacted as a prerequisite to consideration of the application a relinquishment of the right of way grant of Terminal Tract No. 1. The applicant has tendered such a relinquishment—

Upon the express condition precedent that it shall not become effective for any purpose unless and until the pending application of the Yakutat and Southern Railway to purchase the above-described lands under the provisions of section 10 of the act of Congress of May 14, 1898 (30 Stat. 413), for purpose of trade and manufacture and other productive industry, is granted and a certificate of purchase issued therefor, and the order entered for the issuance of patent to said lands to the Yakutat and Southern Railway.

The company in its application asserts continuous possession and occupation of the land in good faith for purposes of trade and manufacture and productive industry since February 6, 1903.

September 11, 1926, S. A. Gee, filed a protest alleging in substance that the application includes land he and his lessees have held, used and occupied in undisputed adverse possession since 1907, and the applicant company is referred to therein as a subsidiary of Libby, McNeill and Libby. The records of the General Land Office show that under application, Juneau 04797, Libby, McNeill and Libby, a corporation, acquired a trade and manufacturer's site under the above-cited act.

By decision of November 24, 1928, the Commissioner of the General Land Office denied the protest, holding as follows:

The Yakutat and Southern Railway Company's right having attached to the tract of land claimed by Gee on January 4, 1905, the date of the approval of the plat of said terminal grounds, its rights thereto are superior to the rights of Gee who claims to have used and occupied the tract since 1907.

In view of the prior claim of the railway company to said tract the protest of Gee is hereby denied subject to the right of appeal to the Secretary of the Interior, within 60 days from receipt of notice hereof.

In view of the statement made by the protestant that the Yakutat and Southern Railway Company is a subsidiary of Libby, McNeill and Libby Company, there is some question as to whether or not the railway company is entitled to a trade and manufacturing site under the act of May 14, 1898, as said Libby, McNeill and Libby have exhausted their right to make such an entry. You are therefore directed to advise the attorney for the railway company, Mr. R. E. Robertson, Juneau, Alaska, that the railway company is allowed 60 days from receipt of notice within which to show that no member thereof has acquired title to any land under the provisions of said act of May 14, 1898, or to appeal, failing in which the trade and manufacturing site application hereby held for rejection for the reason that it is not shown that the company is qualified to acquire title to said lands under such act, will be rejected and closed.

From this decision Gee has appealed.

The matters set forth by Gee in support of his appeal chiefly consist of allegations that the Yakutat and Southern Railway Company has not fulfilled its obligations as a common carrier; that it did not complete the road under its grant of a right of way, and its grant is therefore subject to forfeiture; that independent fishermen are denied access to applicant's wharves on the premises in controversy and passenger carriage and shipment of freight are refused such fishermen; that the railroad is used solely to carry fish and fishermen for Libby, McNeill and Libby, and the statement is reiterated that the applicant is a subsidiary of that company. The appellant contends he has prior valid rights by virtue of his continued possession of certain ground involved since 1907.

In response to the requirements imposed upon applicant relative to its qualifications to acquire the land under its application, there has been filed two affidavits, one dated January 8, 1929, executed by Edw. G. McDougall, who states he is president of Libby, McNeill and Libby; that said company "did not own directly or indirectly any shares of the capital stock of the Yakutat and Southern Railway at the time said Yakutat and Southern Railway entered the tract of land on Monti Bay in the Territory of Alaska, under the act of Congress of May 14, 1898, and erected a salmon cannery thereon." The affidavit further states that the cannery was erected in 1903, is now owned by the railway company, represents an investment of \$50,000, and is now and has been continuously operated by the railway company. The other affidavit is executed by D. E. Hillyer, who states he is secretary of the applicant company, and as such has possession and custody of its stock transfer book and knows the stockholders of record and—

Affiant further says that the record stockholders of said Yakutat and Southern Railway are as follows:

Names	Shares
Philip Larmon.....	500
Henry W. Hardy.....	500
Edward G. McDougall.....	200
D. E. Hillyer.....	200
D. W. Branch.....	100

Affiant further says that he has examined the stock transfer book of said Yakutat and Southern Railway and that it does not appear from said transfer book that any shares of the capital stock of said company were ever registered in the name of Libby, McNeill and Libby.

The appeal of Gee from the commissioner's action dismissing his protest will first be considered. The protest is based upon a claim by Gee of a superior adverse right to part of the ground involved based upon possession and occupancy, and furthermore contains a bare assertion suggesting that the applicant is disqualified for the reason that it is owned and controlled in fact by Libby, McNeill and Libby, a corporation, which has exhausted its right to acquire a trading site under the act.

It is clear that in so far as the commissioner undertook to inquire into and determine, whether Gee or the applicant company had the better and prior right of possession to the land claimed by Gee, he was without authority, as by the last paragraph of section 10 such issues are to be determined by the court in aid of the Land Department. That paragraph provides how all affidavits, testimony, proofs and other papers required under the act, or by regulations pursuant thereto, shall be taken and how notice of claimant's applications shall be given, for a period of 60 days, and concludes as follows:

* * * and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

In *Hinchman v. Ripinsky* (202 Fed. 625, 627, certiorari denied, 234 U. S. 759), the Circuit Court of Appeals for the Ninth Circuit said that this statute—

* * * has in purview, no doubt, adverse claimants who are seeking title from the Government to the same parcel of Government land, and it is incumbent upon the contestants to show by what right they respectively claim superiority each over his adversary. The final judgment of the court will determine the respective rights of the parties, and the final patent is made dependent upon the result of such adjudication. The statute has its prototype in the statutes providing for the acquisition of mineral lands. Section 2326, Revised

Statutes, provides for an action of the kind in case of contest between applicants for the same tract of mineral land.

The department has held that the judgment of the court under the above-quoted provisions of the Alaskan act on the question of the right of possession is binding upon the department; *Cravy v. Gavigan et al.* (36 L. D. 225), *Price et al. v. Sheldon* (45 L. D. 555), and that Congress by this legislation has evinced a general design to have issues between adverse claimants adjudicated in the local courts. *Low et al. v. Katalla Company* (40 L. D. 534). In the case of rival mining claimants it is accepted as settled law that a protest is only to the officers of the Government, challenges only the applicants' claims, and in no manner brings up for consideration any claims of the protestant. *Poore v. Kaufman* (119 Pac. 785, 787), *Wight v. Dubois* (21 Fed. 693), *Barclage v. Russell* (29 L. D. 401). Both the applicant and Gee are asserting rights in the character of occupants of public lands. It is the department's view, therefore, that Gee under the provisions of section 10 above quoted will have the opportunity and must assert his possessory claim in the manner provided in that section.

Where, as here, the question of superior possessory rights has been relegated by law to the courts, a protest will not lie based upon allegations of prior and superior rights to the possession.

Neither are the allegations that the railway company has not complied with the terms of its grant of a right of way upon the lands involved material in considering its application for a trade and manufacturer's site; these allegations would have some bearing on the question whether protestant could initiate a valid possessory right by his actual occupation of the ground, and would seem to be a question that could be raised in the proceedings by an adverse claim, but if material here in considering the protest, it is sufficient to observe that no circumstances are alleged by protestant tending to show that the grant as to Terminal Tract No. 1 reverted to the United States "without further action or declaration" within the meaning of section 5 of said act (U. S. C. Title 48, section 415).

It is true, allegations tending to show that applicant is not qualified to acquire a trade and manufacturer's site are proper as a basis for protest. The bare assertion, however, that the Yakutat and Southern Railway Company is a subsidiary of Libby, McNeill and Libby, and statements to the effect that the operations conducted on the land are those of the latter company when taken with the admission of the applicant that the latter company has a lease from year to year on the buildings and improvements on the premises are not sufficient to entitle the protestant to a hearing. The protestant with precision and fullness must allege facts upon which he rests his allegations in order that the defendant may be advised with reason-

able certainty of the cause of action against which he is called to defend. *Yard et al. v. Cook* (37 L. D. 401).

For the reasons here stated, the commissioner's action dismissing the protest is affirmed.

Notwithstanding the insufficiency of the protest, the statements that have been made as to disqualification of the applicant company are such as to require a proper showing that such disqualification does not exist. In addition to the assertion mentioned of protestee, the Acting Secretary of Agriculture in his letter to the department of October 29, 1924, relating to this application stated: "The applicant it is understood is a subsidiary of Libby, McNeill and Libby Packing Company, which owns all of the stock of the railway company."

Section 10 of the act of May 14, 1898, provides—

That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, *may each purchase one claim only* not exceeding eighty acres of such land for any one person, association, or corporation.
* * * (Italics supplied.)

The tenth paragraph of section 4 of the regulations relating to applications for trade and manufacturing sites under this section (45 L. D. 227,241), provides—

In case the application is made for the benefit of an association or corporation, it must appear that each member thereof has not entered or acquired title to any land entered under the provisions of this act.

The department in the case of *Citizens Light, Power and Water Company* (50 L. D. 334), has held that this regulation does not go beyond the requirements of the act; that it is in harmony with the rule of administration applied in respect to similar provisions contained in other public-land laws and is a rule to secure compliance with a law that permits but one exercise of a right; that the purpose and policy of such a law is violated by the exercise of the right as an individual and another exercise of the right by a corporation of which the individual is a member. It was, nevertheless, held under the principle *de minimis non curat lex*, that a corporation would not be denied the right to acquire a site under the act because a minority interest of its stock is owned by stockholders who are also holders of minority stock in another corporation that had acquired title to public lands under the act.

It would be, however, in flagrant disregard of the restriction in the act and the regulation above mentioned, to extend the exception to a corporation which had applied for a site, where the majority

interest of its stock is owned by another corporation which had acquired a site under the act, or where the persons holding the majority interest in the stock of the corporation applying for a site, are also the holders of the majority stock interest in a corporation which had acquired a site under the act. It is not believed that the inhibitions of the act are avoided by the fact that the two corporations are separate legal entities. The courts have recognized the rule that where the necessity exists they will look beyond the corporation to the individuals composing it. *McKinley v. Wheeler* (130 U. S. 630, 636), and cases cited.

The affidavits of Messrs. McDougall and Hillyer, together considered, amount to no more than an allegation that no stock of the applicant company is registered in the name of Libby, McNeill and Libby, and that the latter did not own directly or indirectly any shares of the former at the time of its entry and occupation of the land in 1903.

The department will take judicial notice of the fact that stock ownership can be transferred and held without the transfer being recorded on the stock books of the corporation issuing the stock. Furthermore, it is a familiar and long-standing rule that an applicant's rights are to be adjusted as they were at the time of the filing of his application to make entry. *Pfaff v. Williams* (4 L. D. 455, 457); *Williams v. Clark* (12 L. D. 173, 175); *Patrick Kelley* (11 L. D. 326, 328); *Goodale v. Olney* (12 L. D. 324, 325); *Rice v. Lenzshok* (13 L. D. 154); *E. S. Newman* (8 L. D. 448, 450); *McDonald v. Jaramilla* (10 L. D. 276, 278); *Clark v. Mansfield* (24 L. D. 343, 348); *Smith v. Longpre* (32 L. D. 226, 228); *Mathison v. Colquhoun* (36 L. D. 82, 84); *West v. Edward Rutledge Timber Co.* (210 Fed. 189, affirmed 221 Fed. 30); *Ard v. Brandon* (156 U. S. 337). The observance of the rule in this case is clearly necessary in order that the restriction in the act under consideration may be made effective.

The showings are therefore adjudged insufficient. The applicant is called upon to furnish further verified statements from persons cognizant of the facts of which they speak, showing the present total number of shares of Libby, McNeill and Libby, the number of shares of such stock, if any, owned by each and every person who is now represented to be a record stockholder of the applicant company, and a further statement as to the nature and extent of the interest, if any, that Libby, McNeill and Libby had in the shares of stock of the applicant company, at the date said application was filed. Upon failure to file such showing within 60 days from the receipt of notice of this decision, the application will be rejected.

Affirmed.

**YAKUTAT AND SOUTHERN RAILWAY COMPANY (ON
REHEARING)**

Decided March 18, 1930

**TRADE AND MANUFACTURING SITE—ALASKA—CORPORATIONS—INDIRECT INTEREST—
LAND DEPARTMENT.**

When the question arises as to whether a public-land statute is sought to be circumvented by the legal fiction of separate entity between a corporation and the parties holding the substantial beneficial interest therein, the Land Department has the power to look through the web of the artificial corporate entity for the purpose of discovering the real parties in interest.

**TRADE AND MANUFACTURING SITE—ALASKA—RAILROAD LANDS—RIGHT OF WAY—
RELINQUISHMENT.**

Land within a right of way grant for terminal purposes that has not been relinquished or forfeited is not public land, and can not, therefore, be selected as a trade and manufacturing site under section 10 of the act of May 14, 1898.

**RAILROAD LANDS—RIGHT OF WAY—RELINQUISHMENT—FORFEITURE—WITH-
DRAWAL—NATIONAL FORESTS.**

A blanket withdrawal of public lands containing a saving clause that it is made subject to valid existing rights so long as legally maintained does not attach to lands embraced within a prior right of way grant that has not been relinquished or forfeited, but such withdrawal will become effective *eo instanti* as to those lands upon relinquishment or forfeiture of the grant.

**TRADE AND MANUFACTURING SITE—ALASKA—NATIONAL FORESTS—WITHDRAWAL—
STATUTES.**

Section 7 of the act of May 14, 1898, which makes the act inapplicable to lands within a military, park, Indian or other reservation in Alaska precludes the selection of lands within a national forest or other reservation for trade and manufacturing purposes under section 10 of that act.

**RAILROAD LANDS—RIGHT OF WAY—ALASKA—WITHDRAWAL—RELINQUISHMENT—
FORFEITURE—NATIONAL FORESTS—TOWN SITES.**

Where lands are excluded from a national forest withdrawal and simultaneously included within a town site withdrawal, the later withdrawal will attach immediately upon relinquishment or upon reversion to the United States by forfeiture of lands which had been excepted from the operation of the first withdrawal because of prior valid appropriation.

**RAILROAD LANDS—RIGHT OF WAY—TRADE AND MANUFACTURING SITE—ALASKA—
POSSESSION—OCCUPANCY.**

Actual possession and use for trade and manufacture of lands within an existing grant of right of way for terminal and station grounds by the grantee can not upon relinquishment of the grant be considered as possession and use for a trade and manufacturing site under section 10 of the act of May 14, 1898.

EDWARDS, Assistant Secretary:

This is a motion filed by the Yakutat and Southern Railway Company for a rehearing of departmental decision of April 29, 1929 (53 I. D. 58), rejecting its application, Anchorage 06449, filed June 24,

1925, for a trade and manufacturing site under section 10 of the act of May 14, 1898 (30 Stat. 409, 413), unless the company filed certain information therein specified relative to the interests that Libby, McNeill and Libby, a corporation, had in the shares of the applicant company, and also relative to the interest that the record stockholders of the applicant company had in the stock of Libby, McNeill and Libby at the date of the filing of the application.

The facts and circumstances disclosed by the record, pertinent statutes and other matters judicially noticed bearing upon the merits of this application have been considered *de novo*, and certain of them sufficient for the proper disposition of this motion and application will be stated.

January 4, 1905, the department under section 2 of the act of May 14, 1898 (30 Stat. 409), approved a map of definite location of the Yakutat and Southern Railway Company of its railroad from Monti Bay to Setuck River, Alaska, and also a map of terminal grounds at Monti Bay, the latter containing 59.974 acres. In accordance with regulations of the department these maps contained certifications by the president of the company "that the said railroad is to be used as a common carrier of freight and passengers." The application for the trade and manufacturing site under consideration covers the land granted as terminal grounds and an additional rectangular contiguous tract not within the grants mentioned 16.11 by 5.19 chains, in all about 68.36 acres.

Continuous possession in good faith of the land applied for is alleged for purposes of trade and manufacture and other productive industry from February 6, 1903, to date of application.

The land applied for was thrown into the Tongass National Forest as enlarged by proclamation of February 16, 1909 (35 Stat. 2226). That proclamation contained the provisos it "shall not be so construed as to deprive any person of any valid right * * * acquired under any act of Congress relating to the Territory of Alaska," and further provided—

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws, or reserved for any public purpose, be subject to, and shall not interfere with or defeat legal rights under such appropriation, nor prevent the use for such public purpose of lands so reserved, *so long as* such appropriation is legally maintained, or such reservation remains in force. (*Italics supplied.*)

By Executive order of August 30, 1927, there was excluded from the Tongass National Forest certain tracts, one of which, as platted according to the description contained in the order, excludes the tract applied for not within the terminal grant and also all but about 24.30 acres of that grant. The last paragraph of the order reads—

Subject to valid existing rights, the lands excluded from the national forest by this order are hereby reserved to be disposed of for town-site purposes as provided by section 11 of the act of March 3, 1891 (26 Stat. 1095), and the act of May 25, 1926 (44 Stat. 629).

Under section 7 of the act of 1898, *supra*, it is provided, "That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by Act of Congress."

By letter of March 20, 1912, the Secretary of the Interior called upon the Yakutat and Southern Railway Company for a statement as to whether the road was being operated as a common carrier. The company responded with a petition to surrender whatever rights it had acquired theretofore in exchange for a right of way for a tramroad under section 6 of the act of 1898. Under the provisions of section 1 of the act of February 1, 1905 (33 Stat. 628) the Secretary of Agriculture was vested with jurisdiction to pass upon such petition, and as the result of the reference to and consideration of the petition by him, such a permit was granted in 1914. Subsequently, the company appears to have been sold and reorganized, and the proposal to relinquish the right of way grants was repudiated by the company. On May 18, 1920, an amended charter under the laws of Washington was granted changing the name to the Yakutat and Southern Railway and enlarging the number and changing the personnel of the trustees. On March 23, 1925, under precedent approval of the department, the company was notified to the effect that unless it relinquished its grants, proceedings would be recommended to forfeit the same. This order was largely predicated on reports from the Secretary of Agriculture and Secretary of the Interstate Commerce Commission, quoted in such letter, which together considered are to the effect that the Yakutat and Southern Railway, then applicant for grants of additional railroad rights of way, was a subsidiary of Libby, McNeill and Libby; that the sole purpose and use of the railroad constructed was to haul fish to its canneries, one of the largest being at Monti Bay; that it did not engage in transportation for the public, and its tariff had been canceled on August 12, 1924. Suggestions were made to the company that it might legitimately obtain rights to the land by invoking the provisions of section 6 of the act of May 14, 1898, providing for tramways and necessary grounds for stations, etc., or the provisions of section 10 of said act providing for the sale of not exceeding 80 acres for trade and manufacture or other productive industry.

Acting upon this suggestion the application for a trade and manufacturing site was filed and several modifications of the order of March 23, 1925, were made, culminating in an understanding between the department and conferees for the company reached on

October 10, 1925, whereunder the company was required to relinquish only the terminal tract as a prerequisite to the consideration of a trade and manufacturing site application for the same land without prejudice to the Government to proceed against the remainder of the right of way grant, it being further understood, that the application should be placed in the regular channels for approval, if no further objection of record appears, the view being expressed by the department—

That upon the statements made, and so far as the record shows (October 10, 1925), there appears to be no reason why the trade and manufacturing application of the said company should not be favorably considered, provided the company relinquished its rights under the Terminal Ground No. 1, approval, such relinquishment to become effective only if and when the trade and manufacturing site application is approved, and patent therefor issued.

The application for a trade and manufacturing site is made "without waiving and expressly reserving its right to Terminal Tract No. 1 for railway terminal purposes," and a relinquishment of its terminal tract filed in connection with the application is tendered "upon the express condition precedent that it shall not become effective for any purpose unless and until the pending application of the Yakutat and Southern Railway to purchase the above-described lands under the provisions of section 10 of the Act of Congress of May 14, 1898 * * * is granted and a certificate of purchase issued therefor and the order entered for the issuance of patent to said lands to the Yakutat and Southern Railway."

Further consideration was given this application by reason of certain protests filed against its allowance and notice was taken of the fact that Libby, McNeill and Libby had applied for and obtained a patent on June 25, 1924, for a tract in Alaska under section 10 of the act of May 14, 1898, for a trade and manufacturing site. Said section 10, provides—

That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying *public lands* in the district of Alaska in good faith for the purposes of trade, manufacture, or other productive industry *may each purchase one claim only* not exceeding eighty acres of such land for *any one person, association or corporation*, at two dollars and fifty cents per acre, * * *. (Italics supplied.)

In view of the provisions of section 10 as above set forth, and the rule, frequently heretofore applied by the department and courts of equity, reflected in Rule 4 of the regulations relating to trade and manufacturing sites (45 L. D. 227, 240), that when there is a question whether a statute is sought to be circumvented by the legal fiction of separate entity between the corporation and the parties holding the substantial beneficial interest therein, there exists the

power to look through the web of the artificial corporate entity and find the real parties, the commissioner required the applicant company to show "that no member thereof has acquired title to any land under the provisions of said act of May 14, 1898." Certain showings made in response to this requirement with the record were referred by the commissioner to the department March 7, 1929. In the department's decision here sought to be reviewed certain additional and more specific showings were required, and part of such requirements have been responded to sufficiently. Upon the showings as they now stand, it appears that no stock is registered on the stock books of the applicant in the name of Libby, McNeill and Libby, that none of such recorded stockholders have heretofore in proper person sought or acquired any title under the trade and manufacturing act; that all of them own collectively not more than a small interest in the total stock of Libby, McNeill and Libby, that Libby, McNeill and Libby had no interest in the Yakutat and Southern Railway Company at the time first possession is claimed in 1903.

The applicant, however, has not directly or explicitly responded to the requirement laid by the department that a statement be made "as to the nature and extent of the interest, if any, that Libby, McNeill and Libby has in the shares of stock of the applicant company at the date said application was filed." It is noticed, however, in the motion presented, it is stated *arguendo*, "In fact, this application was filed on the suggestion and advice of the department with full knowledge of the fact that Libby, McNeill and Libby, at the time the advice was given, owned or controlled the entire capital stock of the Yakutat and Southern Railway," and as evidence of the truth of this assertion that the department had notice of the interest of Libby, McNeill and Libby in the applicant company, the motion repeats the quotation from the report of the Secretary of Agriculture of October 29, 1924, reading, "The applicant, it is understood, is a subsidiary of Libby, McNeill and Libby Packing Company, which owns all of the stock of the railway company." It should here be mentioned, that the applicant company has never denied this statement of the Secretary of Agriculture. The applicant, however, in addition to contending that the Yakutat and Southern Railway has an independent right to acquire a site, irrespective of what Libby, McNeill and Libby acquired, also contends that the qualification of the former must be adjudged as of the date of the initiation of possession in 1903.

The statements of the company as to stock ownership manifestly are not incompatible with the fact that such company is a subsidiary of Libby, McNeill and Libby or that the latter owns all of its stock. The failure to deny the charge or disclose the actual relations between the two companies in this respect impels the conclusion that

the department is now dealing with a subsidiary of Libby, McNeill and Libby which controls its policy and business, and owns its stock. It has been held as to similar grants of rights of way for railroad purposes, that the grantee takes a limited fee title on condition of reverter on failure to use the land for purposes stated in the grant. *E. A. Crandall* (43 L. D. 556); *Rio Grande Western Ry. Co. v. Stringham* (239 U. S. 44, 60); U. S. C. A., Title 43, Sec. 934, Note 6. The grant has not been relinquished and it has not been determined that it has been forfeited. The land within the terminal tract at the present time is not public land subject to sale and disposal under the general laws or section 10 of the act of May 14, 1898. No valid application under said section can therefore be made for the land. The application of the company is no more than a proposition to exchange its base, limited fee title, for an absolute fee simple title. It would seem under the provisions quoted in the forestry withdrawal as to the land not excluded therefrom, upon extinguishment of the terminal grant the withdrawal would attach, and under section 7 of the act of 1898, an application under section 10 thereof would be interdicted; that as to the land excluded by the Executive order of 1927 upon relinquishment or upon reversion of the land to the United States by forfeiture, the simultaneous reservation for town-site purposes upon exclusion of the land from the forest would become effective. The proposal here in order to avoid such legal results is to impute an occupancy and possession under the trade and manufacturing site law to the Yakutat and Southern Railway initiated prior to such withdrawal, and assume a continuity of such possession and occupancy to the present time when it is clear that its right to possession rests entirely, as to the land within the terminal tract, upon its title under the railroad grant, and to act upon the theory, notwithstanding it *prima facie* appears that the ownership and control of the railroad corporation is in another corporation that has exhausted its rights, that the two are separate entities.

Authorization of the issuance of a patent under the facts and circumstances for a trade and manufacturing site, whether before or after a relinquishment of the terminal grant became effective appears to be of very doubtful legality or propriety. The application, therefore, heretofore held for rejection will be finally rejected.

Motion denied.

YAKUTAT AND SOUTHERN RAILWAY COMPANY

Petition for exercise of supervisory authority in the case of Yakutat and Southern Railway Company (53 I. D. 58, 65), denied by Assistant Secretary Edwards, September 23, 1930.

SALE OF REINDEER IN ALASKA

Opinion, April 2, 1930

ALASKA—REINDEER—STATUTES.

The general provision contained in prior appropriation acts authorizing the sale of surplus male reindeer belonging to the United States in the Territory of Alaska was not repealed by the mere failure to continue it in the latest appropriation acts, but the proceeds derived from such sales can not be used to augment the specific appropriation contained in the later legislation for the support of reindeer stations and for the care and management of the reindeer industry.

ALASKA—REINDEER—EX OFFICIO COMMISSIONER—JURISDICTION.

Authority of the Governor of Alaska, as ex officio commissioner of that Territory, to sell surplus male reindeer belonging to the United States is one of the powers and duties pertaining to the reindeer of Alaska that was vested in that official by transfer from the Commissioner of Education by the act of February 10, 1927, but that authority does not extend to the sale of female reindeer.

ALASKA—REINDEER—PAYMENT.

The proceeds derived from the sale of male reindeer belonging to the United States in the Territory of Alaska are to be deposited in the Treasury of the United States.

ALASKA—REINDEER—NATIVES—EX OFFICIO COMMISSIONER—REGULATIONS.

The Governor of Alaska, as ex officio commissioner of that Territory, has the power to regulate relative to the sale of reindeer belonging to the natives with a view to proper protection and conservation of their property and the promotion of their general welfare.

ALASKA—REINDEER—NATIVES—RESTRICTIONS.

Except as specified in contracts with apprentices, the sale of male reindeer owned by the natives of Alaska is without restriction, but female reindeer may be disposed of only upon the written approval of the general supervisor of the Alaska Reindeer Service.

FINNEY, *Solicitor*:

Under date of March 7, 1930, Mr. Burlew, Administrative Assistant, submitted certain correspondence and exhibits relative to the sale of reindeer in Alaska, with request for my opinion as to whether Governor Parks may sell male or female reindeer, and for what purpose the money may be used.

For many years the annual appropriation acts carried a provision authorizing the sale of surplus male reindeer belonging to the Government. These provisions were carried into section 39, title 48 of the United States Code which reads as follows:

All reindeer owned by the United States in Alaska shall as soon as practicable be turned over to missions in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. The Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry. (Mar. 4, 1907, c. 2918, Sec. 1, 34 Stat. 1338; May 24, 1922, c. 199, 42 Stat. 584; Jan. 24, 1923, c. 42, 42 Stat. 1205; June 5, 1924, c. 264, 43 Stat. 427; Mar. 3, 1925, c. 462, 43 Stat. 1181.)

The last sentence above quoted was repeated in the appropriation acts of May 10, 1926 (44 Stat. 453, 492), and January 12, 1927 (44 Stat. 934, 968). The said provision was omitted from the appropriation acts for the fiscal years ending June 30, 1929 and 1930.

By order of October 3, 1929, issued under authority of the act of February 10, 1927 (44 Stat. 1068), all powers and duties pertaining to the reindeer of Alaska then under the jurisdiction and control of the Commissioner of Education were transferred to the Governor of Alaska as ex officio Commissioner for Alaska.

The United States Code is declared to be only *prima facie* evidence of the laws of the United States general and permanent in their nature in force on December 7, 1925. The mere fact that for the last two years provision was not contained in the appropriation acts for the sale of surplus male reindeer does not in my opinion have the effect of repealing that portion of prior law authorizing such sale. But it does have the effect of preventing the use of the money received from such sale to augment the appropriation for the benefit of reindeer stations, instructions of natives in the care and management of reindeer and all necessary miscellaneous expenses in connection with the reindeer industry. The appropriation act of March 4, 1929 for the year ending June 30, 1930 (45 Stat. 1562, 1603) provides—

Reindeer for Alaska: For the support of reindeer stations in Alaska and instruction of Alaskan natives in the care and management of reindeer, including salaries of necessary employees in Alaska, subsistence, clothing, and other necessary personal supplies for apprentices with Government herds, traveling expenses of employees, purchase, erection, and repair of cabins for supervisors, herders, and apprentices, equipment, and all other necessary miscellaneous expenses, \$19,800, to be available immediately.

To allow the use of money received from sale of reindeer belonging to the Government in order to further develop the industry for the benefit of the natives would be in effect augmenting the appropriation. That is not permitted except by express legislative authority. 17 Comp. Dec. 712; 7 Comp. Gen. 391.

Therefore, I am of opinion that the Governor of Alaska has authority to sell surplus male reindeer belonging to the Government, and that any money received therefrom should be deposited in the Treasury of the United States. I find no authority for the sale of female reindeer belonging to the United States.

The correspondence submitted indicates that the controversy refers more particularly to reindeer of the natives. Upon examination of the regulations governing the reindeer service I do not find any restrictions on the sale of male reindeer owned by the natives except as provided under contract with each apprentice, but there has always been a restriction on the sale of female reindeer. The last regulation by order of October 2, 1929, provides—

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

The question of sale of reindeer by natives appears to be for consideration by the Governor of Alaska subject to the regulations and with a view to proper protection and conservation of their property and the promotion of their general welfare.

Approved:

RAY LYMAN WILBUR,
Secretary.

TIMBER CUTTING BY SETTLERS AND ENTRYMEN ON UNPERFECTED CLAIMS

REGULATIONS

[Circular No. 1211]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 5, 1930.

1. Homestead claimants who have made bona fide settlements upon public land, surveyed or unsurveyed, and who are living upon, cultivating, and improving the same in accordance with law and the rules and regulations of this department, with the intention of ac-

quiring title thereto, are permitted to cut and remove, or cause to be cut and removed, from the portion thereof being cleared for cultivation, so much timber as is actually necessary for that purpose, or for buildings, fences, and other improvements on the land entered.

2. In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, the claimant may sell or dispose of such surplus; but it is not allowable to denude the land of its timber for the purpose of sale or speculation before the title has been conveyed to him by patent.

3. The abandonment of a claim after the timber has been removed is presumptive evidence that the claim was made for the primary purpose of obtaining the timber.

4. A bona fide claimant is also permitted to exchange timber for lumber for improvements upon his claim, provided he exchanges timber for lumber of equal value, and only so much as is actually necessary for the required improvements, exclusive of the cost of cutting, sawing, and hauling such timber or lumber to and from the mill. In other words, he has a right to cut as many trees as may be necessary to make or complete his improvements, whether 30, 40, or more, but any cutting in excess of the number of trees required for the improvements would be unlawful.

5. The act of July 3, 1926 (44 Stat. 890), provides for the sale of dead, down, or seriously damaged timber under rules and regulations issued by this department. The act applies to the disposition of this class of timber upon unperfected claims under the public land laws. Rules and regulations governing the disposition of such timber are contained in Circular No. 1093, approved September 11, 1926 (51 L. D. 574), and copies thereof may be obtained, on request, from the Commissioner of the General Land Office, Washington, D. C., or from the chief of field division of the General Land Office, of the division within which the land is situated.

This circular supersedes Circular No. 306,¹ dated March 7, 1914.

C. C. MOORE, *Commissioner*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

¹ Not published in the Land Decisions.—Ed.

LARSON v. LOONEY

Decided December 13, 1929

HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—RESIDENCE—ADVERSE CLAIM—
APPLICATION—REINSTATEMENT.

The intervention of an adverse claim in the form of an application to make entry by a qualified applicant prior to the filing of an application to reinstate a properly canceled homestead entry where residence was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912, prevents the application of the rule announced in *Slette v. Hill* (47 L. D. 108).

EDWARDS, *Assistant Secretary*:

This is an appeal by Dean Larson from a decision wherein the Commissioner of the General Land Office, on May 3, 1928, denied Larson's protest, rejected his application to make second homestead entry, and reinstated the homestead entry of Orville B. Looney, embracing the SW $\frac{1}{4}$ Sec. 22, W $\frac{1}{2}$ Sec. 27, and NW $\frac{1}{4}$ Sec. 34, T. 4 S., R. 22 E., B. M. Idaho (640 acres).

On October 7, 1926, the appellee was required to file a water-hole affidavit in connection with his original stock-raising homestead entry, dated May 1, 1926. Evidence of service of notice consisted of a returned unclaimed registered letter addressed to him at Henry, Idaho. The entry was canceled January 6, 1927.

The appellant, on February 14, 1927, filed application to make second entry for the land, under the act of September 5, 1914 (38 Stat. 712), together with a duly corroborated affidavit as to springs and water holes. The showing was considered sufficient and the application was returned for allowance.

On March 21, 1927, Looney filed application to reinstate his entry, accompanied by a water-hole affidavit. He alleged that in May, 1926, he established residence, which was maintained until November, 1926. He also stated that he did not receive any word concerning the requirement of furnishing a water-hole affidavit; that he was herding sheep near the entry and he depended upon his employer to receive mail.

Larson, on May 16, 1927, filed a protest against the allowance of the application to reinstate. The protest sets out the intervening rights of protestant, and the failure of the entryman, prior to the filing of the second homestead application, to establish an actual bona fide residence, or to construct any house, on the land.

The facts presented, at a hearing, disclosed that Looney went to the homestead on May 2, 1926, taking with him a roll of bedding, some clothes, food, and cooking utensils. A house already on the land had been purchased by the claimant. After staying five days,

he left to herd sheep at distances of from seven to fourteen miles away. A number of indefinite statements were made of occasional visits by the entryman during his employment as sheep herder. At the termination of his work, on November 6, 1926, he did not return to the homestead until July 9, 1927, after which he remained until two weeks prior to date of hearing. During the year 1926 he sold the grass on the homestead entry.

The register recommended the reinstatement of the entry.

The commissioner held that no intention of Looney to abandon the land had been shown, and the residence proven was sufficient to defeat a contest or protest on the ground of abandonment as sufficient time remained within the lifetime of the entry for compliance with the law.

The cancellation of Looney's entry was made after constructive service of notice. *McGraw v. Lott* (44 L. D. 367), and *McKenzie v. Hall* (46 L. D. 172).

The intervention of an adverse claim in the form of an application to make entry by a qualified applicant prior to the filing of an application to reinstate a properly canceled homestead entry, where residence on such entry was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat. 123), prevents the application of the rule announced in *Slette v. Hill* (47 L. D. 108).

Counsel for appellee considers retroactive the provisions of departmental instructions of May 25, 1926, Circular No. 1066 (51 L. D. 457), relating to water holes, that requires a duly corroborated affidavit in connection with every selection, filing, or entry, made upon or subsequent to the date of Executive order of April 17, 1926. He also expresses the opinion that the order should be made effective only after its publication or promulgation in the circular.

An Executive order becomes effectual upon the day of its date. *Lapeyre v. United States* (17 Wall. 191); *Almeda Van Nostern* (51 L. D. 161).

The decision appealed from is

Reversed.

LARSON v. LOONEY (ON REHEARING)

Decided April 8, 1930

DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR—OFFICERS—LAND DEPARTMENT—EQUITABLE CLAIM—HOMESTEAD ENTRY.

Equities can not prevail to defeat a plain legal right, and the officers of the Land Department are without discretionary authority to deprive one of a right conferred upon him by Congress after he has done everything essential, exacted by law and the lawful regulations.

COURT DECISION CITED AND APPLIED.

Case of *Daniels v. Wagner* (237 U. S. 547), cited and applied.

EDWARDS, *Assistant Secretary*:

By decision dated December 13, 1929 (53 I. D. 75), in the above-entitled case, this department reversed the action of the Commissioner of the General Land Office in favor of Orville B. Looney's claim, and held that Larson's homestead application for the lands in question should be allowed. February 6, 1930, a motion for rehearing on Looney's behalf was entertained, and the matter is now ready for consideration.

The material facts are sufficiently set forth in the prior decision and it will not be necessary to restate them here.

On further examination and consideration of the case the department is satisfied that Looney's entry was regularly canceled and that the lands involved were, at the time Larson presented his application for second homestead entry, free from appropriation and legally subject to entry by the first qualified applicant. It has been duly determined that Larson was, on the date of filing, qualified to make a second entry, and in the circumstances, his rights are the same as if he had made entry on that date. *Rippy v. Snowden* (47 L. D. 321).

The record shows that immediately after the allowance of his homestead entry in May, 1926, Looney established residence on the land in a cabin placed there by a former entryman from whom Looney purchased it, including a relinquishment for \$125. It is apparent, too, that Looney was proceeding in good faith under the homestead law. Moreover, it is shown that because of the nature of his employment as sheep herder, he depended upon his employer to get his mail and he never received the registered letter advising that unless she filed a water hole affidavit as required under Circular No. 1066 (51 L. D. 457), his entry would be canceled. Hence, though he knew nothing of the requirement, his entry was properly canceled. When he learned in March, 1927, that the entry had been so canceled, he promptly applied for its reinstatement. But Larson's rights had intervened. The officers of the Government were not at fault in the matter. Everything possible was done by them to bring the notice to him; it was regularly sent and he is not entitled to be heard on the ground that he did not receive notice of the requirement when said notice was sent to the post office address furnished by him, and adverse rights have intervened (11 L. D. 574; 12 L. D. 189; 13 L. D. 670, 672; 18 L. D. 161; 19 L. D. 195; 26 L. D. 147).

The case is one of considerable hardship. The equities appear to be with Looney, but his equities can not prevail over a plain

legal right. As stated above, his entry was lawfully canceled and the lands were subject to appropriation under the homestead laws by the first legal applicant. Larson's application therefor initiated a right under the homestead law which this department has no authority to deny. 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 by the exercise of discretion by the officers of the Land Department. *Daniels v. Wagner* (237 U. S. 547).

The former decision is therefore adhered to. Looney's application for reinstatement of his entry is denied and Larson's application for second homestead entry is accepted.

Motion denied.

NOAH BREDELL

Opinion, April 12, 1930

INDIAN LANDS—MARRIAGE—DIVORCE—DEPARTMENT OF THE INTERIOR—JURISDICTION.

The Department of the Interior has no concern with reference to the distribution of unrestricted property belonging to Indian estates regardless of the fact that the question of marriage or divorce may be involved.

INDIAN LANDS—CEREMONIAL MARRIAGE—INDIAN CUSTOM DIVORCE.

Where Indians, parties to a ceremonial marriage, both of whom were still living in tribal relations, separated with the clear intention of not living together again, such separation constitutes a valid Indian custom divorce.

INDIAN LANDS—INDIAN CUSTOM DIVORCE—DESCENT AND DISTRIBUTION—ESTOPPEL.

Where an Indian wife separated from her Indian husband with the clear intention of never living with him again, she is estopped from claiming any share in his estate.

INDIAN LANDS—INDIAN HEIRSHIP—SECRETARY OF THE INTERIOR—COURTS—JURISDICTION—STATUTES.

The act of June 25, 1910, made the Secretary of the Interior a special tribunal with exclusive jurisdiction to determine the heirs of deceased Indians, and his decisions thereon are final and conclusive, and not reviewable by the courts even after the expiration of the trust period.

INDIAN LANDS—INDIAN CUSTOM DIVORCE.

In recognizing the validity of Indian custom divorces no distinction is to be made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations.

INDIAN LANDS—GUARDIANSHIP—JURISDICTION.

When the guardianship of the United States over Indians terminates is a political matter to be determined by Congress, and one over which neither the courts nor the States have any power.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE.

A marriage contracted between members of an Indian tribe, in accordance with the customs of such tribe, where the tribal relations and government existed at the time of the marriage, and there was no Federal statute rendering the tribal customs invalid, is a valid marriage for all purposes.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE—COMMON LAW MARRIAGE.

An Indian custom marriage is a legal marriage according to the customs of the tribe and is, therefore, not to be treated as the equivalent of a common-law marriage among whites.

INDIAN LANDS—ALLOTMENT—DESCENT AND DISTRIBUTION—TRUST PATENT—MARRIAGE—STATUTES.

The provision in section 5 of the act of February 8, 1887, making the laws of descent of the State or Territory where the lands are situated applicable after trust patents have been issued was merely for the purpose of establishing a rule for the determination of heirship; the act does not undertake to prescribe what is necessary to constitute the legal relation of husband and wife, or of parent and child.

INDIAN LANDS—ALLOTMENT—CITIZENSHIP—MARRIAGE—DIVORCE—STATUTES.

Under the act of May 8, 1906, which amended section 6 of the act of February 8, 1887, an Indian did not become a citizen of the United States upon allotment; consequently, as to allotments thereafter made the allottee did not become subject to State laws, but his domestic relations continued to be governed by tribal custom.

INDIAN LANDS—ALLOTMENT—PATENT—JURISDICTION—INDIAN CUSTOM MARRIAGE.

The allotment of lands in severalty to Indians does not terminate their tribal relations, but all Indian allottees remain subject to the exclusive jurisdiction of the United States until the issuance of fee simple patents, and so long as this jurisdiction continues the marriage relations of such Indians are to be determined by their tribal customs, and not by the laws of the State.

INDIAN LANDS—ALLOTMENT—HEIRSHIP—STATUTES.

The act of February 8, 1887, is primarily an allotment act, whereas the act of June 25, 1910, is for the purpose of determining the heirs of deceased allottees, and if a conflict arises between the provisions of the two acts with reference to the determination of heirship, the latter act governs.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE—CEREMONIAL MARRIAGE—PRESUMPTION OF ABANDONMENT.

The fact that certain members of an Indian tribe who were married and lived together according to tribal custom were subsequently ceremonially married is not sufficient to raise the presumption of abandonment of tribal custom and that Indian custom marriage and divorce are no longer practiced by the tribe.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE—INDIAN CUSTOM DIVORCE.

The Department of the Interior can not hold by regulation that one particular tribe of Indians is sufficiently advanced to justify its marriage relations being henceforth regulated in accordance with the white man's law, and that other tribes are not so advanced, but it must recognize Indian custom marriage and Indian custom divorce generally until Congress fixes some other definite and uniform rule.

INDIAN LANDS—MARRIAGE—DIVORCE.

A law or ordinance adopted by an Indian tribe regulating marriage and divorce is not mandatory and does not invalidate tribal custom marriage and divorce.

INDIAN LANDS—INDIAN CUSTOM DIVORCE—EVIDENCE.

The question as to when an Indian custom divorce has been consummated is one of fact in each particular case.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE—INDIAN CUSTOM DIVORCE.

Congress alone has the power to say when Indian custom marriage and divorce shall cease to be valid.

INDIAN LANDS—CITIZENSHIP—STATUTES.

The act of June 2, 1924, which declared all noncitizen Indians born within the territorial limits of the United States to be citizens of the United States did not contemplate any disturbance of the existing status and relations of the Indians with respect to their property and other recognized rights.

INDIAN LANDS—INDIAN CUSTOM MARRIAGE—INDIAN CUSTOM DIVORCE.

Congress, the courts, and the Department of the Interior have all recognized Indian custom marriage and Indian custom divorce as of equal validity with ceremonial marriage and legal divorce under State laws.

FINNEY, *Solicitor*:

My opinion is requested on certain matters submitted by the Commissioner of Indian Affairs relating to the department's finding of heirs on October 8, 1927, to the estate of Noah Bredell, a deceased Nez Perce Indian, Fort Lapwai Agency, Idaho.

The estate consisted partly of property held in trust by the United States and partly of unrestricted property over which the department has no jurisdiction. The finding of heirs by the department extended only to the property held in trust. An administrator was appointed in Idaho for the unrestricted part of the estate and as to the distribution of this part the department, of course, is not concerned. This is equally true of all property belonging to Indian estates over which the department has no jurisdiction, whether the question of marriage and divorce, as in this case, is involved or not.

Under the department's finding of heirs to the estate of Noah Bredell one Lillie Viles, to whom he was married by ceremony, was excluded on the ground that she separated from him under such circumstances as constituted a valid Indian custom divorce.

The specific questions submitted for opinion are: (1) Whether the 1927 decision should stand or be reversed and (2) the broad general policy as to what constitutes Indian custom marriage and divorce.

Although the department heretofore has frequently had occasion to consider and pass upon similar questions, in view of somewhat prevalent misconceptions it is deemed advisable to review the situation at considerable length. It may be said here that in view of repeated statements and references that have been made concerning

the marital history of Noah Bredell, his having been a member of the church and his seeming inclination to follow the white man's ways, the question is not whether he divorced himself from Lillie Viles, but whether her actions and demeanor amounted to a divorce from him according to the Indian custom; and furthermore as to whether such a divorce may be recognized in view of the fact that the parties went through the form of a ceremonial marriage.

The department determined the heirs to the estate of Noah Bredell October 8, 1927. Similar contentions were made at the original hearing for such determination as are now being made for a reopening of the case. No new evidence of a material nature has been added to the record made up at that time. On the question as to whether the separation of the parties may be regarded as a divorce in accordance with Indian custom the pertinent facts are as follows: Noah Bredell and Lillie Viles were married August 18, 1925. She left him the next day and never returned to him. He died on or about August 13, 1926, one year after the marriage and separation. He was about 70 years of age and Lillie Viles was 29. She testified—

Q. Why did you leave him after two days?

A. He refused to support my children. He agreed to support my children, before I married him; I had two children, age eight and five.

Q. Was there any other reason for leaving him?

A. Well, that was the main reason.

Q. Did you ever go back to live with him, or did you ever intend to go back to live with him.

A. I never went back; I intended to go back to live with him if he would support my children, but he never would offer to support my children.

Q. Are you a member of the Nez Perce Tribe of Indians in Idaho?

A. Yes sir.

Q. Was Noah a member of the tribe?

A. Yes sir.

Q. Had either you or Noah ever renounced your tribal affiliations or privileges or benefits?

A. No sir.

Q. Did you and Noah live in the manner and custom of Indian life, and did you attend tribal councils, camp gatherings and the like?

A. Yes, that was our custom.

She further testified that she never carried on marriage relations with Noah Bredell after she left him the next day after the marriage; that he sent for her and wanted her—

to go to the Indian Congress with him in June, but I was working at the game farm, and could not leave my job and go with him; and before that he came to me and asked me to go back and live with him, but he said he was sorry that he could not take care of my children, so I refused to go back and live with him. That was June after I left him in August, it was June, 1926.

Q. How many times did he talk to you about going back, from the time you left him until the time he died?

A. Once. And that once he sent word for me to come.

Another witness testified—

Q. Were Noah and Lillie both members of the Nez Perce Tribe of Indians in Idaho, who received annuity payments, and enjoyed tribal rights and privileges?

A. Yes sir.

Q. Had they or either of them ever severed their tribal relations? Did they renounce their tribal rights and take up the white manner of living, or did they continue to live in the manner and custom of Indian life?

A. They continued to be Nez Perce Indians and to live in the manner of Indian life, they were both quarter-breeds, but they still continued their Indian custom of living.

The foregoing not only shows that these parties were still living in tribal relations but clearly indicates that Lillie Viles did not intend to live with Noah Bredell again. She had received his final answer that he could not take care of her children, which fairly shows her motive for marrying him at all and as she says was her "main reason" for leaving him. The department was fully justified from the evidence in concluding that her separation or abandonment of Noah Bredell amounted to a valid Indian custom divorce. According to her own testimony she never intended to live with him again which if there were no other reason ought effectually to estop her from claiming any share in his estate. The material question on this phase of the matter is as to what material difference, if any, results from the fact that the parties were married by ceremony instead of by Indian custom in so far as the kind of divorce is concerned.

In determining the heirs of deceased Indians the practice of the department long has been not only to recognize Indian custom divorce of an Indian custom marriage, but of a ceremonial marriage as well, and there are valid and conclusive reasons for the practice. There is no question as to recognizing the validity of *Indian custom* marriages and divorces. Therefore it necessarily follows that they must be treated as being of equal validity with ceremonial marriage and legal divorce under the laws of the State, otherwise their recognition would carry no force whatever. It was held in the case of *Kunkel v. Barnett* (10 Fed., 2d Series, 804, 805)—

By the custom established, no formal contract or ceremony is essential to a marriage; a mere meeting and cohabitation as husband and wife constitute marriage. By the same custom a divorce may be effected by separation by mutual consent.

By the act of June 25, 1910 (36 Stat. 855), the Secretary of the Interior is authorized to determine the heirs of deceased Indians and it is provided that "his decision thereon shall be final and conclusive." It was early held in the case of *Bond v. United States* (181 Fed. 613), that this act made the Secretary of the Interior a special

tribunal for the purpose and in declaring that his decision should be "final and conclusive" made the authority conferred upon him exclusive, thereby depriving the courts of jurisdiction to determine heirship. This ruling was followed in the case of *Pel-ata-yakot v. United States* (188 Fed. 387), wherein it was held: "The provision is comprehensive, and clearly evinces the intention of Congress to confer exclusive jurisdiction to decide such controversies upon the Secretary of the Interior." It was also held (syllabus) in the case of *Parr v. Colfax* (197 Fed. 302), referring to the act of 1910: "Such act deprived the Circuit Court of Appeals of jurisdiction to entertain an appeal from a decree sued out after the statute went into effect, since it deprived the court of jurisdiction to enforce any judgment it might render on such appeal." See also *McKay v. Kalyton* (204 U. S. 458); *Cæsar v. Krow* (176 Pac. 927); *Hallowell v. Commons* (239 U. S. 506); *Lane v. Mickadiet* (241 U. S. 201); *United States v. Bowling* (256 U. S. 484); *First Moon v. White Tail* (270 U. S. 243). In the case of *Spicer v. Coon* (238 Pac. 833), the Supreme Court of Oklahoma held that a determination by the Secretary of the Interior of the legal heirs of an Indian allottee as authorized by the act of June 25, 1910, is final and conclusive, and not reviewable by the courts even *after expiration of the trust period*. That the department is not bound by the laws of the State or the decisions of the courts in matters of this kind was fully settled in the cases of *Bond v. United States* (181 Fed. 613); *Blanset v. Cardin* (256 U. S. 319), and *Sperry Oil Co. v. Chisholm* (264 U. S. 488). This is self-evident, otherwise the courts and not the Secretary of the Interior in whom exclusive authority is lodged by law would become the forum for determining heirship.

As exclusive authority rests in the Secretary of the Interior to determine the heirs of deceased Indians and the courts disclaim any jurisdiction in the premises, and in view of the fact that marriage and divorce among the Indians in accordance with tribal custom are recognized as valid, it necessarily follows that an Indian custom marriage is of equal validity with a ceremonial one, and similarly an Indian custom divorce is of equal force with one procured through legal procedure. The department on March 14, 1912, in the (unreported) case of Heirs of Pishedwin, which involved an Indian custom divorce of a ceremonial marriage, held—

In recognizing the validity of Indian custom divorces, the department does not make any distinction in the kind of marriage which such a divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations. A marriage between two such Indians, accompanied by certain elements which would make a good common law marriage or a ceremonial marriage among citizens of a State, does not thereby become proof against a subsequent Indian custom divorce.

A marriage "by Indian custom," in the view of the department, is as real a "marriage" as one accompanied by a legal ceremony according to forms prescribed by State laws. Similarly, a divorce by Indian custom, while the parties are wards of the Government, is, in the view of the department, a valid divorce dissolving the prior marriage relation, *no matter what may have been the method or the manner by which the marriage relation was assumed.* [Italics supplied.]

which is tantamount to saying that a ceremonial marriage between Indians, being of no more validity nor of any more binding force than one according to tribal custom would have been, such marriage can and will be treated as a valid Indian custom marriage regardless of the ceremony performed in accordance with the laws of the State, as the ceremony was unnecessary to constitute a valid marriage. For similar reasons their separation according to Indian custom constitutes a valid divorce without going through the form of legal procedure to procure it. The fact that the Indian may go through a legal ceremony when without such ceremony and by Indian custom the marriage would have been equally valid can not affect the efficacy of a subsequent Indian custom divorce, the parties still living in tribal relations.

As to the validity of Indian custom marriage and divorce, and as further showing the attitude of the courts, reference is made to the following cases. It was held in the case of *O'yr v. Walker* (116 Pac. 931, 934)—

* * * The courts of the American Union have, from an early time, recognized the validity of marriages contracted between the members of any Indian tribe in accordance with the laws and customs of such tribe, where the tribal relations and government existed at the time of the marriage, and there was no federal statute rendering the tribal customs or laws invalid (*Morgan v. McGhee*, 5 Hump. (Tenn.) 13; *Earl v. Godley*, 42 Minn. 361, 44 N. W. 254, 7 L. R. A. 125, 18 Am. St. Rep. 517); and such marriages between a member of an Indian tribe and a white person, not a member of such tribe, have been held and regarded as valid, the same as such marriages between members of the tribe. *Morgan v. McGhee*, *supra*; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 826; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598; *La Riviere v. La Riviere*, 77 Mo. 512. And the same effect is given to the dissolution of the marriages under the customs of the tribe as is given to the marriage relation itself. *Wall v. Williamson*, *supra*; *Wall v. Williams*, *supra*.

See also *State v. Columbia George* (65 Pac. 604); *McBean v. McBean* (61 Pac. 418); *Kobogum v. Jackson Iron Co.* (43 N. W. 602); *Earl v. Godley* (44 N. W. 254); *James v. Adams* (155 Pac. 1121); *Davidson v. Roberson* (218 Pac. 878); *Ortley v. Ross* (110 N. W. 982); *Coker v. Moore* (249 Pac. 694), and *Kunkel v. Barnett* (10 Fed., 2d Series, 804). The latter case leaves no doubt as to the correctness of the position taken by the department in this matter.

It was held in the case of *Tiger v. Western Investment Co.* (221 U. S. 286)—

It is for Congress, in pursuance of long established policy of this Government, and not for the courts, to determine for itself when, in the interest of the Indian, Government guardianship over him shall cease.

In contending for the reopening of the instant case the belief seems to prevail that even in a case where the marriage is by Indian custom, procedure in accordance with the laws of the State ought to be required to dissolve it. Apparently this is on the theory that marriage by custom among the Indians is the same as or equivalent to common law marriage among the whites. While the two forms possess some elements in common, they are, nevertheless, distinct and independent. For in accordance with the immemorial tribal custom an Indian marriage and an Indian divorce according to such tribal custom are as much a legal marriage and a legal divorce among the Indians as are ceremonial marriages and legal divorces among whites. They are in accordance with what constitutes tribal law. It was held in the case of *Buck v. Branson* (127 Pac. 436), syllabus—

A marriage contracted between members of an Indian tribe, in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there was no federal statute rendering the tribal customs invalid, will be recognized by the courts as a regular and valid marriage for all purposes.

(a) And the same effect is also given to the dissolution of marriages, under the customs of the tribe as is given to the marriage relation itself.

(b) Such marriages are not to be treated as common-law marriages, but as legal marriages according to the customs of the tribe, when such customs are recognized by Congress as concerning and regulating the domestic relations of the tribe.

Also in the case of *McFarland v. Harned* (243 Pac. 141, 143)—

Marriage, according to tribal customs, is neither a common-law nor a ceremonial marriage, but is nevertheless a legal marriage according to the customs of the tribe when such customs are recognized by Congress as regulating their domestic relations.

The case of *Buck v. Branson*, *supra*, was followed by that of *James v. Adams* (155 Pac. 1121), wherein it was held (syllabus)—

Marriages, contracted between tribal Indians according to the usages and customs of their tribe, at a time when the tribal government and relations are existing, will be upheld by the courts, in the absence of a federal law rendering invalid the laws and customs of the tribe.

A dissolution of the marriage contract, according to such tribal laws, usages, and customs, will be likewise upheld by the courts.

It was held in *Kunkel v. Barnett* (10 Fed., 2d Series, 804, 806):

While it is true the decisions are not uniform as to the validity of Indian divorces, it may safely be stated that, so long as the Indians live together under the tribal relation and are not subject to the laws of the state, but only to the jurisdiction of the Congress, and the paramount federal law places no limitation upon such tribes in reference to managing their own affairs, including their

domestic relations, marriages and divorces according to the usages and customs of the tribe will be treated as valid by the courts.

Also in the case of *La Framboise v. Day* (161 N. W. 529), it was held (syllabus)—

Where a half-breed marries an Indian woman according to Indian customs, lives with her as her husband in the tribal haunts, and is thereafter divorced from her according to Indian custom, such divorce will be recognized by the courts of the State as terminating the marriage relation.

And in the opinion (p. 530)—

* * * According to the custom of the Sioux Indians an Indian marriage might be terminated and either party be at liberty to marry again, by mere abandonment without further ceremony. * * * It was not a "common-law" marriage, so called, but a marriage according to the custom and laws of the tribe to which the parties belonged. * * * This principle clearly applies to divorce.

In *Wall v. Williamson* (11 Ala. 839), referred to in *Johnson v. Johnson's Administrator* (77 Am. Dec. 598, 602), the court said—

Marriages among the Indian tribes must be regarded as taking place in a state of nature; and if, according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of contract. Either party may take advantage of this term. * * *

Reference also has been made to section 5 of the act of February 8, 1887 (24 Stat. 388), as having a controlling bearing in this matter of determining heirs to the estate of deceased Indians. That section after referring to the approval of the allotment of lands and directing the issuance of trust patents thereon further 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." But it was held in the case of *United States v. Bellm* (182 Fed. 161, 166), wherein decision was rendered after the act of 1910 conferring exclusive jurisdiction upon the Secretary to determine heirs—

* * * that having provided that the allotment should be held in trust for the benefit of the heirs in case of an allottee's death the proviso adopting the laws of descent of the State was merely for the purpose of providing a rule by which the heirs should be determined.

In the case of *Fosburg v. Rogers* (114 Mo. 122, 21 S. W. 82, 84), referring to State statutes of descent it was held—

* * * But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child or a widow or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere.

It was also provided in section 6 of said act of February 8, 1887, that Indians to whom allotments are made and trust patents issued under the provisions of that act "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." But under the act of May 8, 1906 (34 Stat. 182), amending said section, Indians to whom trust patents are thereafter issued do not thereby become subject to State laws, the act providing—

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.

The Supreme Court in the case of *United States v. Pelican* (232 U. S. 442), said that the act of May 8, 1906, was passed "so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to State laws." The court also said in the case of *United States v. Celestine* (215 U. S. 278), that the passage of the act of 1906 suggests that Congress "in granting full rights of citizenship to Indians, believed that it had been too hasty."

It appears that after the act of February 8, 1887, and prior to the act of May 8, 1906, the practice prevailed for a time of basing recognition of Indian custom marriage and divorce on the fact as to whether they took place before or after allotment and trust patent, in view of the provisions in section 6 of the former act declaring that upon completion of allotments and patenting of the lands the allottees should have the benefit of and be subject to State laws, and also declaring Indians to whom allotments were made to be citizens of the United States. The contention at that time was that since by the act of 1887 every Indian to whom an allotment is made "under any law or treaty" is declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such, the marriage or divorce of an allottee must be governed and controlled by the laws of the State in which he resides and not by tribal customs. This was on the theory that by the allotment the tribal relations of the Indian were severed. But this condition did not exist because as held by the courts the allotment of lands and conferring of citizenship are not incompatible with continued tribal relations and guardianship of the Government. Both the department and the courts soon took the position that as allotments of land in severalty to Indians and conferring of citizenship did not terminate their tribal relations, the marriage and divorce relations of the Indians are to be determined by their tribal customs. It was held in the case of *Kalyton v. Kalyton* (74 Pac. 491, 492)—

* * * though these people have been invested with the rights of citizenship and guaranteed the protection of the laws, and rendered amenable thereto, the object evidently intended to be subserved by such legislation was to encourage

them to forsake their primitive ways and to adopt a higher civilization. Reforms of this character are necessarily radical, and not cheerfully submitted to or acquiesced in by uneducated Indians. The change from savagery to refinement is slow, and results from convincing the ignorant of the superior advantages which the latter state affords. * * * Though Indians residing on a reservation, to whom land therein has been allotted in severalty, are classed as citizens, and deemed to be subject to the laws of the state, the federal courts only have jurisdiction of grave crimes committed on the reservation by one such Indian against another. *State v. Columbia George*, supra. This is an admission that notwithstanding the allotment a quasi tribal relation still subsists, and that the general government continues to exercise a paternal care over these wards of the nation, and until that guardianship is removed, the state courts should not interfere with or disturb the domestic relations of such Indians.

Also in the case of *Yakima Joe v. To-is-lap* (191 Fed. 516), it was said (syllabus)—

The allotment of lands in severalty to Indians * * * did not terminate their tribal relations, and so long as the same continue the marriage relations of such Indians are to be determined by their tribal customs, and not by the laws of the State, and their marriage or divorce in accordance with such customs is valid everywhere and for all purposes.

The Supreme Court in the case of *United States v. Nice* (241 U. S. 591), held in respect to allottees under the act of 1887 that their tribal relations are not disturbed by allotments or trust patents. It was said (p. 599)—

The ultimate question then is, whether section 6 of the act of 1887—the section as originally enacted—was intended to dissolve the tribal relation and terminate the national guardianship upon the making of the allotments and the issue of the trust patents, without waiting for the expiration of the trust period. According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. Upon examining the whole act, as must be done, it seems certain that the dissolution of the tribal relation was in contemplation; but that this was not to occur when the allotments were completed and the trust patents issued is made very plain.

The act of February 8, 1887, is primarily an allotment act, whereas the act of June 25, 1910, is for the purpose of determining the heirs of deceased allottees and confers exclusive authority upon the Secretary of the Interior in the premises. But before the point of determining heirs is reached it is essential to determine whether or not the decedent was married at the time of his or her death. The act of 1910 does not provide that this determination of heirs shall be in accordance with the laws of descent of the State but does provide that the decision thereon shall be final and conclusive. As stated in the case of *United States v. Bellm*, supra, adopting the laws of descent of the State is merely for the purpose of providing a rule by which the heirs shall be determined. The marital status of the deceased Indian must necessarily first be ascertained and then his

or her heirs are determined in accordance with the facts surrounding the marriage relations. The status of the deceased Indian in respect of his marriage relations at the time of his death and the status of the heirs after his death are different and distinct things. Having ascertained the marital status of decedent then it is for the Secretary to determine his or her heirs in accordance with the adopted rule. As set forth in the case of *Fosberg v. Rogers, supra*, the requisites for determining the marital status or relations of a deceased Indian must be sought elsewhere than in the laws of descent. As also previously set out herein it is well settled that the Secretary of the Interior is not bound by the laws of the State in the matter. If there be any conflict between the provisions of the allotment act of 1887 and those of the heirship act of 1910, the general rule is that the last act must govern.

It is also urged that Indian custom marriage and divorce no longer prevail among the Indians of the Nez Perce Tribe, certain affidavits being furnished and references made to reports as to the advancement of these Indians. The department has heretofore had occasion to consider a similar contention in heirship cases coming from other tribes, in one of which it was said—

The policy of the Government is to recognize Indian custom marriage and divorce because experience has demonstrated there is no escape from such a course. The courts have held that so long as Indians continue in tribal relations their domestic affairs are controlled by their peculiar customs.

* * * * *

It would seem to be impractical from an administrative standpoint to isolate any particular tribe because of its superior advancement so long as tribal relations continue. In other words, the policy can not be adopted of holding by regulation that one particular tribe is sufficiently advanced to justify its marriage relations being henceforth regulated in accordance with the white man's law, while other tribes are not. The general policy being to recognize Indian custom marriage and divorce, it must prevail until a definite and uniform rule is established, which can only be done by Congress.

It was said in the case of *The Kansas Indians* (5 Wall. 737, 756)—

* * * This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved.

In 31 C. J. 486 it is said—

So long as the tribal organization is recognized by the National Government, the fact that the habits and customs of the Indians have been changed by intercourse with the whites does not authorize the courts to disregard the tribal status.

Also in the case of *United States v. Dewey County* (14 Fed., 2d Series, 784), it was said (syllabi)—

When the guardianship of the United States over Indians terminates is a political matter, to be determined by Congress, and over which neither the courts nor the State has any power.

Neither the ownership of the lands in fee in severalty by Indians, nor the conferring of citizenship and political rights upon them by a State, is incompatible with continuance of their tribal relations, or with continued guardianship over them by the United States.

There are instances where Indians were married and lived together according to tribal custom but were subsequently married by ceremony. It was contended that this was proof that the marriage relation did not formerly exist between the parties. However, the court said in the case of *Owens v. Carpenter* (252 Pac. 61, 62)—

* * * we do not regard these facts as evidence or proof of any illegitimate relation between them, but it is merely proof of a change of opinion or view on the part of these people and an effort to bring themselves within the sphere of the modern idea of what constitutes a marriage.

The evidence offered in support of the claim that custom marriage and divorce are no longer followed by the Nez Perce Indians amounts to little more than a showing of considerable progress among them and that in case of some of the Indians their marriages are by ceremony. This falls far short of proof that the custom of marriage and divorce has in the main disappeared. Besides, the advancement in the ways of civilization is not proof of the abandonment of old tribal customs. Such abandonment is perhaps to be accomplished by a process of education that the white man's ways are best. In a memorandum opinion of the Solicitor for this department of February 3, 1925, it was said among other things—

Marriage by custom and divorce are as old as Indian life and a very strong presumption of fact exists and must always be indulged in that they still exist among Indians until it is established clearly and beyond doubt that the customs have passed away and no longer exist, and that the Indians no longer recognize or practice the customs. In the present case, in my opinion, this very strong presumption of fact that the age-old customs still exist is not overcome by the evidence of the few witnesses who testified on that point in this particular case.

In connection with the petition for reopening this case, Indian custom marriage and divorce are referred to as being immoral, and for that reason it is urged that they ought not to be recognized.

Any difference of opinion on this subject is, of course, largely due to the standpoint from which the situation is viewed. The fact that the custom has been generally recognized by the authorities is entitled to much weight. That the Indians still look with sanctity upon their old tribal method of consummating marriage there can be no doubt, and that the custom is deeply implanted is evidenced by

the fact that notwithstanding long years of labor and instruction by faithful men and women in an endeavor to convert the Indians to the white man's ways in this matter, they still adhere to a very large extent to the tribal custom. What effect the enactment of rigid and arbitrary laws abolishing the custom instead of pursuing an educational process of conversion is of course problematical. Besides, abolishment by law of the custom and imposing the requirement that marriage and divorce be in accordance with State law might not necessarily result in moral improvement. From the Indian standpoint it must be assumed that morally, marriage and divorce in accordance with tribal custom and usage are just as solemn and significant as they are among white persons in accordance with the laws of the State and decrees of the courts. White persons become married and divorced by compliance with a regulation or custom incorporated into statute law which they have created to guide themselves by, and the Indians in being married and divorced by tribal custom comply with the law or custom which they have set up from time immemorial to guide themselves by. The effect is the same in both cases. The Indians under their tribal customs or law are just as surely, solemnly and absolutely married and separated as are the whites under the statute law and the decrees of the courts. And considering the history and different characteristics of the two races the morals in an Indian community are perhaps not broken down to any greater extent than are the morals of a white community—the Indian's condition under his tribal law or custom in this respect is no worse comparatively than that of the white man under his statutory law upon the subject. The foregoing views are supported by the courts in a number of cases. It was held in *Buck v. Branson*, *supra* (p. 437)—

* * * It being conceded that such marriages are valid, we will therefore give that phase of the case no further consideration. In *Wall v. Williamson*, 8 Ala. 48, it is said by the court in discussing this proposition: "By that law, it appears that the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. However strange it may appear at this day that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes."

Also in *McFarland v. Harned*, *supra*, it was held (p. 143)—

We know of no rule of law or of sound public policy which would justify us in withholding from this union the same presumptions of good faith usually indulged by the courts in favor of marriages generally, merely because the relationship does not conform to the domestic practices of a more civilized society.

In urging the point of immorality of Indian custom marriage and divorce the effect or result of not recognizing the validity of such custom is apparently overlooked in connection with the determination of heirs to estates of deceased Indians. Not to recognize the validity of such custom would result in the offspring of the cohabitation being illegitimate where Indians are married and divorced a number of times. Not to recognize the first marriage or only the first marriage would result in all offspring of subsequent marriages of all parties being illegitimate.

The case of *Carney v. Chapman* (247 U. S. 102) involved an ordinance of the Chickasaw Indian Tribe concerning solemnization of marriages by a judge or ordained preacher of the gospel. In considering the effect of that tribal act and the validity of marriage according to tribal custom, the court in affirming the decision below said (p. 104)—

* * * There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized.

The case of *Chancey v. Whinnery* (147 Pac. 1036), involved a statute of the Creek Indian Tribe, regulating marriage and divorce. A marriage entered into prior to this act in accordance with the laws and customs of the tribe which continued thereafter was upheld by the court as being valid.

In the case of *Barnett v. Prairie Oil and Gas Co.* (19 Fed., 2d Series, 504), the court held (syllabi)—

* * * that Creek Indians, who were husband and wife, separated by mutual consent in accordance with requirements of Creek customs, will not be disturbed if supported by evidence.

Noncompliance with Creek tribal ordinance of 1881, providing that divorce may be adjudged by district court, did not render divorce according to previous custom invalid since such ordinance was not mandatory.

It was held in the case of *Kunkel v. Barnett* (10 Fed., 2d Series, 804), syllabus—

Divorce between Indians by mutual consent, in accordance with a proven custom of tribe while tribal relation existed, held valid, and a subsequent marriage by one of said parties valid, as affecting title to land, notwithstanding existence at time of an Indian law regulatory of divorces.

The similitude of the Indian custom marriage to the common law marriage is indicated by the fact that in Oklahoma where State laws apply to the Indians of the Five Civilized Tribes, Indian custom marriages have been sustained as common-law marriages under the State law; and divorces many times inferred from the fact of long and continuous separation.

The case of *Wo-gin-up's estate* (192 Pac. 267), is frequently referred to as showing that Indians in their marriage relations are subject to the laws of the State. But in that case the parties were not living on a reservation or in tribal relations. The court held that where an Indian, living in a State in which (syllabus)—

* * * there was no reservation, divorced his wife and married another, pursuant to tribal custom, the divorce and second marriage were invalid, there being no compliance with the local laws, for an Indian, not as a part of a tribe or on a reservation, is subject to the laws of the State. * * *

It is for Congress alone to say when the customs in question shall cease. Bills have repeatedly been introduced in Congress having in view the abolishment of Indian custom marriage and divorce, and subjecting the Indians to the laws of the State, but none of these was ever enacted. The introduction of these bills implies recognition by Congress that State marriage and divorce laws are not applicable or controlling in the matter of tribal custom marriage and divorce. Certainly any attempt by the department independently to change the situation would be tantamount to legislation by regulation. There is nothing in this record conclusively showing that the Nez Perce Indians as a tribe have reached that state where the devolution of property or ethical considerations would cause them to feel that the existing customs are so unsatisfactory that they should be done away with. Although they are much advanced in the ways of civilization no protest has been made by them. As was held in the case of *Kobogum v. Jackson Iron Co.* (43 N. W. 602, 605)—

* * * The United States Supreme Court and the State courts have recognized as law that no State laws have any force over Indians in their tribal relations. * * * We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian custom and usage are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. * * * We have here marriages had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules.

The validity of Indian custom marriage has been recognized by Congress. It was said in the case of *United States v. Quiver* (241 U. S. 602, syllabus)—

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

And in the opinion (p. 603)—

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person and property of another Indian to be dealt with according to their tribal customs and laws.

It was held in the case of *Ortley v. Ross* (110 N. W. 982, 983)—

Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiffs was polygamous, it was neither valid in the State of Minnesota, where the parties then resided, nor in the State of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any State of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages. *Consequently, when a member of an Indian tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged. The rule so applied is that marriages, valid by the law governing both parties when made must be treated as valid everywhere.* [Italics supplied.]

It is urged that as Noah Bredell and Lillie Viles were ceremonially married and as it was reported that he contemplated applying for a divorce, thereby indicating intention to abandon the customs of his tribe and adopt the white man's law, it ought to be the policy of the department in the interests of morality and encouragement among the Indians to uphold such endeavors and not to "force" the divorce customs of the tribe upon the parties. Noah Bredell never applied for a legal divorce and the department has never thrown any obstacles in the way of Indians who are married ceremonially against invoking the divorce laws of the State. The condition the department is called upon to determine is where the parties are ceremonially married and no application is made for divorce and they are never divorced according to the laws of the State, but are divorced by Indian custom, as was the fact in the instant case. The question of force could only arise if the parties were compelled to procure a divorce in accordance with the laws of the State which under their recognized customs would be unnecessary and which law "never bound them." *Kobogum v. Jackson Iron Co., supra.* The instant case, like every other, must be decided on its own particular facts and if they show that the wife's abandonment of her husband was such as to constitute an Indian custom divorce, as his alleged applying for divorce, taken in connection with other circumstances, would indicate, then she is not in a position to justly claim to be the surviving wife of Bredell at the time of his death merely because they were married by ceremony any more than, if it were conclusively shown that marriage and divorce by custom had ceased in the tribe, resort might be had to the discarded custom to support a claim of valid marriage.

There has been some evidence of doubt and confusion as to the scope and effect in this matter of the blanket act of June 2, 1924 (43 Stat. 253), which declared all noncitizen Indians born within the territorial limits of the United States to be citizens of the United States. It was clearly not the intention of Congress by said act to disturb the existing status and relations of the Indians in respect to their property and other recognized rights. The act specifically provided that the granting of citizenship should not affect their property rights and it is fair to assume that it was not the intention of Congress to disturb their ancient and recognized customs without specifically so providing. As held in the case of *United States v. Nice, supra* (p. 598)—

* * * Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

The policy of the Government is to recognize Indian custom marriage and divorce because experience has demonstrated there is no escape from such a course. The courts have held that so long as Indians continue in tribal relations their domestic affairs are controlled by their peculiar customs. This is recognized in the act of May 8, 1906 (34 Stat. 182), the effect of which is, in so far as allotments thereafter made are concerned, not to disturb or interfere with the domestic relations of the Indians. Under the provisions of that act an Indian does not become a citizen upon allotment, hence, his domestic relations are governed entirely by the tribal custom. This in the judgment of some may be retrogression, but Congress has spoken.

Marriage and divorce are provided for by statute in all of the States, although the laws are not uniform, yet, notwithstanding such statutory provisions common-law marriages are recognized and upheld in many of the States. There would seem to be no reason why in the absence of any Federal law an exception should be made of the Indians in the matter of their customs by holding them to a stricter rule that prevails among the whites. Besides, the courts in respect to white people studiously endeavor to sustain marriage and divorce by indulging presumptions, inferences, and otherwise even in the face of statutory law governing such relations. It would seem that the Indian, whose only law is the immemorial custom of his tribe, so long as there is no Federal statute to the contrary, and in view of the long recognition of the custom by the department, the courts and Congress, ought to be entitled to equal consideration.

Upon careful examination and consideration of the record I find no good reason for disturbing the action heretofore taken in the matter of heirship to the estate of Noah Bredell; and as Congress,

the courts, the department, and in many instances the States, have all recognized the validity of Indian custom marriage and divorce, it necessarily follows that they must be recognized and treated as being of equal validity with ceremonial marriage and legal divorce. Hence the policy and practice heretofore in this regard are fully justified and should be followed until the enactment by Congress of legislation changing the situation.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

LEAVE OF ABSENCE ON ACCOUNT OF CLIMATIC CONDITIONS

Instructions, April 16, 1930¹

LEAVE OF ABSENCE—SETTLERS—SETTLEMENT—RESIDENCE—NOTICE—WORDS AND PHRASES—STATUTES.

The term "homesteader" as used in the proviso to the act of February 25, 1919, which authorized reduction of the residence requirement under the homestead law for climatic reasons, includes homestead settlers on unsurveyed lands who file in the local office notice of the approximate location of the lands settled upon and claimed.

EDWARDS, *Assistant Secretary:*

The department has considered your [Commissioner of the General Land Office] letter of August 9, 1930, requesting instructions as to whether settlers on unsurveyed lands are entitled to the benefits of the act of February 25, 1919 (40 Stat. 1153).

By the act approved July 3, 1916 (39 Stat. 341), Congress granted to homestead settlers on unsurveyed lands the right theretofore granted to homestead entrymen of being absent five months each year, in not to exceed two periods.

The act of February 25, 1919, *supra*, provides—

* * * That the register and receiver of the local land office under rules and regulations made by the Commissioner of the General Land Office may, upon proper showing, upon application of the homesteader, and only for climatic conditions, which makes residence on the homestead for seven months in each year a hardship, reduce the term of residence to not more than six months in each year, over a period of four years, or to not more than five months each year over a period of five years, but the total residence required shall in no event exceed twenty-five months, not less than five of which shall be in each year, proof to be made within five years after entry.

The act quoted is not limited to homestead entrymen, but by the use of the term "homesteader" Congress included homestead settlers. Therefore, a homestead settler on unsurveyed lands who files

¹ Promulgated May 16, 1930, as Circular No. 1219. See p. 103. —Ed.

in the local office notice of the approximate location of the lands settled upon and claimed may apply to the register for the benefits of the act of February 25, 1919, *supra*, making the showing required by the regulations of March 25, 1919, Circular No. 636 (47 L. D. 95).

NON-INDIAN LANDS WITHIN INDIAN PUEBLOS IN NEW MEXICO

INSTRUCTIONS

[Circular No. 1214]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 17, 1930.

DISTRICT CADASTRAL ENGINEER; AND

REGISTER, UNITED STATES LAND OFFICE,

SANTA FE, NEW MEXICO:

By the act of June 7, 1924 (43 Stat. 636), creating the Pueblo Lands Board, it is required that the board shall report upon each Indian pueblo as a separate unit, and upon the completion of each report, shall file one copy with the United States District Court at Santa Fe, New Mexico, and additional copies with the officials named in the act.

Upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in said court, as provided in section 1 of said act, a suit to quiet title to the lands described in said report as Indian lands, the Indian title to which is determined by said report not to have been extinguished. The board is directed by section 2 of said act, not to include in its report any lands of non-Indian claimants, who, in the unanimous opinion of said board after investigation, are found to hold and occupy such lands by rights that are valid and indefeasible, and for which the Indian title has been extinguished.

The last paragraph of section 4 contains the proviso that nothing in the act shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain, unaffected by the provisions of the act, their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction, at any time prior to the filing of the field notes and plat as provided in section 13 thereof.

Any person whose right to a given parcel or parcels of land has become fixed either by decree of court, or by action of said board, or by contest as therein provided, may apply to the Commissioner of the General Land Office for a patent or certificate of title.

Patents will be issued for all lands, the title to which is determined in suits filed under section 1 of the act, or by original proceedings under the last paragraph of section 4, to be in non-Indian claimants, where the parcel or parcels have been surveyed and the plat approved by the judge of said court in conformity with section 9 of the act, upon production of a certified copy of the final decree including the order of approval by said court, and after a copy of the plat has been filed with the district cadastral engineer at Santa Fe, New Mexico.

Patents will be issued to non-Indian claimants for all lands to which the Indian title has been extinguished as reported by the board, and for which court proceedings have not been brought by or on behalf of the Indians, upon the register of the United States land office for the district in which the land is situated, certifying that, under the provisions of the act of June 7, 1924, *supra*, the report of the Pueblo Lands Board has become final; that the parcels have been surveyed and plat and field notes officially filed with the district cadastral engineer; that notice thereof has been duly published, and that no contest has been filed against the person or persons and for the land described in the certificate; or certifying that after contest duly filed and final decision thereon, the person or persons named in the certificate had prevailed as to the land described.

Section 13 provides that as to all lands within the exterior boundaries of any Indian pueblo, which have not been claimed for said Indians by court proceedings then pending, or by the findings and report of the board as therein provided, the Secretary of the Interior, at any time after two years after the filing of said reports of the board, shall file field notes and plat for each pueblo in the office of the surveyor-general (now district cadastral engineer) of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings, then pending.

Any existing right of the Pueblo Indians to assert and maintain their title and right to any lands by independent suits or original proceedings in any court of competent jurisdiction, unaffected by the provisions of said act, is terminated by the filing of such plat and field notes (section 4-b). Thereafter, copies of such plat and field notes shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands described in said plat, and of any claim of the United States (section 13).

Within thirty days after the official filing of said plat and field notes with the district cadastral engineer, notice thereof must be published in some newspaper, or newspapers, of general circulation,

published within the county, if there be any, otherwise in a paper of general circulation nearest to such non-Indian lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as therein provided, with a description of such several holdings, as shown by survey made by authority of the Secretary of the Interior.

The notice so published shall require any person or persons claiming such described parcel or parcels of land, or any part thereof, adversely to the apparent claimant or claimants so named, or their heirs or assigns, to file, on or before the thirtieth day after the last publication of such notice, his or their adverse claim in the United States land office in the land district wherein such parcel or parcels of land are situate, in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries.

If no such contest is instituted as aforesaid, the patent will be issued to the claimant or claimants, for the parcel or parcels of land, respectively, as described in said notice, leaving the title to inure to his or their heirs or assigns. Persons deriving title through such claimant or claimants will not be recognized as contestants. A right of contest exists only where an adverse title is asserted. If a contest be filed, it shall proceed, be heard, and be decided as contests of homestead entries are heard and decided under the rules and regulations of the General Land Office. Upon such contest either party may claim the benefit of the limitations prescribed in section 4 to the same extent as if he were a party to a suit to quiet title brought under the provisions of the act, and the successful party shall receive a patent for the land as to which he is successful in such proceeding.

Any patent issued under the provisions of said act will have the effect only of a relinquishment by the United States of America and the said Indians.

A notice of all the exceptions in connection with each Pueblo, which have become final according to the decisions of the board, will be prepared in this office (in triplicate) and sent to the district cadastral engineer for verification and completion. After signature by the district cadastral engineer and the register, a copy will be published once a week for five consecutive weeks, beginning within thirty days from date, in a newspaper of general circulation, published in the county in which the land described therein is situated, otherwise in a newspaper published nearest the land. The register's copy will be posted in his office during the period of publication, and proof of posting made in the usual manner.

After thirty days from the date of the last publication, and in the absence of any contest filed with the register, he shall issue his certificate for each exception according to the attached form, designating the exception in the name and by the description appearing in the notice. Where a contest is filed, the same will be reported as in homestead contests. A serial number will be assigned to each exception in the notice in consecutive order, and the contests will be reported under the serial numbers to which they relate. Notice of the contest must be served on the claimant designated in the published notice, and the contest shall proceed, be heard, and be decided under the rules and regulations of the office pertinent thereto, and from the decision thereon the aggrieved party will have the usual right of appeal. After final decision on the contest, a patent certificate will issue on the prescribed form amended to recite that a contest was filed and decided in favor of the successful party, and such other recitals as may be necessary.

The act requires that the non-Indian claimants shall receive a patent or certificate of title without cost or charge, and no additional remuneration is allowed by the act to the register for issuing patent certificates. The costs of the contest proceedings, including the taking of testimony, shall be borne by the respective parties to the contest according to the rules of practice, and be accounted for in the usual manner.

The publication of notice will be made at the expense of the United States, and payment therefor will be made by the special disbursing agent at Denver, Colorado, out of the appropriation for "Quieting Title, Pueblo Lands, New Mexico, 1929 and 1930." Within ninety days after the official filing of the plats, and after the period within which contests may be filed, the register will submit a report of the serial numbers assigned, and the action taken on each, accompanied by the proof of publication and of posting of notice. This report will be made under the file reference of the letter (with initial and date) inclosing the notice for publication.

It is desired that the successive steps shall be taken with only the minimum lapse of time required under the statute to afford adverse claimants an opportunity to present their contests, and necessary to perform the duties involved. Should any doubt arise as to the method of procedure in connection with any exception or contest, or other duty, further instructions should be requested upon the particular matter.

C. C. MOORE, *Commissioner.*

Approved:

RAY LYMAN WILBUR,

Secretary.

LEVANT C. DOSCHADES

Instructions, April 29, 1930

BOARD OF EQUITABLE ADJUDICATION—HOMESTEAD ENTRY—CONFIRMATION—
PATENT—LAND DEPARTMENT—JURISDICTION.

An entry automatically confirmed under the proviso to section 7 of the act of March 3, 1891, which except for the confirmation would properly go to the Board of Equitable Adjudication for consideration, need not be submitted to that board inasmuch as the only jurisdiction over the matter remaining in the Land Department is that of issuance of patent.

PRIOR DEPARTMENTAL INSTRUCTIONS VACATED.

Instructions of March 28, 1916 (45 L. D. 16), no longer to be followed.

EDWARDS, *Assistant Secretary*:

Under date of April 22, 1930, you [Commissioner of the General Land Office] submitted to the Board of Equitable Adjudication the final proof submitted by Levant C. Doschades on his entry under the enlarged homestead act, made May 15, 1922, for W $\frac{1}{2}$ Sec. 20, T. 12 N., R. 35 E., B. M., Idaho.

The final proof was submitted February 6, 1928, and the receipt for the final commissions was issued February 10, 1928. Final certificate was withheld at the request of the division inspector. On January 10, 1930, you received a report of a field investigation, and by letter of January 22, 1930, directed the register to issue final certificate, which issued January 27, 1930.

You stated that the reason for submitting the case to the Board of Equitable Adjudication was the fact that the proof was submitted after the expiration of the statutory period and because of the departmental instructions of March 28, 1916 (45 L. D. 16).

No adverse proceedings having been instituted within two years after February 10, 1928, the entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095, 1099). *Stockley et al. v. United States* (260 U. S. 532).

Inasmuch as the Land Department now has jurisdiction only to issue a patent under the entry, it is unnecessary for the Board of Equitable Adjudication to consider the case.

The instructions of March 28, 1916, *supra*, will no longer be followed.

CREDIT FOR MILITARY SERVICE IN CERTAIN INDIAN WARS
GRANTED TO HOMESTEAD SETTLERS AND ENTRYMEN

INSTRUCTIONS

[Circular No. 1218]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 6, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

The act of April 7, 1930 (46 Stat. 144), provides—

That in every case in which an entryman or settler upon the public lands of the United States under the homestead laws has established, or may hereafter establish, military service in accordance with the provisions of the act entitled "An Act granting pensions to certain soldiers who served in the Indian wars from 1817 to 1898, and for other purposes," approved March 3, 1927, the military service of such entryman or settler so established shall, in the administration of the homestead laws, be 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; except that (1) if any such entryman or settler was discharged on account of wounds received or disability incurred in 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; and (2) no patent shall issue to any such entryman or settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

The benefits hereof are conferred upon such persons who come within the provisions of the act of March 3, 1927 (44 Stat. 1361), and it allows them to deduct the period of their established military service in the Indian wars from the period of compliance with the requirements of the homestead law ordinarily required or to deduct the full term of enlistment if discharged on account of wounds received or disabilities incurred in line of duty, subject, however, to the condition that no patent shall issue to any such entryman who has not resided upon, improved and cultivated his homestead for a period of at least one year.

It must be established that there was, at least, 30 days service in some military organization between January 1, 1817 and December 31, 1898, inclusive, and it is immaterial whether or not the person was regularly mustered into the service of the United States, if the service was under authority or by the approval of the United States or any State or Territory in any Indian war or campaign, or in connection with, or in the zone of any active Indian hostilities in any States or Territories of the United States.

The homesteader should furnish in support of his claim for credit for military service, a certified copy of his certificate of discharge or, where same is not possible, his affidavit, corroborated as far as

possible, giving all data available regarding his military service which will be of aid in establishing the same.

From such data this office will ascertain whether the Pension Bureau has, in connection with a claim for pension under the act of March 3, 1927, adjudicated the matter of military service and if so the finding of the Pension Bureau will be binding upon, and be accepted by, the General Land Office. Where there is no data on file in, or any adjudication on the point of military service by the Pension Bureau, this office will endeavor to secure a verification thereof by reports from the records of the War Department, where there are such records, or by reports from the records of the General Accounting Office showing payment by the United States, where there is no regular enlistment, or muster into the United States military service, or, when there is no record of service or payment for same, by satisfactory evidence from the muster rolls on file in the several States or Territorial archives, or, where no record of service has been made in the War Department or the General Accounting Office and there is no muster roll or pay roll on file in the several States or Territorial archives showing service of the applicant, or, when same has been destroyed by fire or otherwise lost, or, where there are muster rolls or pay rolls on file in the several States or Territorial archives but applicant's name does not appear thereon, the homesteader may make proof of such military service by furnishing through the Commissioner of the General Land Office evidence satisfactory to the Commissioner of Pensions.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

PROLONGED ABSENCES ON ACCOUNT OF CLIMATIC CONDITIONS— SETTLEMENT CLAIMS

INSTRUCTIONS

[Circular No. 1219]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 16, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

By departmental instructions of April 16, 1930 (53 I. D. 96), in the case of Vernon G. Huntley, Denver 042348, it was held that a homestead settler on unsurveyed lands who makes the showing required by the regulations in Circular No. 636, approved March 25,

1919 (47 L. D. 95), and who gives notice of the approximate location of the lands settled upon and claimed may be granted the benefits of the act of February 25, 1919 (40 Stat. 1153), providing for prolonged absences due to climatic conditions.

Said Circular No. 636 and paragraphs 4(b) and 35(c) of Circular No. 541 of July 16, 1926, are modified accordingly.

C. C. MOORE, *Commissioner*.

RELIEF OF DESERT-LAND ENTRYMEN IN CHUCAWALLA VALLEY, CALIFORNIA—ACT OF APRIL 17, 1930

INSTRUCTIONS

[Circular No. 1223]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 17, 1930.

REGISTER, LOS ANGELES, CALIFORNIA:

Your attention is directed to an act entitled "An act to exempt from cancellation certain desert-land entries in Riverside County, California," approved April 17, 1930 (46 Stat. 171), which reads as follows:

That no desert-land entry heretofore made in good faith under the public land laws for lands in townships 4 and 5 south, range 15 east; townships 4 and 5 south, range 16 east; townships 4, 5, and 6 south, range 17 east; townships 5, 6, and 7 south, range 18 east; townships 6 and 7 south, range 19 east; townships 6 and 7 south, range 20 east; townships 4, 5, 6, 7, and 8 south, range 21 east; townships 5, 6, and sections 3, 4, 5, 6, 7, 8, 18, and 19, township 7 south, range 22 east; township 5 south, range 23 east, San Bernardino meridian, in Riverside County, State of California, shall be canceled prior to May 1, 1933, because of failure on the part of the entrymen to make any annual or final proof falling due upon any such entry prior to said date. The requirements of law as to annual assessments and final proof shall become operative from said date as though no suspension had been made. If the said entrymen are unable to procure water to irrigate the said lands above described through no fault of theirs, after using due diligence, or the legal questions as to their right to divert or impound water for the irrigation of said lands are still pending and undetermined by said May 1, 1933, the Secretary of the Interior is hereby authorized to grant a further extension for an additional period of not exceeding five years.

By this act, desert-land entries in Riverside County, California, which were suspended under the provisions of the act of February 25, 1925 (43 Stat. 1580), are continued in a state of suspension until May 1, 1933, the language of both acts being identical except as to the dates during which the entries are to remain in a state of suspension, with authority to the Secretary of the Interior to grant a

further extension for an additional period of not exceeding five years. You will note this extension and give such publicity thereto as is possible without expense to the Government.

The granting of a further extension of time for a period not exceeding five years after May 1, 1933, will depend upon conditions existing at that time and which can not be foreseen and regulations under the provision of the act authorizing further extension will, if necessary, be issued at the proper time.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

TITLE INSURANCE IN LIEU OF ABSTRACT OF TITLE

Opinion, May 17, 1930

NATIONAL PARKS—TITLE INSURANCE—ABSTRACT OF TITLE.

Title insurance may be accepted by the Government in lieu of an abstract of title upon proof that the company is solvent and properly qualified if the policy is free from conditions and stipulations adverse to ownership by the United States.

FINNEY, *Solicitor:*

The Acting Director of the National Park Service has submitted for examination and opinion as to acceptability, a form of title insurance policy proposed to be used in lieu of other evidence of title, in connection with deeds of transfer of certain Yosemite properties to be acquired by the United States.

The following is quoted from the Acting Director's memorandum:

In connection with the closing of the Yosemite timber and land purchase pursuant to the agreement recently reached with the lumber companies and which was handled by Mr. A Crawford Greene, of San Francisco, under cooperative arrangements financed by New York friends, it is proposed to have the title cleared through the California Pacific Title and Trust Company which will issue a title insurance policy to the United States as evidence of good title when the deed covering the conveyance is tendered for acceptance. In order to avoid any difficulties in regard to the acceptance of title insurance as evidence of good title an appropriate provision has been carried in the pending Interior Department Appropriation Bill which carries the funds under which the Government's share of the cost will be met, under which the evidence of title is required to be satisfactory to the Secretary of the Interior. The total purchase price of the timber and land will be approximately \$3,300,000.00 of which half will be defrayed from Government funds and half from funds contributed by Mr. John D. Rockefeller, Jr.

The proposed policy is to be issued by the California Pacific Title and Trust Company, and the first page thereof reads as follows:

By this policy of title insurance California Pacific Title & Trust Company herein called the Company, in consideration of the payment of its premiums and charges for examination of title, receipt whereof is hereby acknowledged does hereby insure United States of America, and its assigns ——— against loss or damage not exceeding in all the sum of ——— Dollars, which the said insured shall sustain by reason of any incorrect statement in this Policy concerning the title to the ——— hereinafter described, ———

The title of said ——— hereinafter described is vested in United States of America free and clear, without any exception whatsoever either of record or not of record, and unconditionally.

In testimony whereof, the Company has caused this Policy to be executed by its officers thereunto duly authorized, and its corporate seal to be hereunto affixed this ——— closing with Recorder's Series No. ———

CALIFORNIA PACIFIC TITLE & TRUST COMPANY,

By ———, *Its Vice-President.*

and by ———, *Its Assistant Secretary.*

On the following pages a description of the insured property is to be given and the conditions and stipulations of the policy.

It will be noted that the title is fully insured, that is, "without any exception either of record or not of record, and unconditionally."

The conditions and stipulations are substantially the same as appear in most policies of title insurance and cover: (1) The rights and duties of the company upon notice of claim; (2) rights of company upon payment of claim; and (3) liabilities of the company.

While the insurance is full insurance as of the date of the policy, the company assumes no liability for loss or damage by reason of defects, claims or incumbrances created subsequent to that date, or created or suffered by the insured claiming such loss or damage, or for defects, claims or incumbrances existing at the date of the policy and known to the insured claiming such loss or damage at the date such insured claimant acquired an insurable interest.

The liability, of course, is also limited to the amount specified on the face of the policy. No mention is made in the memorandum regarding the amount proposed to be fixed but it is assumed that the sum fixed will be sufficient to cover losses resultant from failure of title or by reason of probable defects or incumbrances affecting the property. It is suggested that it should at least cover the purchase price of the property.

The question of the acceptability of a policy of title insurance in lieu of an abstract of title was considered by this office in an [unpublished] opinion dated September 21, 1927, M. 23331, wherein it was stated—

The position has heretofore been taken that a policy of title insurance may be accepted in lieu of an abstract of title when it is made to appear that the company is solvent and properly qualified and the policy is free from conditions and stipulations inappropriate to ownership of premises by the United States.

The form of policy submitted appears to be free from conditions and stipulations inappropriate to the ownership of the United States and, therefore, appears acceptable as to form.

Section 453v, Civil Code of California, 1923, defines a policy of title insurance as follows:

Any written contract or instrument purporting to show the title to real property, or furnish information relative thereto, which shall in express terms purport to insure or guarantee such title or the correctness of such information, shall be deemed a policy of title insurance.

No information is submitted as to the competency and reliability of the title company proposing to issue the policy and in order to complete the record, a certificate from the proper State officer that it has complied with the provisions of the laws of the State and is duly authorized to do business as a title insurance company should be furnished.

The competency and reliability of the company being established, I am of the opinion that a policy of title insurance substantially in the form proposed, may be accepted as a sufficient guaranty of good title in the premises which it is proposed to convey.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

NON-TAXABILITY OF LEASES OF RESTRICTED YAKIMA INDIAN ALLOTMENTS

Opinion, May 23, 1930

INDIAN LANDS—ALLOTMENT—LEASE—TAXATION.

Lands allotted to Indians in severalty under the general allotment act of February 8, 1887, as amended by the act of February 28, 1891, are not subject to taxation by a State or municipality for any purpose during the period that the lands are held in trust by the United States. *United States v. Rickert* (188 U. S. 432).

INDIAN LANDS—ALLOTMENT—LEASE—TAXATION—RENTAL.

The Secretary of the Interior is without authority, under existing law, to require non-Indian lessees of restricted allotted lands on the Yakima Indian Reservation in the State of Washington to pay certain stipulated sums additional to the regular rentals for the benefit of the local authorities in lieu of taxes which the county is not authorized to collect.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion upon a matter arising in connection with the leasing of restricted allotted lands on the Yakima Indian Reservation in the State of Washington for agricultural purposes.

It is explained by the Commissioner of Indian Affairs that the Yakima Indian Reservation embraces a considerable area of land valuable for agricultural purposes, a large part of which is and has been under irrigation and in a high state of cultivation for a number of years; that much of this land is leased to persons other than Indians who enjoy the benefit of the usual facilities provided by the State for its citizens, such as free schools, improved highways, etc., all without substantial cost to them due to the non-taxability of the leased lands and the permanent improvements thereon; that the State and county authorities feel that these non-Indian lessees should be required to pay their just proportion of the expenses of providing and maintaining the facilities mentioned and to that end have urged, with much insistence, that the leasing regulations be amended "so as to provide that no lease covering allotted Indian lands would be approved unless the lessee, in addition to the rental agreed upon to be paid to the Indian owner of such land, would also agree to pay to or for the benefit of the local authorities an additional sum to be stipulated in lieu of taxes which the county is otherwise unable to collect, also that the lease forms and advertisements, if any, inviting bids on such leases should contain similar conditions."

The question presented is whether authority exists in the Secretary of the Interior, under existing law, to require lessees of these lands to meet the conditions mentioned.

The authority to tax necessarily falls to the legislative power. *United States v. New Orleans* (98 U. S. 381, 392); *Palmer v. McMahon* (133 U. S. 660, 669). And, as suggested by Judge Cooley in his work on Taxation (Vol. 1, p. 43), it is an inflexible principle of our law that no executive or administrative officer can lay any tax whatsoever except in execution of laws enacted for his observance. For this reason, if no other, the validity of a regulation of the nature contemplated, which would savor strongly of an attempt on the part of an administrative officer of the Federal Government to levy a tax upon a certain class of citizens for the benefit of a State, is open to such serious question as to render its adoption and promulgation inadvisable in the absence of clear statutory authority therefor. Still other considerations, however, further demonstrate the illegality of the proposed measure.

The Yakima Indians were allotted lands in severalty pursuant to the provisions of the acts of December 21, 1904 (33 Stat. 595) and May 6, 1910 (36 Stat. 348), such allotments being made under the general allotment act of February 8, 1887 (24 Stat. 388) as amended by the act of February 28, 1891 (26 Stat. 794). Section 5 of the general allotment act provides—

That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of

the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

Under the foregoing provision, the United States retains the legal title giving the Indian allottee a paper or writing improperly termed a patent (see *United States v. Rickert*, 188 U. S. 432), showing that at a particular time in the future, unless it was extended by the President, the allottee or his heirs, as the case may be, would be entitled to a regular patent conveying the fee discharged of the trust and free from all charge or incumbrance. The United States thus retained its hold on the lands allotted for a period of 25 years after the allotment and as much longer as the President in his discretion might determine, and the clearly expressed intent of Congress is that so long as the land remains in that status it is beyond the power of the State to tax the same for any purpose. In upholding the non-taxability of lands of this character during the period of the trust, the Supreme Court in *United States v. Rickert*, *supra*, said (p. 437)—

If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for State or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupillage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that “from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.” *United States v. Kagama*, 118 U. S. 375, 384. So that if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated; for by the act of 1887 the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, “and free of all charge or incumbrances whatsoever.” To say that these lands may be assessed and taxed by the county of Roberts

under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.

See also *Choate v. Trapp* (224 U. S. 665, 673), wherein it was held that where an Indian has once obtained a vested right of exemption from taxation for a definite period, it is beyond the power even of Congress thereafter to deprive the Indian of that right without his consent. To the same effect is the decision of the 8th Circuit in *Morrow v. United States* (243 Fed. 854).

The Yakima Indians have not been fully emancipated. They are wards of the Government and the retention of title by the United States with the grant of exemption from taxation during the period so held constitutes an important part of the legislative policy of Congress towards the Indians. Administrative officers of the Government are bound not only to respect this condition as much as outsiders, but as agents of the Government charged with the execution of its guardianship powers over the Indians, it is their duty to enforce the tax exemption and protect the same from impairment or infringement in any manner.

Turning to the leasing laws, in which the authority to prescribe the regulation under consideration must be found, if it exists at all, we find that Congress by an item contained in the Indian appropriation act of May 31, 1900 (31 Stat. 221, 246), has authorized the leasing of certain lands allotted to the Yakima Indians in the following language:

That the Indians to whom lands have been allotted on the Yakima Reservation in the State of Washington shall be permitted to lease unimproved allotted lands for agricultural purposes, for any term not exceeding ten years upon such terms and conditions as may be prescribed by the Secretary of the Interior.

Subsequent legislation of a general nature relating to leases of this character as found in section 4 of the act of June 25, 1910 (36 Stat. 855, 856) and the act of March 3, 1921 (41 Stat. 1225, 1232) is of the same general tenor in that such leases are authorized to be made under such rules and regulations as the Secretary may prescribe.

In restricting the right of the Indians to the making of only such leases as are in accord with the rules and regulations prescribed by the Secretary of the Interior, it is plain that the primary intent of Congress had to do with the protection of the Indians from their own improvidence and overreaching by others. See *LaMotte v. United States* (254 U. S. 570). To that end the discretion of the Secretary is very broad. His powers, however, are not unlimited. He is not vested, for instance, with arbitrary authority (*Anacker v. Gunsburg*, 246 U. S. 110), and he necessarily is restrained from tak-

ing any action by regulation or otherwise that would have the effect of invading or impairing rights and privileges conferred upon the Indians by Congress. The regulation under consideration is one clearly not to the interest or for the benefit of the Indians. To the contrary a requirement that as a condition of the leasing of the lands the lessee shall pay for the benefit of the State, in addition to other considerations, an amount equivalent to that customarily assessed and collected by the State as taxes upon property of this kind, would unquestionably diminish to that extent the income flowing to the Indians from the leasing of their lands. The burden would thus be placed upon the Indians and the plain effect of such a measure would be to shorten or curtail the period during which Congress has said they shall enjoy immunity from taxation.

I have to advise, therefore, that the suggested amendment to the leasing regulations involving as it does an attempt to do by indirection that which can not lawfully be done directly is unauthorized.

Approved:

Jos. M. Dixon

First Assistant Secretary.

CREATION OF RESERVATION FOR ALASKAN NATIVES

Opinion, May 29, 1930.

WITHDRAWAL—ALASKAN NATIVES—OFFICE OF EDUCATION.

Withdrawal of public lands in Alaska to be administered by the Office of Education under the supervision of the Secretary of the Interior primarily for experimental vocational education of the natives as authorized by the act of February 25, 1925, and in aid of their support and advancement is in the public interest and for a public purpose.

FINNEY, *Solicitor*:

In response to the request of the Administrative Assistant, I have considered the questions in the memoranda submitted concerning a proposal for the withdrawal by Executive order, of certain lands in the upper Tanana Valley, in Alaska, near the international boundary line, to be administered by the Office of Education under the supervision of the Secretary of the Interior, primarily for experimental vocational education of the natives who inhabit that section of the country, and to aid in their support and otherwise to advance their interests.

It appears from the memorandum that this section is located about 200 miles from the nearest settlement and is difficult of access. The natives are without medical assistance of any kind. During certain seasons the country is frequented by undesirable white men who are gamblers and bootleggers. The fur-bearing animals which

heretofore have afforded a means of livelihood are being rapidly depleted by white trappers and the natives are barely able to eke out an existence by traveling great distances into the hills in the quest of caribou. These journeys are not made without great hardship. It is reported that there are no white settlers in the country and these natives are practically the only permanent inhabitants.

It is proposed to reserve the area approximately 25 miles or more square to promote the interests of the natives by appropriate vocational training, to encourage and assist them in restocking the country and protecting the fur-bearing animals, and otherwise to aid in their care and support.

There is no express statutory authority for the withdrawal of lands for the purpose proposed, but it appears to be well settled that withdrawals of lands belonging to the United States may be made by Executive order without express statutory authority as the exigencies of the public service require. *Grisar v. McDowell* (6 Wall. 363); *Alaska Pacific Fisheries v. United States* (248 U. S., 78); *United States v. Leathers* (6 Sawyer 20); 17 Ops. Atty. Gen. 258. Attention is also directed to the act of June 25, 1910 (36 Stat. 847) which authorizes the President to make withdrawals of public lands for public purposes.

To encourage, assist and protect the natives in their efforts to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life, is in the public interest and for a public purpose (17 Ops. Atty. Gen. 258, 260; *Alaska Pacific Fisheries v. United States, supra*).

The act of February 25, 1925 (43 Stat. 978) authorizes the Secretary of the Interior to establish a system of vocational training for the aboriginal native people of the Territory of Alaska and to construct and maintain suitable buildings for schools, dormitories and hospitals in such localities within the territory as he may select.

Reservations have heretofore been created by Executive order in Alaska for the use of the Office of Education under the supervision of the department for the care, support and advancement of the interests of the natives (Solicitor's opinion May 18, 1923, 49 L. D. 592), and the withdrawal of an area sufficient to meet the needs of the situation presented may be made should you determine that the exigencies require a withdrawal of the lands.

The administrative details incident to the purposes of the reservation may be determined by the conditions found to exist after a careful study of the needs of the natives is made. The suggestion in the memorandum that tracts be allotted as fur farms and that within ten years the reservation be abolished and fur farm leases granted to the occupants, could not be made effective without the enactment of further legislation by Congress.

The department, however, may use or permit the reserved lands to be used, in any reasonable manner and for any reasonable purpose which will advance the interests of the natives, provided it does not undertake to make such a disposition of them as may eventually embarrass the Government's title (Opinion May 18, 1923, 49 L. D. 592, at 596).

A withdrawal of the character proposed would not vest the natives with any rights which would be inconsistent with the power of Congress to provide for the ultimate disposal of the lands. Should it be deemed in the public interest in the future to revoke the reservation, the enactment of appropriate legislation to care for the interests of the natives may then be recommended.

Should the withdrawal be made the area would be subject to valid rights existing at the date of the withdrawal and may be held open for purposes of prospecting, locating, developing and disposing of the mineral resources under applicable laws.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

STATE OF NEW MEXICO

Decided June 9, 1930

SCHOOL LAND—AVULSION—ACCRETION—RIPARIAN RIGHTS—LAND DEPARTMENT— JURISDICTION—PUBLIC LANDS—SURVEY.

The law of title by accretion has no application to lands uncovered by an avulsion resulting in a change in the course of a river and the Land Department retains sole jurisdiction to survey unsurveyed public lands thus formed and to dispose of them under appropriate laws.

SCHOOL LAND—INDEMNITY—SURVEY.

Lands that passed to a State under its school land grant upon approval of the survey thereof, do not afford valid base for an indemnity selection because the State's title has been lost through litigation in which the Government took no part and by which it was not bound.

EDWARDS, *Assistant Secretary.*

The State of New Mexico has appealed from the decision of the Commissioner of the General Land Office dated November 20, 1929, which required the State to offer other and valid base in support of its indemnity school-land selection, Las Cruces 036972, for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 25, T. 2 S., R. 8 W., N. M. P. M., New Mexico.

The Commissioner found that lots 5, 6 and 7 of Sec. 2, T. 19 S., R. 4 W., of which part of lot 5 was offered as base, were not formed as accretion to the adjoining lots 1 and 2 of said section, but that

by an avulsion the course of the Rio Grande was changed, leaving the described lands, with respect to the river, in the position shown upon the plat. He, accordingly, held that the parties claiming said lands as owners of the adjoining lots 1 and 2 had no valid claim therein, except in so far as they were able to show that the patented lots as surveyed embraced lands between the 1858 meander line of the right bank of the river and the thread of the river as it then existed. He further held that as the said lots were not embraced in any withdrawal or reservation, or other claim at the date of the acceptance of the plat of survey on April 14, 1921, they passed to the State as of that date under the act of June 20, 1910 (36 Stat. 557), and are not valid base for an indemnity selection.

The State alleges that the Commissioner erred in holding that lots 5, 6 and 7 of said Sec. 2 passed to the State under its school-land grant, and further, that it was error to disregard the decree of the district court of Dona Ana County, in which the lands are situated, wherein it was held that the title to the lots in question is vested in the adjoining landowners as accretion. The State contends that the holding of the court is binding on the parties to the suit and upon the Land Department.

The Commissioner has found as a fact that these lands were not formed by accretion but that an avulsion occurred resulting in a change of the course of the river, and sets forth at length in the opinion the grounds upon which his finding is based. The lands in question were surveyed as public lands. Prior to this survey their status as unsurveyed public lands was unchanged by avulsion. Under these facts, the grantees of the adjoining lots 1 and 2, claiming under the title having its root in the patent issued to Blas Rael on November 23, 1891, acquired no title in the adjoining unsurveyed lands now identified as lots 5, 6 and 7. The Land Department clearly had sole jurisdiction in the premises. *Bishop of Nesqually v. Gibbon* (158 U. S. 155); *Knight v. United States Land Association* (142 U. S. 161); *McDaid v. Oklahoma* (150 U. S. 209).

The survey of these lands in the field was made in July, August, and September, 1916, and the conveyance by Clapp to Wilson and Sanford on January 24, 1920, of lots 1 and 2 "together with all accretion thereto due to the action of the Rio Grande" carried no title in lots 5, 6 and 7, nor did the entering into possession by these parties under this deed, add any rights in the premises, which may be recognized under the public land laws.

Section 6 of the Enabling Act of June 20, 1910, *supra*, reads 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 pre-emption 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.

The facts in this case clearly show that there was no withdrawal or reservation, no settlement under the homestead laws, no improvement of these lands with a view to desert entry, or other appropriation cognizable under the act or the public land laws, prior to survey in the field, and the lands passed to the State of New Mexico when the plat of survey was accepted April 14, 1921, under the provisions of the act above quoted.

The title to lot 5 having passed to the State, it does not afford good base for an indemnity selection if it has since been lost to the State by abortive litigation in which the United States took no part and by which it is not bound.

The decision appealed from is therefore

Affirmed.

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Decided June 9, 1930

MINING CLAIM—ADVERSE CLAIM—LAND DEPARTMENT—EVIDENCE—PATENT—PRACTICE.

In adverse proceedings under section 2325, Revised Statutes, as amended by the act of March 3, 1881, each party is nominally plaintiff and must show his title, and the applicant for patent can not go forward with his proceedings in the Land Department simply because the adverse claimant had failed to make out his case, if he also had failed.

MINING CLAIM—ADVERSE CLAIM—LAND DEPARTMENT—EVIDENCE—POSSESSION—PATENT—PRACTICE.

The trial of suits under section 2325, Revised Statutes, as amended by the act of March 3, 1881, is to aid the Government in determining whether either party, and, if so, which has the exclusive right to possession arising from a valid subsisting location, and patent proceedings in the Land Department are suspended to await determination of that question.

MINING CLAIM—ADVERSE CLAIM—DEMURRER—EVIDENCE—ESTOPPEL—RES JUDICATA—PRACTICE.

Where in a suit of adverse proceedings against a mining claim a demurrer is sustained and the action is dismissed on the merits, all facts well pleaded

are admitted, and, if the facts relevant to the issue as to the validity of the claim were not determined, the Government is not estopped from fully inquiring into and determining them.

MINING CLAIM—ADVERSE CLAIM—JUDGMENT—LAND DEPARTMENT—POSSESSION—RES JUDICATA.

A judgment in adverse proceedings against a mining claim simply determines the right of possession and does not preclude the Land Department from ascertaining the character of the land and determining whether the law has been complied with in good faith.

MINING CLAIM—ADVERSE CLAIM—JUDGMENT—PATENT—PROTEST—LAND DEPARTMENT.

An unsuccessful adverse mining claimant may still by way of protest call the attention of the Land Department to irregularities in the patent application which were not determined by the court in its judgment.

MINING CLAIM—ADVERSE CLAIM—MILLSITE—PROTEST—JUDGMENT—RES JUDICATA—LAND DEPARTMENT.

A controversy between a prior millsite claimant and a placer claimant is not subject to an adverse claim, but of protest, and any finding of a court in adverse proceedings between such claimants as to the mineral or nonmineral character of the land or any fact relevant to that issue is merely advisory and not binding upon the Land Department. *Helena etc. Co. v. Dailey* (36 L. D. 144).

MINING CLAIM—ABANDONMENT—RELINQUISHMENT—EVIDENCE.

To establish abandonment both the intention to abandon and actual relinquishment must be shown; mere failure to check deterioration in value that follows from lapse of time of unproductive property is not of itself conclusive as to abandonment.

MINING CLAIM—MINERAL LANDS—TAILINGS—ABANDONMENT.

Ore when severed from the land becomes personalty, but tailings from the mine that are dumped upon nonmineral land and abandoned become, upon abandonment, a part of the realty so as to mineralize the land upon which they are placed and make it subject to mining location by the first comer.

MINING CLAIM—MINERAL LANDS—TAILINGS.

No rights can be acquired under the placer mining laws to public land, nonmineral in its natural state, that was covered by valuable tailings placed there by another where the owner of the tailings had kept and preserved them from waste and destruction pending such time as they might be profitably worked and sold. *Ritter v. Lynch* (123 Fed. 930).

MINING CLAIM—TAILINGS—ABANDONMENT—EVIDENCE.

A charge of abandonment of tailings impounded on public land on the ground that breakages in cribbing due to age and decay of the logs that retained them were not repaired, that a large amount of the tailings had escaped, and that there was an absence of any specific acts towards their conservation for a long period of time and discontinuance long ago of active mining operations by the company that placed them on the land, is refuted by the facts that about 75 per cent of the cribbing is still intact, that the tailings had settled to such an extent as to render cribbing protection no longer necessary, that they had been purchased as personal property at

a sheriff's sale and taxes paid thereupon, that rights in the land had been invoked by the purchaser under the millsite law, and that he expected to treat them at some future time.

EDWARDS, Assistant Secretary:

This is an appeal by John A. Grosso, administrator of the estate of Antone C. Grosso, deceased, from a decision of the Commissioner of the General Land Office dated July 15, 1929, which affirmed the local register in holding for rejection application, Great Falls 062827, for patent to the Bird placer, Survey No. 10408, situate in unsurveyed T. 3 S., R. 10 W., Montana Meridian, and within the Beaverhead National Forest, and further declared the claim void because made on nonmineral land.

Grosso filed his application January 19, 1923. Henry Knippenberg *et al.* filed mineral contest March 12, and adverse claim March 21, 1923, against the application, alleging superior rights to the greater part of the land by virtue of prior location and maintenance of Everest 2, 3, and 4 millsites, and declaring, among other things, that no discovery had been made; that the land was not valuable for mineral, but only for the stacks of tailings owned by contestant and impounded upon the land. Adverse suit was instituted by contestants April 12, 1923, in the district court for the Fifth Judicial District of Montana. Demurrers and motions to dismiss the adverse claim filed in the local office by applicant, including among others, the ground that controversies between millsite and mining claimants were not the subject of adverse proceedings under sections 2325 and 2326 of the Revised Statutes, were overruled by the local officers, and with subsequent approval by the Commissioner further proceedings on the application were stayed to await the outcome of the adverse suit.

On January 19, 1924, the Forest Service lodged protest against the application, in substance charging (1) no discovery, (2) location made because of mineral values in the tailings, the property of the Hecla Mining Company, and not because of mineral values in the land, (3) insufficient patent expenditure. Upon the doing of further work by applicant on the claim Charge 3 was later withdrawn.

On June 19, 1925, applicant filed a certified copy of the judgment roll in the adverse suit, showing that the action had been dismissed on its merits. It is conceded by all parties that the judgment was final. The applicant set up the judgment as a further bar to the prosecution of the contest by plaintiffs in the adverse suit and contended that they had lost their right to further question applicant's claim, and that by the judgment the Forest Service had lost all right to contest his application. By decision of November 11, 1925, the Commissioner upon consideration of certain matters disclosed

in the judgment roll held the judgment not *res adjudicata* as to all matters connected with the final proof and directed hearing of the protest of the Forest Service and permitted Henry Knippenberg *et al.* to intervene in that proceeding.

On December 23, 1926, George B. Conway filed a protest against the application, averring that he and the Darby Mining Company were the present owners of the tailings deposited on the land; that there was no valuable deposits of minerals thereon; that the requisite expenditure had not been made; that the mining location was made to deprive the owners of their tailings. Hearing was duly had before a United States Commissioner at Butte, Montana, from June 19 to 25, 1928, Conway in his own and the Darby Mining Company's behalf, over protest of the applicant, being permitted to intervene and adduce evidence, so much of it relevant to the charges being adopted by the Forest Service as Government testimony. The appeal is from the decision of the Commissioner in this Government proceeding. The respective contentions of each party has been presented in elaborate briefs and by oral argument before the department.

Applicants present for decision at the threshold of the case questions as to the conclusiveness of the judgment of the State court in estopping first, Conway as alleged transferee of the rights of Knippenberg *et al.* in the millsites and tailings from further contesting the claim of the applicant, and asserting a claim adverse to the applicant for the land; second, in precluding the Government from permitting Conway to participate and offer evidence as an intervenor at the hearing; third, in estopping the Government from making certain determinations as to the mineral character of the land, the validity of his claim and of other facts pertinent to the issues raised by the charges. The contention of the attorney for the applicant being to the effect that there was necessarily involved or there must necessarily be implied in the decree of the court dismissing the action on its merits determinations by the court that the applicant had a valid possession under the mining law by virtue of his placer location; that the mineral applicant owned the tailings; that they were real and not personal property; that they had been abandoned by their former owners either at the moment of their deposit on the lands or thereafter, and prior to the location of the Bird claim, and that such findings or determinations are final and conclusive and binding upon the Land Department and not open to further inquiry.

In considering this contention it is pertinent to inquire as to what are the essentials of a judgment that would so bind the department, and determine from the judgment rendered in this case whether those essentials appear.

It is settled law that in adverse proceedings contemplated by section 2325, Revised Statutes, as amended by the act of March 3, 1881 (21 Stat. 505), each party is practically plaintiff and actor and must show his title, and before the applicant for patent can have judgment he must prove his claim of title to the ground. The applicant for patent can not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. *Brown v. Gurney* (201 U. S. 184, 191); *Perego v. Dodge* (163 U. S. 160, 167); *Cole v. Ralph* (252 U. S. 286, 297); Lindley on Mines, Sec. 763. The proceedings are suspended in the land office "to await the determination by a court of competent jurisdiction of the question whether either party, and if so, which, has the exclusive right to the possession arising from a valid subsisting location." [Italics supplied.] *Cole v. Ralph*, p. 296. In *Tonapah Fraction Min. Co. v. Douglas* (123 Fed. 936, 941), the court said—

It must constantly be remembered that the trial of suits of this character, under the provisions of the statute, is had in order to aid the Government, through its proper department, in determining whether the applicant or the adverse claimant is entitled to a patent. The Government is not strictly speaking, a party to the suit, but it is interested in the proceedings to the extent of having it not only established by the courts, under the evidence at the trial which of the parties has the better or superior right to the land in controversy, but also whether there has been full compliance with the mining laws, rules and regulations; and if it should be found, upon the proofs, that neither of the parties to the proceedings has complied with the laws, it is the duty of the court to render judgment against both. *Jackson v. Roby*, 109 U. S. 440, 442, * * * It will thus be seen that the government acts upon the proofs established at the trial, and requires that certain facts be found whether alleged in the pleadings or not. [Italics supplied.]

The plaintiff may be nonsuited, but this will not avail the defendant unless he thereupon proceeds to establish his rights affirmatively and secures a judgment. *Kirk v. Meldrum* (Colo.) (65 Pac. 633); 3 Lindley on Mines, Sec. 763, and cases cited. If the plaintiff is nonsuited the case proceeds *ex parte*. *Lozar v. Neill* (37 Mont. 287, 96 Pac. 343, 346).

Now in the adverse suit in this case, Knippenberg and his co-plaintiffs alleged in their complaint in addition to certain matters of fact in support of their claim to the millsites and tailings thereon that no discovery had been made on the Bird placer of gold or other minerals; that the land was nonmineral in character; that the location was made for the purpose of obtaining and holding the mill tailings thereon lying loose upon the surface of the ground and that the tailings were the property of the plaintiff. Demurrer to the complaint was sustained on the ground of incapacity of one of the plaintiffs to sue, and that the complaint did not state a cause of action. Thereafter a supplemental and amended complaint was filed

by the Hecla Consolidated Mining Company, a common-law trust. Demurrer to this amended complaint was also interposed and sustained on the specific grounds, (1) that the plaintiff was without capacity to sue, and (2) that the complaint did not state facts sufficient to constitute a cause of action. On motion of defendant the action was dismissed on the merits. The amended complaint contained the identical statements contained in the original as to the lack of discovery, and nonmineral character of the Bird placer, and as to the ownership of the tailings by plaintiff. Nowhere in the pleadings did the defendant set up affirmatively his rights to the ground under a placer location nor did he in his prayer in the complaint ask for a judgment as to its validity. The facts as to his possessory right under a valid and subsisting mining location were not passed on by the court, and as by the demurrer all facts well pleaded are admitted (49 C. J. 438, note 4), if any findings are to be implied, they are that the land is nonmineral in character, that no discovery was made, and that the ownership of the tailings was in the plaintiffs notwithstanding that they were adjudged to have no right of possession to the land under their alleged millsite claims.

In *Lehman v. Sutter* (198 Pac. 1100), the Supreme Court of Montana held (syllabus)—

Where plaintiff, in action in pursuance of Rev. Stat., Sec. 2326, to determine an adverse claim to mining locations, unnecessarily attempts in the complaint to show that the defendant's adverse claims are without foundation, a demurrer admits the truth of plaintiff's allegations in this behalf.

Whatever may have been the effect of the judgment of dismissal on the merits as a bar to the prosecution of another suit by the adverse claimants or their successors in interest for the same cause of action, a matter with which the department has now no present concern, it is clear that no issues or facts relevant to the issues as to validity of applicant's claim, raised in the present proceedings, were determined in that suit, and the Government is not estopped to fully inquire into and determine them. The judgment at the most established that the adverse claimants had no right of possession. It did not establish a valid possession in the applicant to the Bird placer claim. As to the contention that it estops Conway and his associates from litigating their rights as millsite claimants again before the department, it suffices to say that those rights are not litigated in this proceeding. And as to the contention that it was improper to allow the transferees of the adverse claimants to intervene in the Government proceedings, the answer is that it is well settled that the unsuccessful adverse claimant may still by way of protest call the department's attention to irregularities in the patent application which were not determined by the court in its judgment. *Hughes v. Ochsner* (27 L. D. 396); *Opie v. Auburn Gold Mining and Milling Co.*

(29 L. D. 230) ; Lindley on Mines, Sec. 765. The interveners have the same right as any other person to come in and enter this protest or objection; in other words to say to the officers of the Government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination made by such officers to see if the terms in fact have been complied with. *Wight v. Dubois* (21 Fed. 693) ; *Poore v. Kaufman* (44 Mont. 248, 119 Pac. 785).

Furthermore, even if the department should be in error as to the scope and effect of the judgment above considered, and there was in fact a judgment awarding the right of possession to the applicant, notwithstanding, it still remains for the Land Department to pass upon the sufficiency of the proofs, ascertain the character of the land, and determine whether the conditions of the law have been complied with in good faith.

The judgment simply determines the right of possession and not the right to a patent. *Alice Placer Mine* (4 L. D. 314), approved in *Perego v. Dodge*, *supra*, and *Clapper M. Co. v. Eli M. & L. Co.* (194 U. S. 220, 234). The Land Department can yet declare the claim not valid, *Upton v. Santa Rita Min. Co.* (89 Pac. 275), and the land non-mineral, *Cameron v. Bass* (Ariz.) (168 Pac. 645), U. S. C. A. Title 30, Sec. 30, Notes 71 and 125, and cases cited.

Finally, the weakness of applicant's position urging any contention of *res adjudicata* based upon the court's judgment may be pointed out from another point of view. While the Supreme Court of Montana announced a contrary rule in *Shafer v. Constans* (3 Mont. 369), the department has repeatedly held that sections 2325 and 2326, Revised Statutes, relative to adverse claims contemplate proceedings to determine only the right of possession between claimants of the same unpatented mineral lands, not to decide controversies respecting the character of public lands, that is, whether they are mineral or non-mineral. *Ryan v. Granite Hill M. & D. Co.* (29 L. D. 522). See also *Harkerader v. Goldstein* (31 L. D. 87), *Lalande v. Townsite of Saltese* (32 L. D. 211), *Low v. Katalla Company* (40 L. D. 534, 538), *Bailey v. Molson Gold Min. Co.* (43 L. D. 502).

The rule is supported by the weight of authority in the courts, and in its application the department has held that as between a prior millsite claimant and a placer claimant the only question involved would be the character of the land which is not the subject of an adverse claim, but of protest. *Helena etc. Co. v. Dailey* (36 L. D. 144) ; Lindley on Mines, Sec. 724. Any finding of the court therefore in such a suit as to the mineral or nonmineral character of the land or of any fact relevant to that issue would be considered as advisory and not binding upon the department.

Turning now to the evidence, it is disclosed that the applicant sought by the testimony offered by him to base his discovery on the showings of gold found in the ground apart from the superincumbent tailings. A large mass of testimony was adduced as to pannings, much of it being performed a few days before the hearing, which resulted in the recovery of a few colors of gold and black sand. Of 75 pans taken by all parties about 60 contained no colors of gold. Twelve of the 15 pans taken by applicant's witnesses from concentrated material in the bottom of ditches showed one or more colors. The claimed profitable values in the black sand rested on surmise and conjecture. Assay of this sand made at the instance of the Government showed a value of \$19 a ton in gold and uncontradicted evidence was introduced that it would take 8,000 cubic yards of material or 500 cubic yards of concentrated material to produce a ton of black sand. Several witnesses for the applicant admitted that there was not enough in what was found to justify working, but were of the opinion that the explorations should be pursued to bed rock where gold in sufficient quantities to mine would be found. The decided weight of opinion by the mining engineers, supported by better reasoning and more cogent facts is that the lands are not favorable for the deposition of gold. It is sufficiently shown that the material in the Bird placer is glacial débris, not material carried by erosion and transportation by stream action which would favor the sorting and segregation of free gold in gravel and at bedrock; that the mining above the claim has been from rock in place principally for silver and lead containing little or no free gold from which valuable placer deposits could originate; that Trapper Creek, along which this claim is located, has no history of placer mining or recoveries of placer gold although mining and prospecting has been carried on for years in the locality and evidence of placer diggings exist along its course. The claim has been located for nine years and no attempts to mine it have been shown nor to reach bedrock. Without mentioning other details that point persuasively to the nonmineral character of the land, those above stated are sufficient to warrant the concurrent findings below.

The question remains to consider whether under conditions shown the deposit of the tailings mineralized the land and render it subject to location under the mining law. Intervener showed without contradiction that the Hecla Consolidated Mining Company between 1882 and 1889, during their mining and milling operations, deposited the tailings on the land in controversy and upon other land covered by the Everest millsite locations; that the tailings were confined by cribbing consisting of several thousand logs, costing fifty cents to one

dollar each exclusive of construction costs; that to prevent the escape of the tailings ore sacks and canvas were placed in the interstices between the logs; that the tailings pile, about 1200 by 600 feet in areal extent and 25 feet high in places, is divided by cross cribbing into four bins; that average assays of the tailings disclose that they contain per ton 8.8 ounces in silver, $2\frac{1}{2}$ per cent lead, fractions of an ounce in copper and zinc, and gold to the value of 93 cents; that these mineral values were known to the company by frequent assay at the times of deposit, but that the processes then used did not permit of their recovery, and it was their expectation that metallurgical processes would improve so as to justify milling them again. It is shown that the Greenwood Mining Company obtained a lease upon the tailings, installed a new concentrator and operated on the tailings until about 1892, but the endeavor was not a success and these tailings were sold as personal property at a sheriff's sale in 1894. The operations of both of these companies ceased and the machinery was moved away. Application for patent to all but Everest Millsite No. 1 was denied. (*Hecla Consolidated Mining Co.*, 12 L. D. 75.) Later the Penobscot Mining Company obtained a lease of the mill-sites and tailings and their superintendent looked after them. In 1918 money was raised to buy machinery to further treat the tailings but the man that had the money absconded. Conway after he had acquired an interest in the tailings shipped several car loads to Helena and Salt Lake in 1924, but the returns were not profitable. Conway testified that about \$200 was expended in repairs in 1922 or 1923 to the cribbing by propping and shoveling at the weakest places, and that he paid taxes on these millsites from 1921 to 1927, inclusive, either for the Knippenberg crowd or in his own behalf and taxes had been paid thereon theretofore, certain of the tax receipts being filed as exhibits. His testimony as to repairs is corroborated by one of the men employed to make them. Conway testified also without contradiction that he had warned Fabian, one of the witnesses who admits interest in the Bird placer that he was trespassing and to keep off the premises. He further testified that the purpose of putting the sacks between the timbers was to prevent the tailings from going to waste, and at the time there was hope of treating the tailings, but admitted a subsidiary reason was to prevent damage to the farmers below that would follow from their escape to the creek.

The application sought to show that abandonment of the tailings by the owners is clearly indicated by the unrepaired breakages in the cribbing due to the age and decay of the logs that retained them and consequent wastage of material so impounded, and by the ab-

sence of any specific acts towards their conservation in recent years and by facts showing discontinuance long ago of active mining operations by the company that placed them and its successors, prior to the location of the placer claim. A large amount of conflicting testimony was introduced as to the extent of such wastage and breakage. Photographs of the condition of the cribbing were introduced by applicant and the Government.

The applicant, however, did not refute the opposing evidence that his pictures are largely representations from different angles of the same, and the worst break; and that about 75 per cent of the cribbing is still intact. Engineers for the Government and intervener declared their opinions that the tailings had settled and reached such an angle of repose as to render cribbing protection no longer a necessity. A mining engineer testifying for applicant estimated that 1500 tons of tailings had escaped. Considering the undisputed fact that there was an estimate that 20,000 tons had escaped during the operation of the Greenwood Mining Company on the dump, and that 75,000 tons remained after that company ceased operations, the degree of wastage, if this were accepted, is not such as to indicate an indifference by the claimants thereof as to what became of them. The inference sought to be drawn that the tailings were impounded only to avoid lawsuits because of damages to stock of farmers on lower lands that would be occasioned by the escape of noxious mineral substances is little more than a suggestion of counsel for applicant that is dispelled by positive testimony to the contrary of Conway, who was in charge of the offices of the Hecla Mining Company, such statement being satisfactorily buttressed by the *ante litem motam* statement of said company years ago set forth in the department's decision above cited, wherein the company in speaking of the tailings on Everest Millsites Nos. 1 and 2 represented as follows:

That in treating ores in the concentrator the portion of the ore richest in lead is taken out and sent to the smelter for reduction; that the overflow or tailings though not so rich in lead is by no means valueless; that it carries grains of ore too light to be recovered by concentration, but rich in silver; that it has been the policy of claimant to retain the tailings resulting from concentration with the expectation of erecting further machinery for the profitable treatment of the same.

Neither will the contention of applicant be accepted that the levy of taxes was invalid, or the sheriff's sale unauthorized, or that abandonment is shown by the neglect to subsequently seek a patent for the millsites on proper grounds as invited in the department's decision. As the department did not declare the millsites void, the sheriff's sale does not appear to have been set aside, and the mineral

claimants, if they saw fit, need never apply for patent, provided they maintained the claims by the uses the law requires. Even if it were true as to the invalidity of tax assessment and sheriff's sale, such sale and payment of the assessments were evidence of the recognition and assertion of ownership and dominion of the property, and negative the inference of abandonment.

Conceding that if the tailings had been abandoned at the date of the location of the Bird claim, subsequent acts of dominion and assertion of claim to them would not restore the owner's rights, there were no such acts or failure to act shown in this record up to that time that satisfied the rule as to proof of abandonment. It is clear from the foregoing that the tailings were deposited on the claims with the intention of retaining the possession of them, and rights under the millsite law were invoked, no matter whether successful or not, to be secure in that possession. No rule of law has been called to the department's attention where mere failure to check deterioration in value that follows from lapse of time of unproductive property is of itself conclusive of abandonment, and that is practically all that has been proven. The tailings were deposited to wait for better days, and from the evidence in the record as to the improvement in processes of treating complex ores, and the strenuous struggle for possession, those days have but recently come.

To establish abandonment both the intention to abandon and actual relinquishment must be shown. In the opinion of the department neither was shown in this case. No abandonment being shown, but on the contrary a clear intention to preserve and protect the property right in the tailings, there is no room for the conclusion under the authorities cited by appellant that the tailings became a part of the realty so as to mineralize the public land upon which they were placed and make it subject to mining location. It is clear that by severance of the ore from the land in which it existed for milling and sale it became personalty (2 R. C. L. Secs. 50 and 52), and that it did not lose that character by its retention for further utilization.

In *Steinfeld v. Omega Copper Co.* (141 Pac. 847), the court said—

* * * The intention with which the owner of the property extracted the ore from the ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at the solution of the question of whether the ore after having been extracted and placed in the dump was personalty or realty.

While it may be true that—

To suffer tailings to flow where they may without obstruction to confine them is equivalent to their abandonment. If they lodge on lands of another, they are considered as an accretion and belong to him. If they accumulate on vacant

unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first comer to appropriate them by proceedings analogous to the location of placer claims. (Lindley on Mines, Sec. 426, and cases cited.)

Yet, it is manifest that this doctrine is not applicable to the facts in the instant case. In *Ritter v. Lynch* (123 Fed. 930), in holding that no rights could be acquired under the placer mining law to public land nonmineral in its natural state that was covered by valuable tailings where the owner thereof had kept and preserved them from waste and destruction until such time as they could profitably be worked and sold, it was said—

It must be admitted that, if the tailings had been suffered by Mr. Lynch to flow where they listed, his claim of ownership therein would have to be considered as abandoned; or if the tailings were, by their own uninterrupted flow, lodged upon the land of another, they would be considered as an accretion, and belong to the owner of the land. If they were allowed to flow in their natural course, and accumulate on vacant and unappropriated public land, they would become subject to appropriation by any one who took them up and pursued the steps and proceedings analogous to the location of placer mining claims. (Lindley on Mines (2d Ed.), Sec. 426, and authorities there cited. But no such conditions appear in this case.

The grounds of invalidity are all the stronger in the instant case where not only were the tailings deposited under conditions practically the same as the *Lynch case*, but the lands were embraced in an asserted millsite location by the claimants of the tailings, the invalidity of which had not been declared by the rejection of the application for patent thereto. (See *Alaska Copper Co. et al.*, 43. L. D. 257.) As the evidence shows convincingly that the land in its natural condition is nonmineral in character, and that under the conditions shown no mineral character is imparted to it by the deposit of the tailings, the Commissioner's decision is

Affirmed.

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Motion for rehearing of departmental decision of June 9, 1930 (53 I. D. 115), denied by First Assistant Secretary Dixon, July 29, 1930.

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Petition for the exercise of supervisory authority in the above-entitled case (53 I. D. 115, 126), denied by Secretary Wilbur, March 16, 1931.

**WITHDRAWAL OF OIL SHALE LANDS—EXECUTIVE ORDER OF
APRIL 15, 1930**

INSTRUCTIONS

[Circular No. 1220]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 9, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

By Executive Order (No. 5327) of April 15, 1930, made under authority 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), and subject to valid existing rights, the deposits of oil shale and lands containing such deposits owned by the United States were temporarily withdrawn from lease or other disposal and reserved for the purposes of investigation, examination and classification.

In order to identify for administrative purposes the known areas affected by the order, the Secretary has approved maps prepared by the Geological Survey designating the lands containing oil shale of recognized commercial importance, in Colorado, Wyoming, and Utah. Copy of the map showing the designations is transmitted herewith to the register of each district in which designations have been made.

The oil shale deposits and the lands so designated, title to which is in the United States, are by the order withdrawn from lease, entry, selection or other form of disposal, and you will therefore reject all applications for such lands, except applications for patent under the mining laws for metalliferous mining claims, or applications under other public land laws which are based on claims to the lands initiated prior to the date of the withdrawal.

Lands not designated on the map as oil shale, but which are in fact valuable for their oil shale deposits are also withdrawn by said order. Affirmative proof of the nonoil shale character of lands not designated on the maps as oil shale, other than the regular nonmineral affidavit, will not be required.

However, if your records show any land not designated on the map to be in fact oil shale in character, you will reject any application therefor. Any entry, filing, or selection allowed for lands which are thereafter, and prior to patent, found to be valuable for oil shale, will be subject to cancellation by appropriate proceedings.

Approved:

C. C. MOORE, *Commissioner.*

RAY LYMAN WILBUR,

Secretary.

**ACCEPTANCE OF PROOFS AND PAYMENTS ON RECLAMATION ENTRIES IN PROJECTS WITHIN IRRIGATION DISTRICTS—
PARAGRAPH 59, GENERAL RECLAMATION CIRCULAR,
AMENDED**

INSTRUCTIONS

[Circular No. 1222]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 12, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

The general reclamation circular of May 18, 1916 (45 L. D. 385, 400), is hereby amended by adding thereto paragraph 59 (a) as follows:

On a reclamation project or part thereof operated and maintained by an irrigation district or water users' association not delinquent in its obligations to the Government in the matter of payments the certifications as to cultivation, reclamation and payments as to lands within its boundaries may be made by the superintendent of the district or association under the seal of the district or association, and when so made will be accepted and given the same force and effect as certifications made by a Government project superintendent. This provision, however, is not applicable to the Salt River Valley Water Users' Association, concerning which special instructions have been issued.

The purpose of said amendment is to authorize the acceptance of certifications as to cultivation, reclamation and payments made by superintendents of irrigation districts and water users' associations under the circumstances stated.

If for any reason certification can not be obtained as provided in paragraph 59 of the general reclamation circular or in the added paragraph 59 (a), the matter should be reported to the General Land Office, and further instructions will be given.

THOS. C. HAVELL,
Acting Commissioner.

I concur:

ELWOOD MEAD,
Commissioner, Bureau of Reclamation.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CREATION OF INDIAN RESERVATIONS

Opinion, June 14, 1930

INDIAN LANDS—INDIANS—CONGRESS.

Congress has the power to dispose of the property of Indian tribes and to set aside lands for or to increase and decrease the size of reservations, but

such power presumably will be exercised only when circumstances arise which justify the Government in disregarding treaty stipulations in the interest of the country and the Indians themselves.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion relative to the validity of certain acts of President Lincoln and President Roosevelt in connection with the creation of the Uintah Indian Reservation in Utah and the disposition of some of the lands in the reservation.

The Uintah Indian Reservation was created by Executive order of October 3, 1861. The recommendation of the Secretary of the Interior and the order of President Lincoln are as follows:

DEPARTMENT OF THE INTERIOR,

Washington, Oct. 3, 1861.

SIR: I have the honor herewith to submit for your consideration the recommendation of the Acting Commissioner of Indian Affairs that the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian Tribes.

In the absence of an authorized survey (the valley and surrounding country being as yet unoccupied by settlements of our citizens) I respectfully recommend that you order the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side, to be reserved to the United States and set apart as an Indian Reservation.

Very respectfully, your obedient servant, CALEB B. SMITH, *Secretary*.

The PRESIDENT.

EXECUTIVE OFFICE, October 3, 1861.

Let the reservation be established as recommended by the Secretary of the Interior.

A. LINCOLN.

The action of President Lincoln in setting aside this reservation was confirmed by an act of Congress approved May 5, 1864 (13 Stat. 63); section 2 of this act provides as follows:

And be it further enacted, That the superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same.

The act of June 18, 1878 (20 Stat. 165), repealed section 1 of the act of May 5, 1864, but did not disturb section 2 of the act which remains as permanent law. This appears to settle the validity of the action of President Lincoln in setting aside the reservation and it remains to turn our attention to the actions taken by President Roosevelt in setting aside a part of the Uintah Indian Reservation and attaching it to the Uintah Forest Reserve.

By act of March 3, 1905 (33 Stat. 1048, 1070), it is provided—

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the Act opening the reservation.

Acting on the authority granted in the provision just quoted President Roosevelt by proclamation made June 14, 1905 (34 Stat. 3116), after quoting from the act of March 3, 1905, proclaimed that certain lands in the Uintah Indian Reservation are hereby added to and made a part of the Uintah Forest Reserve, and the boundaries of the forest reserve were changed accordingly. The lands included by this proclamation in the forest reserve comprised an area of 1,010,000 acres.

There can be no doubt of the authority of President Roosevelt to issue the proclamation because his right is based upon statutory authority. The right of Congress to dispose of the property of Indian tribes, to set aside lands for Indian reservations or to increase and decrease the size of the reservations has been the subject of decisions by the Supreme Court in numerous cases. In *Lone Wolf v. Hitchcock* (187 U. S. 553, 566), the Supreme Court says:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy particularly if consistent with perfect good faith towards the Indians.

In the case of *Stephens v. Cherokee Nation* (174 U. S. 445, 488), the court says:

* * * The lands and moneys of these tribes are public lands and public moneys and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves contradiction of terms.

It is interesting to note that by the act of Congress approved April 4, 1910 (36 Stat. 269), the Secretary of the Interior was authorized to purchase in connection with the Strawberry Valley

project, Utah, 61,000 acres of land at \$1.25 per acre with the provision that title should pass to the owners of the lands irrigated from the project. This money was paid into the Federal Treasury by transfer from the reclamation fund for the benefit of the Uintah Indians.

Approved:

RAY LYMAN WILBUR,

Secretary.

GOVERNMENT PROCEEDINGS AGAINST OIL SHALE CLAIMS FOR DEFAULT IN ASSESSMENT WORK

Instructions, June 17, 1930

MINING CLAIM—DEFAULT IN ASSESSMENT WORK—ADVERSE PROCEEDINGS—GOVERNMENT PROCEEDINGS.

In so far as challenging a default in assessment work required on a mining claim is concerned, the Government stands in the same position as an adverse claimant under section 2325, Revised Statutes.

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—PATENT—NOTICE—GOVERNMENT PROCEEDINGS.

The United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to perform the annual labor required in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings, including the publication of notice, have been completed.

Secretary Wilbur to the Commissioner of the General Land Office:

In the instructions to you of February 28, 1930, in the case of mineral entry Denver 041649, it was held that default in performance of assessment work on an oil shale placer, for the period immediately preceding the date application for patent was filed, rendered the claim subject to challenge by the United States, because of such default, at any time prior to the issuance of patent. This conclusion was reached from a consideration of the decision of the Supreme Court of the United States in the case of *Wilbur v. Krushnic* (280 U. S. 306).

This decision was the subject of a conference with the Public Lands Committee of the House recently, and it was subsequently agreed that the decision would be reconsidered by the department.

The court in its decision, *supra*, stated that a claim initiated under section 2324, Revised Statutes, could be maintained by the performance of annual assessment work of the value of \$100.00; that after failure to do assessment work the owner equally maintained his claim within the meaning of the leasing act by a resumption of work.

unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.

The court clearly indicated that the challenge must be made at a time when the claim was not being maintained. In the case under consideration, application for patent was filed April 22, 1929, and publication of notice of the patent proceedings was completed June 26, 1929. Patent expenditures to the value of \$500 on each claim are shown to have been made. Final certificate was issued June 28, 1929. No charges were filed against this claim as to default in assessment work until January 21, 1930, when it was alleged that the assessment work for the year ending July 1, 1928, had not been done and that the work had not been since resumed.

The court clearly indicated in its decision that the Government was in the same position as an adverse claimant under section 2325, Revised Statutes, in so far as challenging a default in assessment work is concerned. Said section provides—

* * * If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

If no third party could challenge such a claim after the period of publication, the Government may not do so because it stands in no better position under the law and the decision than do third parties mentioned in such section and, therefore, can not challenge the claim for default in assessment work after publication has been completed. In other words, where, as in this case, patent proceedings have been instituted and the requisite expenditure has been made, the applicant has shown compliance with the law in maintaining the claim, no challenge can, at this late date, be made against the claimants because of failure to perform annual labor. Such challenge must be at a time when under the law adverse claimants could assert their rights.

It is clear to my mind that the United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to do the annual assessment work in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings including the publication of notice have been completed.

In view of these findings, the instructions of February 28, 1930, to you in this case are hereby vacated, and adjudication of these claims will follow the views herein expressed.

TAXATION OF NEZ PERCE INDIAN ALLOTMENTS AFTER EXPIRATION OF TRUST PERIOD

Opinion, June 30, 1930

NEZ PERCE INDIAN LANDS—ALLOTMENT—TAXATION.

The provision in the treaty of June 9, 1863, concluded with the Nez Perce Indians, for the allotment of lands in Idaho to individuals of that tribe, was, by the stipulations of the later agreement of August 25, 1894, superseded by the general allotment act of February 8, 1887, and the tax exemption of the allotted lands created by the treaty was abrogated.

NEZ PERCE INDIAN LANDS—ALLOTMENT—PATENT—TAXATION.

Upon the issuance of fee simple patents following the expiration of the 25 year trust period provided for in the general allotment act, the lands allotted to members of the Nez Perce Tribe of Indians become subject to taxation by the State in the same manner as property belonging to other citizens. *Goudy v. Meath* (203 U. S. 146), and *Larkin v. Paugh* (176 U. S. 431).

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether the lands allotted to the members of the Nez Perce Tribe of Indians in Idaho become subject to taxation by the State upon the issuance of fee simple patents therefor, following expiration of the 25-year trust period provided for in the acts under which these Indians were allotted.

The Nez Perce Indians were allotted lands in severalty pursuant to the provisions of the general allotment act of February 8, 1887 (24 Stat. 388), and for the lands so allotted the allottees received patents of the form and legal effect provided in section 5 of that act which reads—

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. * * *

The United States, under the foregoing provision, retained the legal title, giving the allottee a paper or writing inaptly termed a patent (*United States v. Nice*, 241 U. S. 591, 595), showing that at a particular time in the future, unless it was extended by the President,

the allottee or his heirs, as the case might be, would be entitled to a regular patent, conveying the fee discharged of the trust and free of all charge and incumbrance. The United States thus retained its hold upon the land for a period of 25 years and as much longer as the President in his discretion might determine. While the statute contains no express provision with respect to taxation of the land during or after the expiration of the trust period, the intent of Congress in that regard is plain. During the restricted or trust period, the land is held by the United States for the allottee or his heirs, as a part of the general policy of dealing with the Indians and is being administered as a governmental instrumentality. While so held and administered, no power rests in the State to assess and tax the same until at least the fee is conveyed to the Indian. *United States v. Rickert* (188 U. S. 432). Upon issuance of the fee simple patent following expiration of the trust period, however, the title passes from the United States to the allottee. The jurisdiction and authority theretofore possessed by the Secretary of the Interior by reason of the prior trust and restriction come to an end (*Larkin v. Paugh*, 276 U. S. 431), and the allottee becomes invested with full power of alienation and as a necessary incident thereof, the lands become subject to taxation in the same manner as property belonging to other citizens. *Goudy v. Meath* (203 U. S. 146).

Presented with the record, however, is a brief filed by Serven and Patten, attorneys representing certain of the Nez Perce Indians, wherein it is contended that an exemption from taxation attaches to these lands even after expiration of the trust period and issuance of fee simple patent. This contention rests mainly upon the following provision contained in the original treaty with these Indians concluded June 9, 1863 (14 Stat. 647, 649):

* * * Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of, only to the United States, or to persons then being members of the Nez Perce tribe, and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior or the Commissioner of Indian Affairs shall prescribe. * * *

But an examination of the provisions of the treaty of 1863 and subsequent legislation and agreements with these Indians, coupled with other circumstances hereafter referred to, clearly discloses that the provision in question, whatever its effect might otherwise have been, never attached to the lands allotted to the members of this tribe of Indians.

Under the treaty of 1863, by which the Nez Perce Reservation was created, the United States agreed to reserve the land for a home and the sole use and occupancy of said tribe. So far as here material, the treaty provided that immediately after ratification thereof, the

President should cause the boundaries of the reservation to be surveyed and established, after which the cultivable land should be surveyed into lots of 20 acres each and one such lot assigned to each member of the tribe over the age of 21 years, or the head of a family, who desired it "as a permanent home for such person," and set apart for the perpetual and exclusive use and benefit of himself and heirs. Then followed the provision reproduced above with respect to the taxability and alienability of the lands assigned. The residue of the land was to be held in common for pasturage for the sole use and benefit of the Indians, with the provision, however, for future assignments of land from time to time as members of the tribe might come upon the reservation and claim the privileges granted by the treaty. By an amendatory treaty of August 13, 1868, ratified February 24, 1869 (15 Stat. 693), provision was made, among others, for the removal of Indians residing outside the reservation to allotments within the reservation, or upon certain conditions such Indians might be allowed to remain on the lands then occupied by them upon the same terms and conditions as those within the reservation.

Examination of the records of the Indian Office, however, discloses that no allotments were made to the Indians under the provisions of these earlier treaties, because the Indians, being dissatisfied with the small quantity of land to which each was entitled, had refused to take such allotments. Matters stood thus when the general allotment act of 1887 was passed, section 1 of which provided 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 is authorized, whenever in his opinion any such reservation or part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed and to allot the lands in severalty to any Indian located thereon in the quantities therein specified. Acting upon authority of this statute, which embraced within its scope reservations created by treaty stipulation, such as the Nez Perce, the President, on April 13, 1889, issued directions for the making of allotments of land in severalty to the Indians of the Nez Perce Reservation under the provisions of the general allotment act. Pursuant thereto, a schedule of allotments, based upon selections made by the Indians, was approved by the Secretary of the Interior on March 19, 1895, and trust patents therefor duly issued to the allottees in conformity with section 5 of the general allotment act, as aforesaid.

In the act of August 15, 1894 (28 Stat. 286, 326, 327, 330), making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Indian

Tribes, will be found an agreement between the Nez Perce Tribe of Indians and the United States, from which it appears that in making that agreement the parties proceeded under authority of the act of 1887. By that agreement, the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to certain unallotted lands within the reservation, except certain specified tracts which they retained. The parties stipulated that the lands so ceded should not be open for settlement until "*trust patents*" for the allotted lands [italics supplied] had been duly issued and recorded and the first payment made to the Indians. Article 7 stipulated that all allotments made to the members who have died since the same were made, or may die before the ratification of the agreement, shall be confirmed "*and trust patents issued in the names of such allottees respectively.*" [Italics supplied.] Article 2 provided for relinquishments by certain allottees, with provision for the issuance of a new patent "of the form and legal effect prescribed by the fifth section of the act of February 8, 1887 (Twenty-fourth Statutes three hundred and eighty-eight), for the new allotment and that portion of the old allotment surrendered." It is significant to note that the earlier treaties contained no provision for the issuance of trust patents and the stipulations in this later agreement for the issuance of such patents as provided for in the fifth section of the general allotment act, clearly show that it was the understanding of the parties that the provisions of the general allotment act controlled in the matter of allotments, and the agreement can, therefore, have no other effect than to confirm the action of the President in causing the allotments to be made thereunder. The refusal of the Indians to take allotments under the earlier treaties of 1863 and 1869, the subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act. The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

LEASES OF OIL AND GAS IN AND UNDER RAILROAD AND OTHER RIGHTS OF WAY—ACT OF MAY 21, 1930**REGULATIONS**

[Circular No. 1224]

DEPARTMENT OF THE INTERIOR,**GENERAL LAND OFFICE,***Washington, D. C., July 3, 1930.***REGISTERS, UNITED STATES LAND OFFICES:**

Pursuant to the authority and direction of the act of Congress approved May 21, 1930 (46 Stat. 373), entitled "An act providing for the lease of oil and gas deposits in or under railroad and other rights of way," the following rules and regulations for the administration of and governing the exercise of the discretion and authority conferred by the act are adopted:

1. Leases will be issued only for rights of way through the geologic structure of known producing oil or gas fields.

No lease will be authorized until the Secretary of the Interior has determined that development of the right of way is necessary to offset or prevent drainage or threatened drainage of the oil and gas deposits from the right of way and consequent loss of royalty to the Government through operations on adjoining or near-by lands.

As drainage through wells on lands leased by the United States at a royalty of not less than 12½ per cent does not cause loss to the Government, leases will not be issued for rights of way through such leased lands.

Any lease will be limited in area to such part or parts of the right of way as are affected by drainage or threatened drainage.

2. No particular form of application for lease will be required, nor is an application necessary as a basis for the authorization of a lease.

Any application for lease hereunder must be filed in the United States land office of the district in which the right of way is situated, by the owner of the right of way or by his or its assignee. If filed by an assignee, the applicant should file therewith a duly executed assignment of the right to lease.

The application should detail the facts as to the ownership of the right of way, and of the assignment if the application is filed by an assignee, also as to the development of oil and gas in adjacent or near-by lands, the depth and location of the wells, the production, and the probability of drainage of the deposits in the right of way. Since rights of way are of record in the General Land Office, a description by metes and bounds is not necessary or required, but each legal subdivision through which the portion of the right of way desired to be leased extends should be described.

You will assign a current serial number to the application and promptly transmit the same to the General Land Office with report and recommendation based upon the record and the facts within your knowledge.

No filing fee will be required.

3. After the Secretary of the Interior has determined that a lease of a right of way or any portion thereof is consistent with the public interest, either upon consideration of an application for lease or on his own motion, you will be directed to serve notice on the owner or lessee of the adjoining lands, as provided in section 3 of the act, allowing him 30 days or such other time as may be provided in the notice within which to submit an offer or bid of the amount or percentage of compensatory royalty such owner or lessee will agree to pay for the extraction through wells on his or its adjoining land of the oil and gas under and from such right of way. Notice to the owner of the right of way will be given at the same time allowing him or it opportunity within the same period to submit a bid or offer as to the amount or percentage of royalty he or it will pay if a lease be awarded to the holder of the right of way.

When the time fixed in the notice has expired, you will transmit any bids or offers received, evidence of service of notices, and make report.

Award of lease to the owner of the right of way, or of a contract for the payment of compensatory royalty by the owner or lessee of the adjoining lands, will be to the bidder whose offer is determined to be to the best advantage to the United States, considering the amount of royalty to be received and the better development of the oil and gas deposits in the right of way under the respective means of production and operation.

4. The lease issued to the owner of the right of way or assignee of such owner will be substantially in form as follows:

U. S. Land Office _____
Serial No. _____

DEPARTMENT OF THE INTERIOR

Lease of oil and gas lands under the act of May 21, 1930

Date—Parties.—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 the Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ of _____, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved May 21, 1930 (46 Stat. 373), entitled, "An act providing for the lease of oil and gas deposits in or under railroad and other

rights of way," hereinafter referred to as the act, which is made a part hereof witnesseth:

SECTION 1. Purposes.—That the lessor in consideration of 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 drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described right of way situated in the county of _____, State of _____, and more particularly described as follows: _____, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof, for a period of 20 years.

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

(a) *Bond.*—To furnish a bond with approved corporate surety in the penal sum of \$5,000, conditioned upon compliance with the terms of the lease.

(b) *Commence drilling.*—The lessee agrees within 30 days from delivery of executed lease to proceed with reasonable diligence to install on the leased ground a standard or other efficient drilling outfit and equipment, and to commence drilling, and to drill and produce only such wells as are necessary to offset drainage from the leasehold through wells on adjoining lands unless and until authorized in writing by the Secretary of the Interior to drill or produce additional wells or unless directed by said Secretary to drill and produce wells in number not greater than the number of 40-acre tracts or lots crossed by the right of way: *Provided*, That, for each month during which loss of royalty occurs by reason of drainage from the leasehold through producing wells on adjoining lands or deposits not the property of the United States or leased by the United States at lesser royalty rates, and until the drainage causing such loss shall have been fully offset by producing wells on the leasehold, the lessee shall pay a sum estimated to reimburse the United States for current loss of royalty through drainage.

(c) *Royalty.*—To pay the lessor a royalty of _____ per cent of the value of oil or gas produced from the land leased herein (except oil or gas used for production purposes on said lands or unavoidably lost), or, on demand of the lessor, _____ per cent of the oil or gas produced (except oil or gas used for production purposes on said lands, or unavoidably lost); the royalty, when paid in value, to be due and payable monthly on the 15th of each month following the month in which produced, to the receiver of public moneys of the proper land district; and when paid in kind, to be delivered in the field where produced at such times, and in such manner as may be required by the lessor: *Provided*, That when the daily average production of any oil well does not exceed 10 barrels per day, the Secretary may, in his discretion, reduce the royalty on subsequent production.

(d) *Sales contracts.*—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder, except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased, except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) *Monthly statement.*—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month, as the basis for computing the royalty due the lessor. The leased prem-

ises, and all wells, improvements, machinery, and fixtures thereon or connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the department.

(f) *Plats and reports.*—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements 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, accompanied by a report in detail as to the stockholders, investment, depreciation, and cost of operation, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor, by operation hereunder.

(g) *Log of wells.*—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log, or copy thereof, shall be furnished to said lessor on demand.

(h) *Diligence—Prevention of waste—Health and safety of workmen.*—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby while such products can be secured in paying quantities, and the lessee shall have the right, with the approval of the Secretary, to shut down the operation of any well or wells the operation of which has become unprofitable, to resume operations when such resumption may result in profit, and to abandon any well or wells that cease to produce oil and/or gas in paying quantities; to carry on all operations hereunder in a good and workmanlike manner, in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely any well before abandoning the same so as to effectually shut off all water from the oil or gas bearing strata; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: *Provided*, That lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(i) *Taxes and wages—Freedom of purchase.*—To pay when due all taxes lawfully assessed and levied under the laws of the State upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

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

(k) *Deliver premises in case of forfeiture.*—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease.

SEC. 3. The lessor expressly reserves:

(a) *Pipe lines to convey at reasonable rates.*—The right to require the lessee, his assignee, or beneficiary, if owner, or operator of, or owner of a controlling interest in any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discriminating the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act.

(b) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of the act of February 25, 1920 (41 Stat. 437), to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices to prevent monopoly and to safeguard the public welfare.

(c) *Helium.*—Pursuant to section 1 of the act of February 25, 1920, the lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium, the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof; provided, that the lessee shall not, as a result of the operation in this section provided for, suffer a diminution in value of the gas from which the helium has been extracted, or loss otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

SEC. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon the payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

SEC. 5. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 6. *Heirs and successors in interest.*—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon and every benefit hereof shall inure to the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 7. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States; and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat. 1109), relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof:

THE UNITED STATES OF AMERICA,

By _____ [L. S.]

Witness:

_____, [L. S.]
 _____, [L. S.]
 _____, [L. S.]

5. The agreement with the owner or lessee of the adjoining land to pay a compensatory royalty for the extraction through wells on his or its adjoining land of the oil and gas in or under the right of way will be in substantially the following form:

U. S. Land Office —
 Serial No. _____

Agreement to pay compensatory royalty under section 3, act of May 21, 1930 (46 Stat. 373)

This agreement entered into in triplicate this _____ day of _____, 19____, by and between the United States of America, acting in this behalf by the Secretary of the Interior, party of the first part, and _____ of _____, party of the second part, witnesseth:

Whereas the party of the second part is the owner or lessee of _____, section _____, township _____, range _____, meridian, in the State of _____, through which the right of way of _____ extends, and did, pursuant to and within the time fixed in the notice dated _____, 19____, issued under section 3 of the act of Congress approved May 21, 1930 (46 Stat. 373), submit to the Secretary of the Interior an offer or bid of the amount or percentage of compensatory royalty he will agree to pay to the United States for the extraction through wells on the above-described land of the oil and gas under and from said right of way, as follows: _____; and

Whereas said bid or offer has been accepted by the Secretary of the Interior, and the right to extract the oil and gas from and under said right of way awarded to the party of the second part;

Now, therefore, in consideration of the foregoing, the party of the second part hereby agrees:

- (1) To furnish and maintain a bond with approved corporate surety in the penal sum of \$5,000, conditioned upon compliance with the terms hereof, said bond being submitted herewith.
- (2) To pay to the United States a royalty of _____ per cent of the amount or value of _____ of all oil and gas produced and taken from the said described tracts of land adjoining the said right of way, payments to be made to the

register of the district land office monthly before the 15th day of each month for the production during the preceeding month, and when paid in kind to be delivered in the field where produced at such times and in such manner as may be required by the Secretary of the Interior.

(3) To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced from said lands, except for production purposes thereon.

(4) To furnish monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality and value of all oil and gas produced and saved during the preceeding calendar month, as the basis of computing the royalty due hereunder. The said premises and all wells, improvements, machinery and fixtures thereon or connected therewith, and all books and accounts of the party of the second part shall be open at all times for the inspection of any duly authorized officer of the department.

(5) To furnish annually and at such times as the secretary of the Interior may require, in the manner and form prescribed by him, a plat showing all developement work and improvements on said lands, and other related information, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor.

(6) To keep a log in the form prescribed by the Secretary of the Interior of all wells drilled on said lands, showing the strata and the character of the ground passed through by the drill, which log, or a copy thereof, shall be furnished to the Secretary of the Interior on demand.

(7) To drill such additional wells when and as may be required by the Secretary of the Interior, and at such sites as he may designate, for the purpose of and to reasonably extract all oil and gas from and under said right of way, and to operate all wells in accordance with approved methods and practice and so long as commercially productive.

In witness whereof:

[L. s.]

[L. s.]

6. Bond required under paragraph 2 (a) of the lease and by the contractor under agreement to pay compensatory royalty, should be in substantially the following form:

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

U. S. Land Office _____

Serial Number _____

Bond of oil and gas lessee

Act of May 21, 1930 (46 Stat. 373)

Know all men by these presents, that we, _____, of the county of _____, in the State of _____, as principal, and _____ of the county of _____, in the State of _____, as surety, are held and firmly bound unto the United States of America, in the sum of _____ dollars, lawful money of the United States, for the use and benefit of the United States and of any entryman

or patentee of any portion of the land covered by the hereinafter described lease heretofore entered or patented with a reservation of the oil and gas deposits to the United States, to be paid to the United States, for which payment well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

The condition of the foregoing obligation is such that—

Whereas the said principal, by instrument dated _____, has been granted the exclusive right to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described right of way _____, under and pursuant to the provisions of the act approved May 21, 1930 (46 Stat. 375); and

Whereas the said principal has by such instrument entered into certain covenants and agreements set forth therein, under which operations are to be conducted;

Now, therefore, if said principal shall faithfully comply with all the provisions of the above-described lease, then the above obligation is to be void and of no effect, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—

Name and address of witness:

Principal [L. S.]

Surety [L. S.]

The obligation of the bond filed with an agreement to pay compensatory royalty should read:

Whereas the said principal, by instrument dated _____, has entered into an agreement with the Secretary of the Interior for the payment to the United States of a compensatory royalty for the extraction through wells on his adjoining land of the oil and gas in and under the right of way described therein, pursuant to section 3 of the act of May 21, 1930;

Now, therefore, if said principal shall faithfully comply with the conditions of said agreement, then the above obligation is to be void and of no effect; otherwise to remain in full force and virtue.

7. The royalties to be paid under a lease, or agreement, shall in no case be less than that fixed in the so-called sliding-scale leases under the act of February 25, 1920, the minimum being 12½ and the maximum 33⅓ per cent of the amount or value of the production of oil, and the royalty on gas that fixed in the standard lease form under said act, being 12½ per cent of the value of the gas where the average production per day for the calendar month is less than 3,000,000 cubic feet, and 16⅔ per cent where the average daily production is 3,000,000 cubic feet or more; and where more than one bid is received, the royalty will be determined and fixed in accordance with the accepted bid.

8. The operating regulations approved by the Secretary of the Interior to govern the production of oil and gas under the act of February 25, 1920 (41 Stat. 437), in so far as applicable, shall likewise govern operations for the production of oil and gas under this act.

C. C. MOORE, *Commissioner.*

Approved:

RAY LYMAN WILBUR,

Secretary.

(PUBLIC—No. 241—46—Stat. 373)

[H. R. 8154]

An act providing for the lease of oil and gas deposits in or under railroad and other rights of way.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement: *Provided*, That, except as hereinafter authorized, no lease shall be executed hereunder except to the municipality, corporation, firm, association, or individual by whom such right of way was acquired, or to the lawful successor, assignee, or transferee of such municipality, corporation, firm, association, or individual.

Sec. 2. That the right conferred by this act may, subject to the approval of the Secretary of the Interior, be assigned or sublet by the owner thereof to any corporation, firm, association, or individual.

Sec. 3. That prior to the award of any lease under section 1 of this act, the Secretary of the Interior shall notify the owner or lessee of adjoining lands and allow him a reasonable time, to be fixed in the notice given, within which to submit an offer or bid of the amount or percentage of compensatory royalty that such owner will agree to pay for the extraction through wells on his or its adjoining land, of the oil or gas under and from such adjoining right of way, and at the same time afford the holder of the railroad or other right of way a like opportunity within the same time to submit its bid or offer as to the amount or percentage of royalty it will agree to pay, if a lease for the extraction of the oil and gas deposits under the right of way be awarded to the holder of such right of way. In case of competing offers by the said parties in interest, the Secretary shall award the right to extract the oil and gas to the bidder, duly qualified, making the offer in his opinion most advantageous to the United States. In case but one bid or offer is received after notice duly given, he may, in his discretion award the right to extract the oil and gas to such bidder.

Sec. 4. That any lease granted by the Secretary of the Interior pursuant to this act may, in the discretion of said Secretary, contain a provision giving the lessee the right, with the approval of said Secretary, to shut down the operation of any well or wells, the operation of which has become unprofitable, to resume operations when such resumption may result in profit, and to abandon any well or wells that cease to produce oil and/or gas in paying quantities.

SEC. 5. That the royalty to be paid to the United States under any lease to be issued, or agreement made pursuant to this act, shall be determined by the Secretary of the Interior, in no case to be less than 12½ per centum in amount or value of the production nor for more than twenty years: *Provided*, That when the oil or gas is produced from land adjacent to the right of way the amount or value of the royalty to be paid to the United States shall be within the discretion of the Secretary of the Interior: *Provider further*, That when the daily average production of any oil well does not exceed ten barrels per day said Secretary may, in his discretion, reduce the royalty on subsequent production.

SEC. 6. That the Secretary of the Interior is authorized and directed to adopt rules and regulations governing the exercise of the discretion and authority conferred by this act, which rules and regulations shall constitute a part of any application or lease hereunder.

Approved, May 21, 1930.

RACHEL HARRIS, WIDOW OF CHARLES HARRIS, DECEASED

Decided July 16, 1930.

TOWN SITES—PATENT—ASSIGNEE—PURCHASER—RULES AND REGULATIONS.

The distinction that may be made in law between assignees and transferees and those who succeed to the title or interest in property upon and in consequence of the demise of the owner is not a sufficient reason for modification of the existing rule of the department that in the purchase of a town lot all necessary papers and patent will be issued in the name of the purchaser.

DIXON, First Assistant Secretary:

November 7, 1929, the Commissioner of the General Land Office ruled Rachel Harris, widow and devisee of Charles Harris, deceased, to show cause why a final certificate issued in her name for lot 5, block 2, in the townsite of Harding, Florida, should not be amended to run to Charles Harris, the original purchaser. Response to the rule has been made and it will be treated as an appeal.

It appears from the record that at a public sale held on February 12, 1924, Charles Harris purchased the lot above mentioned for \$3350. Harris, after making partial payment on the lot, died, leaving a will devising all of his property to his wife Rachel Harris who completed the payments and on August 13, 1929, the register of the local land office issued final certificate running to "Rachel Harris, widow of Charles Harris, deceased."

The regulations approved October 30, 1923, for the sale of town lots in the townsite of Harding, Florida, provided in part as follows:

Nothing herein will prevent the transfer of interest secured by the purchase and the partial payment of the lot, by deed, but the assignee will acquire no greater right than that of the original purchaser and the final entry and patent will issue to the original purchaser when all payments are made.

The Commissioner held that the certificate issued by the register was in violation of the rule above quoted, and accordingly required appellant to show cause why it should not be amended to conform thereto.

Appellant contends in substance and effect that the rule governing the rights of transferees of town lots applies only where there is a transfer or assignment by deed and does not apply where, as in this case, a person succeeds by will to the interest of the original purchaser.

In the opinion of the department the distinction that may be made in law between assignees or transferees and those who succeed to the title or an interest in property upon and in consequence of the demise of the owner, affords no sufficient reason for modification of the existing regulations or for departure from the rule laid down therein governing the issuance of patents to purchasers of town lots.

The rule as above laid down conforms to the rule governing the rights of transferees of town lots as contained in the general regulations relating to town sites approved April 27, 1927 (52 L. D. 106, 130), which reads as follows:

The purchaser of a town lot, which is sold on the installment plan, may transfer his equitable interest in the lot, prior to the payment of the last installment of the purchase price, but the Government will not recognize anyone but the original purchaser and will issue all necessary papers and also the patent in his name. By such course, the Government is relieved of all unnecessary responsibility, and the patent, when issued, inures to the benefit of the transferee.

Formerly patents were issued to transferees, but based on departmental instructions of October 11, 1911, patents are now issued only in the names of the original purchasers, except where their issuance to transferees is authorized by the act of July 9, 1914 (38 Stat. 454), and instructions thereunder approved August 5, 1914 (43 L. D. 361).

In the instructions of October 11, 1911, mentioned in the above-quoted paragraph it is stated—

While the purchaser of lots in town sites created under said act (an act relating to Newell Townsite, South Dakota) acquires a property right that he may, prior to the completion of his right to a patent, transfer by deed, the department will not recognize any one but the original purchaser and will issue all papers necessary to the completion of the title and also the patent in his name.

The plan contemplated by the instructions submitted for approval would require the department to determine in every instance in whom the right to a title is vested and to issue the patent accordingly. A patent issued in the name of the original purchaser will inure to the benefit of his transferee, whoever he may be, which will fully protect all parties claiming under the purchase, and the Government by such course will be relieved of all unnecessary responsibility.

In supplemental instructions in the matter communicated to the Commissioner of the General Land Office under date of November 29, 1911, following his recommendation for modification of the order the department said—

That order is of general application to all sales of lots, on installments, in town sites made by the Government, whether the sale was made before or after the date of its issuance, and no sound reason appears why it should not be strictly enforced in all such sales. It is a salutary provision that was designed to protect the Government against the issuance of patents to wrongful owners and which does not in any way impair the rights of transferees, or complicate the title that may finally be acquired to any lot.

The United States will not part with the legal title to any lot until the purchase price has been fully paid, and it is under no legal or moral obligation to determine who is the rightful owner under such purchase but, when the purchase price has been paid, whether by the original purchaser or his transferee, it will divest itself of the legal title by the issuance of a patent in the name of the purchaser, which will inure and vest in the rightful owner in every case.

The department did not in such order refuse to recognize the transferees of the right to such title. On the contrary, it stated that a purchaser of lots in said town sites acquires a property right that he may, prior to the completion of his right to a patent, transfer by deed, and such transferee may perform all the acts necessary to the completion of the title. But it does not follow that it is the duty of the United States to determine in whom the right to the title is vested and to issue the patent in his name. If he is the rightful owner, he secures title whenever the patent is issued in the name of the original owner.

The Commissioner's action in the instant case was correct and is affirmed. The final certificate will be corrected to stand in the name of Charles Harris.

Affirmed.

SALE OF ISOLATED TRACTS OF SURFACE OF COAL LANDS IN ALABAMA—ACT OF MAY 23, 1930

INSTRUCTIONS

[Circular No. 1225]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 17, 1930.

The act of May 23, 1930 (46 Stat. 377), extending the provisions of section 2455 Revised Statutes, as amended, to the coal lands in Alabama provides:

That the provisions of section 2455 of the Revised Statutes of the United States (U. S. C., title 43, sec. 1171), as amended, be, and the same are hereby,

extended to the surveyed unreserved, unappropriated public lands in the State of Alabama which have been reported as containing coal deposits and which were withheld from homestead entry under the provisions of the Act of Congress entitled "An Act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands," approved March 3, 1883, but there shall be a reservation to the United States of the coal in all such lands so sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of the Act of Congress approved June 22, 1910, entitled "An Act to provide for agricultural entries on coal lands," and such lands shall be subject to all the conditions and limitations of said Act.

The instructions in Circular No. 684, approved April 7, 1928 (52 L. D. 340), issued under amended section 2455, Revised Statutes, and those in Circular of September 8, 1910 (39 L. D. 179), under the act of June 22, 1910 (36 Stat. 583), should be followed in administering this act in so far as they are applicable.

C. C. MOORE, *Commissioner.*

Approved:

JOS. M. DIXON,

Assistant Secretary.

STATE OF ARIZONA

Decided July 18, 1930

SCHOOL LAND—INDEMNITY—MINERAL LANDS—SURVEY—RULES AND REGULATIONS—WAIVER.

The departmental practice and regulations requiring all entries, selections and other disposals of public lands to conform to the smallest regular legal subdivision or lot and to treat minor subdivisions as indivisible for all administrative purposes may be waived by the Secretary whenever he deems it advisable.

SCHOOL LAND—INDEMNITY—MINERAL LANDS—SURVEY—SEGREGATION.

The segregation of mineral and nonmineral lands by aliquot parts of a subdivision rather than by a metes and bounds survey simplifies the record, avoids unnecessary trouble and expense, and insures that the nonmineral land will be disposed of to a nonmineral claimant to whom it should rightfully go.

DIXON, *First Assistant Secretary:*

The State of Arizona has appealed from a decision of the Commissioner of the General Land Office of February 13, 1930, canceling its indemnity school-land list, Phoenix 058885, as to the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 18, T. 7 N., R. 6 W., G. & S. R. M.

Based upon undisputed evidence adduced from a mining engineer of the General Land Office at a hearing upon adverse proceedings charging that the land was mineral in character, by decision of December 11, 1929, the Commissioner held, in effect, that the mineralized

area was not confined to a lode location invading the tract, but by excluding from the selection the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of the section, the mineral lands would be excluded and no segregation of the lode location would be necessary. The selection was accordingly allowed, except for the two last described tracts. The State acquiesced in this action by taking no appeal.

In the decision attacked by the appeal, however, the Commissioner reopened the case and canceled the selection in its entirety, basing his action not upon any finding that the mineralized area was of any greater extent than that theretofore found, but for the reason that his former decision left the selection standing as to portions of two forty-acre tracts, this being held not in accordance with certain quoted views of the department expressed in *United States v. Central Pacific Railway Company* (49 L. D. 250, 303).

The departmental practice and regulations requiring all entries, selections and other disposals to conform to the smallest regular legal subdivision of 40 acres or lot and to treat minor subdivisions as indivisible for all administrative purposes is well established as a general rule, and the power of the department to require that in railroad indemnity lists, such minor legal subdivisions must be used as entireties and not in fragments has been upheld by the courts (*Southern Pacific Railroad Company v. Fall*, 257 U. S. 460; *Work v. Central Pacific Railway Company*, 12 Fed. (2d) 834), and the present regulations as to such lists, Circular No. 1077 (51 L. D. 487), as amended by Circular No. 1139 (52 L. D. 254), provide that "a legal subdivision of indemnity lands therefore can not be subdivided but must be selected and its character and status determined as a whole, except as provided in 49 L. D. 250, 303 and 50 L. D. 577, which still remains applicable to indemnity lands."

The last two cases cited recognized that there was an exception where a mining location invaded such a subdivision and directed the carving out of the location by a segregation survey and the approval of the railroad selection as to the remainder of the tract, but in those two cases the evidence showed that the mineral ground was all within the limits of the locations. In the first case mentioned in the regulations quoted, it was held, that "Those smallest regular subdivisions of forty acres each, can not be treated, in claims of land grant areas or in any other proceeding, as partly mineral and partly non-mineral, any more than can the areas embraced in patented tracts or in mineral locations or the areas of remainders of a subdivision designated as fractional lots by supplemental surveys."

The rule that such minor subdivisions must be selected by entireties and not in fragments is one, however, adopted in aid of the convenient and expeditious consideration of such lists (46 L. D. 279),

and to facilitate the checking up and tracing of various land transactions and prevent confusion in public-land administration by forbidding the splitting up of the units defined into little pieces (49 L. D. 250, 252), and may be waived by the Secretary whenever he deems that course advisable (26 L. D. 621; 46 L. D. 279, 281). Instances are cited in the brief of appellant where it has been disregarded, where no public interest would be prejudiced and where its enforcement would result in hardships to land claimants such as allowing partition of 40-acre tracts in dispute by agreement between rival settlers or between an agricultural and mineral claimant.

If the decision complained of is allowed to stand, 30 acres in each 40-acre tract though nonmineral could not be appropriated under the nonmineral land laws. Neither could any lodes be located covering both the mineral and nonmineral portions so as to exhaust the area of the nonmineral land. If mineral in placer formation should exist, the location would be invalid as to any ten-acre tract found nonmineral, *American Smelting & Refining Company* (39 L. D. 299); *Central Pacific Railway Company v. Mullin* (52 L. D. 573). It thus would result that a situation would be created where part of the area would not be subject to disposition either under the mineral or nonmineral land laws. The segregation by aliquot parts of a subdivision rather than by metes and bounds survey does not complicate but simplifies the record, and avoids unnecessary trouble and expense, and insures that the nonmineral land will be disposed of to a nonmineral claimant to whom it should rightfully go. Accordingly it is directed that action be taken in accordance with the decision of December 11, 1929, *supra*. The decision challenged by the appeal is

Reversed.

**DESERT-LAND ENTRIES WITHIN ABANDONED RECLAMATION
PROJECTS—ACT OF JUNE 6, 1930—GENERAL RECLAMATION
CIRCULAR AMENDED**

INSTRUCTIONS

[Circular No. 1229]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 30, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

The act of June 6, 1930 (46 Stat. 502), amends the proviso to section 5 of the act of June 27, 1906 (34 Stat. 519, 520), so as to read as follows:

Provided, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law

by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements theretofore made on any such desert-land entry of which proof has been or may be filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry the entryman shall thereupon comply with all the provisions of the aforesaid act of June 17, 1902, and shall relinquish within a reasonable time after notice as the Secretary may prescribe and not less than two years all land embraced within his desert-land entry in excess of one farm unit, as determined by the Secretary of the Interior; and as to such retained farm unit he shall be entitled to make final proof and obtain patent upon compliance with the regulations of said Secretary applicable to the remainder of the irrigable land of the project and with the terms of payment prescribed in said act of June 17, 1902, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

The effect of the act is to require a reduction of area of the desert-land entry, in case it is to be perfected under the project, to a farm unit instead of 160 acres as originally provided and to allow the entryman a minimum period of 2 years within which to make such reduction.

Pursuant to the provisions of said act, paragraphs 123, 124, and 128 of the General Reclamation Circular, approved May 18, 1916 (45 L. D. 385), are hereby amended to read as follows:

123. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman shall begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman must, if he depends on the Government's project for his water supply, comply with all provisions of the reclamation law, and must under the act of June 6, 1930 (46 Stat. 502), relinquish or assign in not less than two years after notice all the land embraced in his entry in excess of one farm unit, and upon making final proof and complying with the regulations of the department applicable to the remainder of the irrigable land of the project and with the terms of payment prescribed in the reclamation law, he shall be entitled to patent as to such retained farm unit, and final water-right certificate containing lien as provided for by the act of August 9, 1912, act of August 26, 1912, and the act of February 15, 1917; or to patent without a lien if provision therefor shall have been made as provided for by the act of May 15, 1922 (42 Stat. 541).

124. Under the act of July 24, 1912 (37 Stat. 200), desert-land entries covering lands within the exterior limits of a Government reclamation project may be assigned in whole or in part, even though water-right application has been filed for the land in connection with the Government reclamation project, or application for an extension of time in which to submit proof on the entry has been submitted, under the act of June 27, 1906 (34 Stat. 519), as amended

by the act of June 6, 1930; *supra*, requiring reduction of the area of the entry to one farm unit.

128. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish or assign all of the lands embraced in their entries in excess of one farm unit in not less than two years after notice through the local land office, must reclaim one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project, and also comply with the regulations of the department applicable to the remainder of the irrigable land of the project.

C. C. MOORE, *Commissioner*.

I concur:

P. W. DENT,

Acting Commissioner, Bureau of Reclamation.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

CUSTER NATIONAL FOREST EXCLUDED FROM OPERATION OF FOREST HOMESTEAD LAW—ACT OF JUNE 13, 1930

INSTRUCTIONS

[Circular No. 1227]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 22, 1930.

REGISTERS, UNITED STATES LAND OFFICES,

BILLINGS, MONTANA, AND PIERRE, SOUTH DAKOTA:

The act of Congress approved June 13, 1930, (46 stat. 583), provides as follows:

That from and after the passage of this Act no applications may be accepted by the Secretary of Agriculture for the classification and listing of any land in the Custer National Forest for homestead entry under the provisions of the act of June 11, 1906 (Thirty-fourth Statutes, page 233; United States Code, title 16, section 506), nor shall any lands be so classified for entry under the provisions of the act of August 10, 1912 (Thirty-seventh Statutes, pages 269-287): *Provided, however*, That the Secretary of Agriculture may, in his discretion, list limited tracts when in his opinion such action will be in the public interest and will not be injurious to other settlers or users of the national forest.

While no more applications for classification and listing of Custer National Forest lands may be accepted by the Secretary of Agriculture, the proviso of the act of June 13, 1930, vests in that officer discretionary authority to list limited tracts in that forest when in

his opinion such action will be in the public interest and will not be injurious to other settlers or users of the national forest.

Should the Secretary of Agriculture list lands under this act as suitable for entry under the homestead laws the list will be filed by him with the Secretary of the Interior who will then declare the listed lands subject to entry. In so far as they are not inconsistent with this act the instructions in Circular No. 263, approved May 2, 1922 (49 L. D. 9), will be followed in the restoration of such lands to homestead entry.

C. C. MOORE, *Commissioner.*

Approved:

Jos. M. DIXON,

First Assistant Secretary.

STATUS OF FLATHEAD INDIAN SURPLUS LANDS

Opinion, August 5, 1930

INDIAN LANDS—OIL AND GAS LANDS—PUBLIC LANDS.

The unentered surplus lands within the Flathead Indian Reservation, Montana, which have been opened to entry and sale, are not public lands or lands owned by the United States within the purview of the leasing act of February 25, 1920, and are not, therefore, subject to the operation of that act. *Peter Fredericksen*. (48 L. D. 440).

FINNEY, *Solicitor:*

You [Secretary of Interior] have referred to me for an opinion a question submitted by the Commissioner of Indian Affairs as follows:

Are the unentered surplus lands within the Flathead Indian Reservation, Montana, which have been opened to entry and sale, subject to the terms of the general leasing act of February 25, 1920 (41 Stat. 437); and, if so, are not the Indians entitled to the entire proceeds received from such leases, in view of the opinion of the Supreme Court in the case of *Ash Sheep Company v. United States*. (252 U. S. 159)?

The Flathead Indian Reservation was established by the treaty of July 16, 1855 (12 Stat. 975), and by the act of April 23, 1904 (33 Stat. 302). The Secretary of the Interior was directed to cause all of the reservation to be surveyed, to make allotments, to classify and appraise the lands remaining after allotments, and to dispose of such remaining lands under the general provisions of the homestead, mineral, and town-site laws of the United States, with certain exceptions.

In section 9 of said act it is provided that the lands shall be opened to settlement and entry by proclamation of the President. In section 14 it is provided that the proceeds received from the sale

of said lands shall be expended for the benefit of or paid to the Indians. Section 16 reads as follows:

That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section 12, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

The unallotted lands were opened to entry by proclamation of the President dated May 22, 1909 (36 Stat. 2494).

It is clear that the lands involved are not public lands or lands owned by the United States within the meaning of the leasing act of February 25, 1920, *supra*. In addition to the cited case of *Ash Sheep Company v. United States*, attention is invited to the case of *Peter Fredericksen* (48 L. D. 440).

Section 35 of the leasing act provides for the disposition of all proceeds from lands leased under said act. These provisions are utterly inconsistent with the provisions of section 14 of the act of April 23, 1904, *supra*.

The unentered surplus lands within the Flathead Indian Reservation, Montana, which have been opened to entry and sale, are not subject to the terms of the general leasing act of February 25, 1920.

Approved:

Jos. M. Dixon

First Assistant Secretary.

PRODUCERS AND REFINERS CORPORATION AND MOUNTAIN FUEL SUPPLY COMPANY

Instructions, August 6, 1930

OIL AND GAS LANDS—LEASE—ASSIGNMENT.

Authority does not exist under the general leasing act for recognizing oil interests separate and apart from gas interests in the same land, and the department can not approve an assignment which recognizes, in the same land, oil interests in one party and gas rights in another.

OIL AND GAS LANDS—LEASE—TRANSFER—RENTAL.

The leasing act does not prohibit lessees from agreeing between themselves that one shall develop and produce gas and that the other shall have all rights to the oil, if the provisions of the act and the regulations issued thereunder are not violated, but if interests are thus transferred and held, each lessee will be chargeable for the total acreage involved.

Acting Secretary Dixon to the Commissioner of the General Land Office:

On June 17, 1930, you submitted, through the Geological Survey, with recommendation for the issuance of lease, oil and gas prospecting permit, Salt Lake City 045051, of the Producers and Refiners Corporation.

The application for lease is made by the Producers and Refiners Corporation and the Mountain Fuel Supply Company. There is in the record an "Assignment and Agreement," dated December 31, 1928, whereby the Producers and Refiners Corporation transfers, assigns, and conveys to the Mountain Fuel Supply Company all its right, title, and interest in and to the natural gas in and that may be produced from the permit lands, and the Producers and Refiners Corporation reserves to itself all right, title, and interest in and to oil that there is in and that may be produced from said lands.

You state that the instrument called an assignment and agreement, instead of being an assignment, is in the nature of a working agreement by which one is to have the right to drill for and produce oil and the other the right to drill for and produce gas, "and each is to have the use of the surface equally for such purpose." You recommend that leases be granted to the Producers and Refiners Corporation and assume that each company is to be charged with 50 per cent of the acreage, which is slightly reduced by some small royalty interests.

The Director of the Geological Survey has declined to concur in your recommendations. In a memorandum dated July 24, 1930, he states—

If the assignment and agreement of December 31, 1928, is in fact merely a working agreement as stated in the Commissioner's letter, the Survey has no further objection to the issuance of the leases applied for.

If, on the other hand, the said instrument is to be considered as an assignment of the gas rights in the permit, or leases to be issued, with an option in each party to surrender or assign its interests, the Survey questions whether the rights of the Government will be properly protected under issuance of the leases as prepared. While the Survey can find no objection to a lessee selling gas to one party and oil to another, the separation of leasehold interests in the oil and in the gas that may be produced will lead to many complications and is believed to be outside the intent of the mineral leasing law and is certainly poor public policy.

And if the agreement as it now stands and the issuance of leases as proposed may be considered as properly protecting the rights of the Government, the further question arises as to whether the party holding the gas rights, or the party retaining the oil rights, or both, should be charged with the acreage involved in the proposed leasehold. In this connection it should be understood that so far as is now known the field involved is exclusively a dry-gas field, and the proposal now made is essentially to convey to the Mountain Fuel Supply Company all known values while being charged for only one-half the acreage.

It is clear that the parties intended that the instrument referred to should be accepted and approved as an assignment, for the reason that in paragraph 11 thereof they agree that any lease application "shall be made by, and said lease or leases issued to, the parties hereto jointly."

There is no authority in the general leasing act for recognizing oil interests separate and apart from gas interests in the same land. An oil lease can not be granted to one person and a gas lease to another person for the same land. Inasmuch as interests of oil and of gas in the same land can not be granted in opposition to each other, the department can not approve an assignment which recognizes, in the same land, oil interests in one company and gas rights in another. The department declines to approve the assignment of gas rights to the Mountain Fuel Supply Company as presented.

The department can not prohibit the companies from agreeing between themselves that one shall develop and produce gas and that the other shall have all rights to oil, if the provisions of the leasing act and regulations thereunder are not violated. But if interests are thus to be transferred and held each must be held chargeable with the full acreage involved. Otherwise it would be possible for one person, association, or corporation to acquire and hold leases embracing 5120 acres, or more, of oil land, or gas land, on the same structure.

The granting of leases to the Producers and Refiners Corporation as recommended by you is hereby authorized with the understanding that said corporation and the Mountain Fuel Supply Company will each be charged with the full acreage of the leases, and that each is qualified to take and hold such acreage.

RESTRICTIONS UPON LANDS AND FUNDS OF MEMBERS OF THE FIVE CIVILIZED TRIBES

Opinion, August 11, 1930

INDIAN HOMESTEAD—INDIAN FUNDS—FIVE CIVILIZED TRIBES—RESTRICTIONS.

The act of May 10, 1928, which extended the restrictions imposed upon homesteads of certain members of the Five Civilized Tribes in Oklahoma by the act of May 27, 1908, likewise extended the restrictions upon the accumulated income derived from the lease of those lands, notwithstanding that the act was silent with reference to restrictions upon such funds.

INDIAN HOMESTEAD—FIVE CIVILIZED TRIBES—RESTRICTIONS UPON ALIENATION—HEIRS—DEVISEES.

The provision relating to restrictions upon alienation contained in the second proviso to section 9 of the act of May 27, 1908, which created a special estate in the homestead of a deceased member of the Five Civilized Tribes

in favor of the issue born since March 4, 1906, is to be construed in conjunction with the first proviso to that section, and, when so construed, the effect of the repeal of the second proviso by section 2 of the act of May 10, 1928, was, upon termination of the special estate in the homestead, to remove the restrictions only where the heirs or devisees are of less than the full-blood, and that where they are of full-blood their interests are subject to the restrictions attaching under the first proviso, that is subject to the approval of the proper local court. *United States v. Gypsy Oil Company* (10 Fed. (2d) 487), and *Parker v. Richard* (250 U. S. 235).

INDIAN HOMESTEAD—INDIAN FUNDS—FIVE CIVILIZED TRIBES—RESTRICTIONS—HEIRS—DESCENT AND DISTRIBUTION.

Upon the termination of the restrictions imposed upon the special estate in the homestead of a member of the Five Civilized Tribes created in favor of the issue born since March 4, 1906, by the second proviso to section 9 of the act of May 27, 1908, the accumulated funds derived from the homestead of the deceased allottee do not become the absolute property of such issue, but are subject to distribution among the heirs in accordance with their respective interests under the applicable laws of descent and distribution. *Parker v. Riley* (250 U. S. 66).

FINNEY, Solicitor:

At the suggestion of the Commissioner of Indian Affairs you [Secretary of the Interior] have requested my opinion upon the following questions dealing with the restrictions upon lands and funds of members of the Five Civilized Tribes in Oklahoma.

1. Will the restrictions now attaching to accumulated funds derived from restricted lands allotted to members of the Five Civilized Tribes terminate on April 26, 1931, the date of expiration of the present restrictions imposed upon such lands by sections 1 and 9 of the act of May 27, 1908 (35 Stat. 312), or do sections 1 and 2 of the act of May 10, 1928 (45 Stat. 495), extending the existing restrictions against the lands for an additional period of 25 years, also extend the restrictions upon such accumulated funds for a like period?

2. What is the legal effect of the repeal by section 2 of the act of May 10, 1928, of the provision in section 9 of the act of 1908, as amended, creating for the issue born since March 4, 1906, a special estate in the homestead of a deceased allottee of one-half or more Indian blood with respect to termination of restrictions upon such homestead as well as the accumulated income therefrom?

3. Admitting that the special estate created in favor of the issue born since March 4, 1906, terminates on April 26, 1931, do the accumulated funds on hand derived from the homestead then become the absolute property of such issue, or is it divisible among all the heirs of the decedent in accordance with their respective interests under the laws of the State of Oklahoma?

Before discussing these somewhat complicated questions, it may be well to refer briefly to the status of the lands involved with respect to the restrictions upon alienation existing thereagainst prior to the restrictions extension act of 1928, as well as the scope of the latter act.

The Five Civilized Tribes originally owned extensive areas of land in what is now the State of Oklahoma. Division of these lands, which were held in communal ownership, was had through allotments in severalty to the individual members of the tribes, pursuant to agreements negotiated with the several tribes for that purpose, which agreements provided for varying periods of nonalienability and nontaxability. With these agreements, however, we are not here concerned, as Congress, by the act of May 27, 1908 (35 Stat. 312), provided a new and uniform scheme of restrictions, applicable alike to all of the Five Civilized Tribes. Section 1 of that act dealt with the restrictions upon allotted lands of living allottees and for that purpose divided such lands into three classes based upon the Indian blood of the allottees. *First*, both homestead and surplus allotments of allottees having less than one-half Indian blood. *Second*, surplus allotments of allottees of half and less than three-fourths Indian blood. *Third*, homesteads of allottees of one-half or more Indian blood, and both homestead and surplus allotments of allottees having three-fourths or more Indian blood. Lands of allottees in classes one and two were freed from all restrictions, but as to lands within the third class, Congress declared that they "shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Section 9 of the same act dealt with the restrictions upon lands of deceased allottees and provided—

That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one, but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this is not done, or in

the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

The above section was amended by the act of April 12, 1926 (44 Stat. 239), by extending, among other things, the scope of the first proviso relating to conveyances by full-blood heirs so as to include within its provision full-blood devisees.

The death of an allottee under section 9 as interpreted by the courts operates to remove the restrictions upon alienation of the lands allotted to the decedent with two exceptions. First, lands inherited by or devised to full-blood members of the Five Civilized Tribes, and as to them the Supreme Court of the United States in *Parker v. Richard* (250 U. S. 235) has held that the restrictions are not removed but merely relaxed to the extent of sanctioning such conveyances as receive the approval of the proper local court, which acts in that regard as a Federal agency. Further, that such lands in the hands of a full-blood continue in the restricted class, and during the restricted period supervision over the collection, care and disbursement of royalties, accruing from a lease made during the lifetime of the allottee falls to the Secretary of the Interior. But where the lease is made by the full-blood heir, the Circuit Court of Appeals, Eighth Circuit, in a final decision from which no appeal was taken, has held that such a lease is a conveyance of an interest in the land, valid when approved by the proper local court and operating to terminate the jurisdiction and control of the Secretary of the Interior. See *United States v. Gypsy Oil Company* (10 Fed. (2d) 487). While this decision is open to serious question as in conflict with the rule as laid down in *Parker v. Richard*, *supra*, the decision having become final must be accepted as controlling in the class of cases to which it applies, at least until overruled or modified by subsequent decisions of courts of equal or higher standing having occasion to reexamine the question. The second exception embraces homestead allotments of deceased allottees of one-half or more Indian blood, leaving issue born since March 4, 1906, such homesteads being restricted and inalienable for the use and support of such issue during lifetime but not beyond April 26, 1931.

The act of May 10, 1928, extending restrictions upon these lands, so far as material, reads—

Sec. 1. That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931; *Provided* That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners

of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians, as he may prescribe.

SEC. 2. That the provisions of section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," as amended by section 1 of the Act of April 12, 1926 (Forty-fourth Statutes at Large, page 239), entitled "An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes," be, and are hereby, extended and continued in force for a period of twenty-five years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided*, That the word "issue," as used in this section, shall be construed to mean child or children: *Provided further*, That the provisions of section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section:" which quoted provisions be, and the same are, repealed, effective April 26, 1931: *Provided further*, That the provisions of section 23 of the Act of Congress approved April 26, 1906 (Thirty-fourth Statutes at Large, page 137), as amended by the provisions of section 8 of the Act of Congress approved May 27, 1908 (Thirty-fifth Statutes at Large, page 312), be and the same are hereby, continued in force and effect until April 26, 1956.

Section 1 above plainly extends for an additional period of 25 years the restrictions attaching to lands of living allottees under section 1 of the act of 1908, which, as we have seen, embraces homesteads of allottees of one-half or more Indian blood, and both homestead and surplus allotments of allottees of three-fourths or more Indian blood. It is also plain that section 2, while repealing the provision creating a special estate for the issue born since March 4, 1906, to homestead allottees of one-half or more Indian blood, likewise extends, for the same period, the restrictions attaching under section 9 of the act of 1908, as amended, to lands inherited by or devised to full-blood members of the Five Civilized Tribes. With this situation in mind, we turn to the first question as to whether the extension of restrictions applies to funds now in the control of the Secretary of the Interior, representing the income derived from these restricted lands.

Section 2 of the act of 1908 declared that "leases of restricted lands for oil, gas, or other mining purposes * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The funds here involved represent for the most part accumulated royalties from minerals produced under leases made and approved under this provision. The leases are on forms providing, in conformity with existing regulations, that the Secretary of the Interior, through his representatives, shall supervise all operations under the leases, that the royalties thereunder shall be paid to his representatives, that with certain exceptions the regulations then or thereafter in force should be deemed a part of the leases, and that supervision should only be relinquished in the event of removal of restrictions from the lands. The leases and the regulations thus contemplate continued supervision of the Secretary of the Interior over the collection, care, and disbursement of royalties so long as the lands remain restricted, and in view of the action of Congress in extending the restrictions upon the lands for an additional period of 25 years, the event which otherwise would have terminated the Secretary's supervision and control over the leases and the royalties in 1931 will not then occur and may not thereafter occur until the restrictions expire in regular course in 1956.

The fact that the act of 1928 is an act extending restrictions upon lands with no specific mention therein of funds is unimportant. The act of 1908, like that which it amended, is a comprehensive measure, designed by Congress for the protection of the Indians against their own improvidence and overreaching by others. Admittedly, the need for such protection extends to the income from the lands as much as to the land itself, and, as was said by the Circuit Court of Appeals, Eighth Circuit, in *United States v. Brown* (8 Fed. (2d) 564, 566): "It would present a remarkable inconsistency in governmental policy if such funds were not subject to the same beneficent control as the lands from which they are derived."

From the viewpoint of governmental control no sound basis in fact exists for making any distinction between the lands and the income therefrom. The lands being restricted, the proceeds therefrom are likewise restricted and under the protecting care of the Federal Government. *United States v. Mott* (37 Fed. (2d) 860). In authorizing the leasing of lands for oil, gas, or other minerals with the approval of the Secretary of the Interior, Congress permitted a change in the form of the property. No citation of authority is needed to sustain the doctrine that into whatever form trust

property is converted it continues to be impressed with the trust. The rule is a salutary one and has been repeatedly applied to the trust or restricted property of the Indians. Thus, in *United States v. Thurston County* (143 Fed. 287) it was held that the proceeds of the sales of allotted lands are held in trust by the United States for the same purposes as were the lands; that no change of form of property divests it of a trust, and that the substitute takes the nature of the original and stands charged with the same trust. Again, in *National Bank of Commerce v. Anderson* (147 Fed. 87) the Circuit Court of Appeals, Ninth Circuit, held that the sale of allotted lands, with the consent of the Secretary of the Interior, did not affect the trust which attached to the proceeds under the rules prescribed by the Department of the Interior. In that case the court said—

We construe the act as expressing the intention of Congress, not to end the trust but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired and which period was subject to further extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form.

Similar expressions will be found in *United States v. Gray* (201 Fed. 291) and *United States v. Moore* (284 Fed. 86). In *United States v. Brown*, *supra*, the rule was expressly applied to royalties derived from a lease upon restricted lands of a member of the Five Civilized Tribes, the court saying: "It must be conceded that the royalties accruing therefrom are lodged with the officers of that Department impressed with the same trust as are the lands themselves." See also *Barnes v. Keys* (36 Okla. 6; 127 Pac. 261); *Strawn v. Brady* (84 Okla. 66; 202 Pac. 505); *Harris v. Brady* (136 Okla. 274; 277 Pac. 579); *Parker v. Riley* (250 U. S. 66). In the case last cited, the Supreme Court held that the royalties derived from a lease of the homestead allotment of a deceased member of the Five Civilized Tribes took the place *pro tanto* of the land as the lessee extracted and took the minerals and that the rights of the heirs in the royalties were the same as in the homestead.

It sufficiently appears from the foregoing decisions not only that the royalty interest of the lessee is but a right attached and incident to his ownership of the land but that the proceeds from the lands, whether derived from sale or lease, partake of the nature of the lands themselves and are impressed with the same trust. The status of the funds is thus determined by the status of the lands from which derived, and it therefore follows that the act of May 10, 1928, *supra*, extending restrictions upon the lands for an additional period of 25

years, *ipso facto*, extends for a like period, the restrictions upon the funds.

As to the second question, it becomes necessary first to consider the matter of when the restrictions terminate upon the homestead of deceased allottees leaving issue born since March 4, 1906. The special estate therein belonging to such issue was, as we have seen, created by the second proviso to section 9 of the act of May 27, 1908, as amended by the act of April 12, 1926, *supra*. This proviso declared that the homestead should remain restricted and inalienable for the use and support of such issue during life but not beyond April 26, 1931. The restrictions so imposed were designed, of course, for the protection of the owners of the special estate and were substantially the same as those attaching to lands of living allottees under section 1 of the act of 1908. Repeal of the proviso by section 2 of the act of May 10, 1928, *supra*, effective April 26, 1931, operates, of course, to terminate the special estate as of that date. But this does not necessarily mean that all restrictions against alienation of the homestead were then to terminate, as there is for consideration the first proviso of the same section by which the sale of any interest inherited by or devised to a full-blood member of the Five Civilized Tribes is subject to the approval of the proper local court—a provision which, as hereinbefore pointed out, continues the restrictions in relaxed form in the hands of such full-blood Indians. True, the second proviso creating the special estate, contains the provision that—

if no such issue survives, then such allottee, if an adult, may dispose of his homestead by will, free from all restrictions; and if this be not done, or in the event the issue hereinbefore provided for, die before April 26, 1931, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

This provision, which indicates that upon the termination of the special estate the restrictions will terminate is undoubtedly broad but so is the first proviso. As both are in the same section of the same act they evidently were intended to operate harmoniously and should be construed accordingly. If the second proviso be regarded, as well it may, as contemplating the removal upon termination of the special estate, only of those restrictions imposed upon the homestead for the protection of the owners of the special estate, the two provisions will operate in entire harmony and all full-bloods will receive the measure of protection that Congress undoubtedly intended that they should have. While the matter is by no means free from doubt, I am constrained to hold that this is the true construction, and am therefore of the opinion that upon termination of the special

estate in the homestead, the restrictions upon alienation of the lands are only removed where the heirs or devisees, as the case may be, are of less than the full-blood and that where such heirs or devisees are of the full-blood, their interests are subject to the restrictions attaching thereto under the first proviso of section 9 of the act of 1908 as amended, as interpreted in the cases of *Parker v. Richard* and *United States v. Gypsy Oil Company, supra*.

Having already determined in connection with the first question that the income falls in the same category as the lands from which derived; no other conclusion can be reached than that the expiration of the restricted or trust period on the lands terminates the restrictions upon the income. Nothing in the decision of the Circuit Court of Appeals in *United States v. Hinkle* (261 Fed. 518), makes to the contrary. That decision held that the exclusive control and custody of minerals, rents, and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes were vested in the Secretary of the Interior as a trust fund separate and distinct from the trust estate in the land itself, and that the right to such rents and profits *accruing during the term of restriction* can not be conveyed by the allottee or his heir. Doubtless, the court in holding that the mineral rents and profits constitute a trust fund separate and distinct from the land had in mind that the Secretary of the Interior, in the exercise of authority reposing in him under the law might remove the restrictions and terminate the trust as to one without impairing or disturbing the trust as to the other. That the two classes of property are separate and distinct to that extent is undeniably true, but the court did not consider, and hence did not decide, that the period of the trust as to the mineral rents and profits was any different from that fixed by Congress with respect to lands. Ample authority to the contrary will be found in the decisions above cited, which support the doctrine that the proceeds from the land are impressed by the same trust as the lands themselves. It should be remembered in this connection that the power of Congress over the Indians and their property is plenary and that it is for that body to determine when its guardianship shall cease. *United States v. Nice* (241 U. S. 591); *Winton v. Amos* (255 U. S. 373). Whenever Congress has so determined the supervision and control theretofore exercised by the Secretary of the Interior as the agent selected by Congress to perform its guardianship powers necessarily come to an end.

The third question presents little difficulty. It is controlled by the decision of the Supreme Court of the United States in *Parker v. Riley, supra*, wherein the rights of the heirs and the owners of the

special estate in the homesteads of deceased allottees leaving surviving issue born since March 4, 1906, were defined as follows (p. 70):

* * * Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary. Under the provision in section nine specially providing for issue born after March 4, 1906, Julia was entitled for her support to the exclusive use of the entire homestead while she lived, but not beyond April 26, 1931, and those who took the fee took it subject to that right. The rights of all in the royalties must, as we think, be measured by that standard. In this view Julia is entitled to the use of the royalties, that is to say, the interest or income which may be obtained by properly investing them, during the same period, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right.

Obviously, under the foregoing decision the accumulated funds on hand derived from the homestead do not, upon termination of the special estate, become the absolute property of the issue born since March 4, 1906, but are for distribution among the heirs in accordance with their respective interests under the applicable laws of descent and distribution.

Approved:

JOS. M. DIXON

First Assistant Secretary.

CITIZENSHIP OF MARRIED WOMEN

INSTRUCTIONS

[Circular No. 857]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 12, 1930.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress approved September 22, 1922 (42 Stat. 1201), entitled "An Act relative to the naturalization and citizenship of married women," as amended by act of July 3, 1930 (46 Stat. 849), and the amendatory act of July 3, 1930 (46 Stat. 854), which are appended.

In all cases of applications for entry of public land, or proofs in support of such entries, by married women otherwise duly qualified to make such entry or proof, you will require a showing of such facts concerning marital status and citizenship as may be rendered necessary by the provisions of said act, as amended.

¹ This is a revision of Circular No. 857 of October 11, 1922 (49 L. D. 316).—Ed.

The act makes no change in the existing requirements with respect to a female citizen of the United States who, after initiating a claim to public land, marries an alien, as set forth in paragraph 2, Circular No. 361 (43 L. D. 444), and she must show that her husband is entitled to become a citizen of the United States.

C. C. MOORE, *Commissioner*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

(PUBLIC—No. 346—42 STAT. 1021)

[H. R. 12022]

An Act Relative to the naturalization and citizenship of married women

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged, because of her sex or because she is a married woman.

SEC. 2. That any woman who married a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required:

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.

SEC. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who married an alien ineligible to citizenship shall cease to be a citizen of the United States. (If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside of the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the Expatriation Act of 1907 with reference to expatriation.)¹

¹ That part of section 3 set forth in parentheses repealed by section 1 of act of July 3, 1930 (46 Stat. 854), appended, which also provides that "such repeal shall not restore citizenship lost under such section 3 before such repeal."

Sec. 4.² That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship may be naturalized as provided by section 2 of this act: *Provided*, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act.

Sec. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Sec. 6. That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

Sec. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.

Sec. 8.³ That any woman eligible by race to citizenship who has married a citizen of the United States before the passage of this amendment; whose husband shall have been a native-born citizen and a member of the military or naval forces of the United States during the World War, and separated therefrom under honorable conditions; if otherwise admissible shall not be excluded from admission into the United States under section 3 of the Immigration Act of 1917, unless she be excluded under the provisions of that section relating to—

(a) Persons afflicted with a loathsome or dangerous contagious disease, except tuberculosis in any form;

(b) Polygamy;

(c) Prostitutes, procurers, or other like immoral persons;

(d) Persons convicted of crime: *Provided*, That no such wife shall be excluded because of offenses committed during legal infancy, while a minor under the age of twenty-one years, and for which the sentences imposed were less than three months, and which were committed more than five years previous to the date of the passage of this amendment;

(e) Persons previously deported;

(f) Contract laborers.

That after admission to the United States she shall be subject to all other provisions of this Act.

Approved, September 22, 1922 (42 Stat. 1021), and amended by acts of July 3, 1930 (46 Stat. 849, 854).

(PUBLIC—No. 508—46 STAT. 854)

An Act To amend the law relative to the citizenship and naturalization of married women, 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 last three sentences of section 3 of

² Amended by section 2 of act of July 3, 1930 (46 Stat. 854), which also provides that the amendment "shall not terminate citizenship acquired under such section 4 before such amendment."

³ This section added by act of July 3, 1930 (46 Stat. 849).

the Act entitled "An Act relative to the naturalization and citizenship of married women," approved September 22, 1922 (relating to the presumption of loss of citizenship by married women by residence abroad), are repealed, but such repeal shall not restore citizenship lost under such section 3 before such repeal.

Sec. 2 (a) Section 4 of such Act of September 22, 1922, is amended to read as follows:

"SEC. 4. (a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

"(1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the country where the petition is filed shall be required;

"(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

"(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

"(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

"(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect."

(b) The amendment made by this section to section 4 of such Act of September 22, 1922, shall not terminate citizenship acquired under such section 4 before such amendment.

Sec. 3. Subdivision (f) of section 4 of the Immigration Act of 1924, as amended, is amended to read as follows:

"(f) A woman who was a citizen of the United States and lost her citizenship by reason of her marriage to an alien, or the loss of United States citizenship by her husband, or by marriage to an alien and residence in a foreign country."

Approved, July 3, 1930.

EFFECT OF REVOCATION OF CERTIFICATE OF COMPETENCY ISSUED TO A MEMBER OF THE OSAGE TRIBE OF INDIANS

Opinion, August 13, 1930

OSAGE INDIAN LANDS—ALLOTMENT—CERTIFICATE OF COMPETENCY—TRIBAL FUNDS.

The effect of the issuance of a certificate of competency to a member of the Osage Tribe of Indians pursuant to section 2 of the act of June 28, 1906, was to remove the restrictions imposed upon him, while an incompetent, with respect to his surplus allotted lands, to confer upon him the privilege of receiving his full share of the tribal income, and to remove the restriction upon his power to contract debts.

OSAGE INDIAN LANDS—ALLOTMENT—REVOCATION OF CERTIFICATE OF COMPETENCY.

Revocation by the Secretary of the Interior under the authority conferred upon him by section 4 of the act of February 27, 1925, of a certificate of

competency issued to a member of the Osage Tribe of Indians, has the effect of automatically restoring the holder to his former status of an incompetent member of that tribe and reimposes restrictions against his unsold surplus lands, but it does not affect the legality of any transactions made by reason of the issuance of the certificate.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether the revocation by the Secretary of the Interior of a certificate of competency issued to a full-blood member of the Osage Tribe of Indians in Oklahoma operates to reimpose restrictions upon the unsold surplus lands allotted to such member under the provisions of the act of June 28, 1906 (34 Stat. 539).

In the consideration of this question, it may be well to refer to the pertinent legislation and point out briefly the nature and effect of a certificate of competency.

Under the provisions of the act of June 28, 1906, *supra*, each enrolled member of the Osage Tribe of Indians received in allotment some 660 acres of land. Out of the land so allotted each member was required to designate 160 acres as his homestead, the remainder of the land assigned to each individual being commonly referred to as the surplus. Both classes of land were to remain inalienable for a period of 25 years, which period has since been extended to January 1, 1959, by the act of March 2, 1929 (45 Stat. 1478). Provision for the removal of restrictions from the surplus lands by the issuance of a certificate of competency was made by section 2, paragraph 7, of the act of 1906, which reads—

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: * * *

The above provision requires, among other things, an application by the member and a finding by the Secretary of the Interior that the applicant is competent and capable of transacting his business and caring for his own affairs and declares that upon the issuance of the certificate, the lands of such member, except his homestead, shall become subject to taxation and "such member, except as herein

provided, shall have the right to manage, control and dispose of his or her lands the same as any citizen of the United States." In conformity with this provision the form of certificate in use, when issued, invests the member "with full power and authority to sell and convey any and all surplus lands." Thus, under the act mentioned, the practical effect and, in fact, the fundamental object of a certificate of competency, was to remove the restrictions from the surplus lands of the member and confer upon him the right and authority to dispose of such lands upon an equal footing with other citizens of the United States.

The allotments made to members of the tribe under the act of 1906 carried surface rights only, the underlying minerals being reserved to the tribe in common, and the income therefrom, broadly speaking, was paid to the members, share and share alike. However, the income having increased to such an extent that gross extravagance and waste prevailed (*Work v. Lynn*, 266 U. S. 161), Congress, by the act of March 3, 1921 (41 Stat. 1249), as amended by the act of February 27, 1925 (43 Stat. 1008), placed the incompetent members of the tribe upon quarterly allowances designed to meet their current needs, the balance being invested and conserved for their future benefit. Members holding certificates of competency continued to receive their full income. The later enactment, as amended by section 5 of the act of March 2, 1929, *supra*, further placed a restriction upon the power of incompetent members of the tribe having one-half or more Indian blood to make contracts of debt by declaring that such contracts should have no validity unless approved by the Secretary of the Interior. A certificate of competency, where the member is a full-blood, thus accomplishes three things; first, it removes the restrictions from the surplus lands of the allottee; second, it confers upon him the privilege of receiving his full share of the tribal income, and third, it removes the personal restriction upon his power to make a contract of debt.

The authority to revoke certificates of competency is found in section 4 of the act of February 27, 1925, *supra*, reading as follows:

Whenever the Secretary of the Interior shall find that any member of the Osage Tribe of more than one-half Indian blood, to whom has been granted a certificate of competency, is squandering or misusing his or her funds, he may revoke such certificate of competency after notice and hearing in accordance with such rules and regulations as he may prescribe, and thereafter the income of such member shall be subject to supervision and investment as herein provided for members not having certificates of competency to the same extent as if a certificate of competency had never been granted: *Provided*, That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior, or his authorized representative, out of the income of such member, in addition to the quarterly

income hereinbefore provided for: *And provided further*, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of the issuance of any certificate of competency.

The revocation of the certificate of competency under the foregoing authority automatically restores the member to the status of an incompetent member of the tribe. His income, according to the express direction of the statute, is distributable, as is that of other incompetent members of the tribe. The restriction upon his power to contract indebtedness again rests upon him. Two of the things accomplished by issuance of the certificate have thus been restored by its revocation. As to those lands still retained by the member from which the restrictions were removed by issuance of the certificate of competency the statute is silent. But as the original and primary purpose of the instrument was to remove restrictions from lands, revocation of the instrument seems necessarily to restore the restrictions, and a clear direction in the statute to the contrary would have been necessary to prevent that result. The right to manage, control, and dispose of the lands the same as any citizen of the United States was given the member because he was found to be competent and capable of managing his affairs free from supervision. Revocation of the certificate is a determination that that finding was erroneous; it has been vacated and annulled and the holder must be deemed as lacking the ability, experience, and judgment necessary to enable him to conduct the negotiations for the sale of such lands as he still retains and to care for, manage, and control the proceeds. In the absence of some expression to the contrary, cancellation of the certificate, from the very nature of the instrument itself, extinguishes the rights and powers granted thereby, and when such cancellation is had, the holder reverts to his former status as an incompetent member of the tribe, subject to the same restrictions that rest upon other incompetent members. True, the statute contains the provision that revocation or cancellation of the certificate of competency shall not affect the legality of any transactions theretofore made by reason of its issuance, but that is a provision very properly inserted for the protection of third parties in dealings had with the allottee while the certificate was outstanding and tends to strengthen rather than weaken the foregoing view.

I conclude, therefore, that upon revocation of the certificate of competency of a full-blooded member of the Osage Tribe of Indians, the restrictions revive and again attach to his unsold surplus lands to continue until they expire in regular course on the date fixed by Congress therefor unless the Secretary of the Interior shall have in

the meantime, removed such restrictions in the exercise of authority reposing in him under the law.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

WITHDRAWAL OF LANDS CONTAINING HOT OR MEDICINAL SPRINGS

INSTRUCTIONS

[Circular No. 1231]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., August 16, 1930.

REGISTERS, UNITED STATES LAND OFFICES;
CHIEFS OF FIELD DIVISIONS:

By Executive order of July 7, 1930 (No. 5389), the following order of withdrawal was issued:

Under authority of the act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912, (37 Stat. 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a hot spring, or a spring the waters of which possess curative properties; and all land within one-quarter of a mile of every such spring located on unsurveyed public land, exclusive of Alaska, be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for lease under the provisions of the act of March 3, 1925 (43 Stat. 1133), subject to valid existing rights.

This order shall remain in full force and effect unless and until revoked by the President or by act of Congress.

The above order was designed to preserve for general public use and benefit the unreserved public lands, exclusive of Alaska, containing hot springs or springs the waters of which possess curative properties, in order that they might be leased under the provisions of the act of March 3, 1925 (43 Stat. 1133), and the regulations issued thereunder, Circular No. 1034, approved October 6, 1925 (51 L. D. 221).

An applicant to enter or select lands situated outside of a national forest in any State must show that the land is not within an area of one-quarter mile surrounding any hot spring or other spring having waters possessing curative properties, and that no such spring exists, if it be a fact, upon any legal subdivision of land sought to be appro-

appropriated, if surveyed, and if unsurveyed within one-quarter of a mile from the exterior boundaries of the land.

If there be any such spring upon or adjacent to the land as stated, the applicant must show the exact location and size thereof, together with an estimate of the quantity of water in gallons which it is capable of producing daily and any other information necessary to determine whether or not it is valuable or necessary within the meaning of said Executive order. Where such showing is made the application should not be allowed but should be transmitted to the General Land Office for consideration. The showing must be made in affidavit form duly corroborated.

Permission may be obtained to use or improve lands containing such springs, under the said act of March 3, 1925.

In case the attempted appropriation of lands is one the allowance of which is within the discretion of the Secretary of the Interior or the Commissioner of the General Land Office, the showing hereinbefore referred to must be furnished irrespective of the date of filing of the application, entry, or selection before favorable action is taken thereunder.

This circular shall not apply however to selections or filings made in pursuance of grants which have been determined to be "*Grants in praesenti*" and to have attached and become effective prior to July 7, 1930, or to valid existing rights, initiated prior to said date and thereafter maintained in accordance with the laws applicable thereto.

You will make proper notations on your records of this withdrawal, in order that it may be considered in connection with any application filed.

Geological Survey designation lists, both enlarged and stock raising, will contain a paragraph stating—

This area contains no spring of the type intended to be withdrawn by Executive order of July 7, 1930, No. 5389, and therefore is unaffected by it.

Where orders of designation under the enlarged homestead or stock raising acts contain the above-quoted paragraph, it will not be necessary for entrymen to make the showing required by this circular.

C. C. MOORE, *Commissioner.*

I concur:

GEORGE OTIS SMITH,
Director, Geological Survey.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FRANCIS D. WEAVER¹

Decided August 23, 1930

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—DEFAULT.

Section 37 of the leasing act of February 25, 1920, effected a change in the mining law with respect to the performance of annual assessment work upon mining claims, and thereafter a default not cured by a resumption of work became ground for challenge by the United States to the valid existence of the claim. *Wilbur v. Krushnic*: (280 U. S. 306).

MINING CLAIM—CONTEST—ANSWER—HEARING—PRACTICE—GENERAL LAND OFFICE—FOREST SERVICE.

The rule that an answer which fails to deny a charge is insufficient to warrant a hearing and must be taken as an admission of its truth under the regulations relating to contests on report by representatives of the General Land Office is equally applicable to protests preferred by the Forest Service.

MINING CLAIM—CONTEST—ANSWER—PRACTICE.

Where a claimant elects to stand on his answer to a charge and does not choose to support his contention as to the legal insufficiency of the charge by filing brief and argument before the case is reached in its order for examination in the Land Department, he will not thereafter be heard to assert that he was deprived of his day in court because subsequently denied the privilege of filing brief and argument.

EDWARDS, Assistant Secretary:

The Commissioner of the General Land Office has submitted for consideration and appropriate disposition a paper termed "Election to Stand on Answer" filed by Francis D. Weaver, in connection with protest proceedings instituted by the Forest Service, challenging the validity of the Ideal Nos. 2, 3, 4, 5, 11 and 12 oil shale placer locations covering lands in Secs. 30, 31 and 32, T. 7 S., R. 94 W., 6th P. M., Colorado.

The Forest Service charges:

1. That no discovery of valuable deposits of oil shale or of other mineral has been made within or upon any of said mining locations.
2. That none of said mining locations have been maintained by the performance of annual assessment work thereon for the years ending July 1, 1927 to 1929, inclusive, and work has not been resumed.

Weaver admits receipt of notice of these charges on April 11, 1930. On May 10, 1930, Weaver filed answer, denying Charge No. 1, and as to Charge No. 2 alleged only—

That the performance of assessment work was unnecessary so far as the United States is concerned, and, if there had been any default therein, such default would not be available to the United States.

¹ See decision on motion for rehearing, p. 179.

concluding his answer with the statement—

Wherefore, this contestee, having now made written answer to the charges contained in said notice of April 10, 1930, hereby applies for a hearing on said charges.

The Commissioner's views upon the foregoing answer were expressed in his decision of June 3, 1930, as follows:

Contestee, instead of denying the truth of charge No. 2 makes the statement that assessment work was unnecessary so far as the United States is concerned, and it cannot take advantage of any default in said work, according to his contention.

The Supreme Court of the United States, in its decision of January 6, 1930, in the *Krushnic* case, answered this contention. In discussing the question of whether an oil shale placer location, valid at the date of the leasing act, was "thereafter maintained in compliance with the laws under which initiated," within the terms of the excepting clause of section 37 or the leasing act of February 25, 1920, the court pointed out that such claim would be maintained by the performance of annual assessment work to the value of \$100, or upon failure to do such work, by a resumption of work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened."

This challenge by the United States mentioned in the decision, relates solely to a challenge to the validity of the claim because of failure to maintain it in the manner stated by the court, since the leasing act was enacted.

In accordance with the said decision, the United States can avail itself of a default in the performance of assesment work on oil shale placers, and in this case has challenged the validity of the claims involved because of such default.

He, therefore, directed that—

Unless the contestee files proper answer denying the allegations contained in charge No. 2, within 30 days from notice, the truth of said charge will be taken as admitted by him, so that no hearing will be necessary on the first charge, as establishment by the Government of charge No. 2 renders the claims invalid, the deposits and the lands therein not being then excepted by section 37 of said leasing act.

The claimant in his Election to Stand on Answer reaffirms his position that the United States is not concerned with the doing of assessment work, and contends that the Commissioner's decision of June 3, 1930, did not give him the chance to present orally or by written brief his arguments in support of such position; that it was made without giving him his day in court, and that the decision purporting to hold his answer insufficient, without affording him an opportunity to be heard, is a nullity.

In the opinion in *Wilbur v. Krushnic* (280 U. S. 306), the Supreme Court, in considering the question, "Did the Leasing Act of 1920 have the effect of extinguishing the right of the locator, under sec-

tion 2324, to save his claim under the original location by resuming work after failure to perform annual assessment labor?" said—

1. The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk v. Meagher*, 104 U. S. 279, 283; *Manuel v. Wulff*, 152 U. S. 505, 510-511; *Elder v. Wood*, 208 U. S. 226, 232; *Bradford v. Morrison*, 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of \$100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever \$500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. *P. Wolenberg et al.*, 29 L. D. 302, 304; *Nielson v. Champagne Mining & M. Co.*, 29 L. D. 491, 493.

It being conceded that the Spad No. 3 "was a valid claim existent on February 25, 1920," the only question is whether, within the terms of the excepting clause of section 37, the claim was "thereafter maintained in compliance with the laws under which initiated." These words are plain and explicit, and we have only to expound them according to their obvious and natural sense.

It is not doubted that a claim initiated under section 2324, R. S., could be maintained by the performance of annual assessment work of the value of \$100; and we think it is no less clear that after failure to do assessment work the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; for as this court said in *Belk v. Meagher*, *supra*, at page 283, "His rights after resumption were precisely what they would have been if no default [that is, no default in the doing of assessment labor] had occurred." Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is "maintained" no less than it is by performance of the annual assessment labor. Such resumption does not restore a lost estate—see *Knutson v. Freðlund*, 56 Wash. 634, 639; it preserves an existing estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.

Nothing is perceived in the language of the court above quoted, or elsewhere in the opinion from which it is taken, that warrants the conclusion that the United States has no concern, *subsequent* to the passage of the Leasing Act, with the performance of annual assessment work and may not take advantage of defaults in its performance that have not been cured by a resumption of work. To the contrary, the court appears to have expressly recognized that a change in the law in this respect was effected by the provisions quoted from section 37 thereof, and that defaults in performance of assessment work not cured by a resumption of work is a valid ground for challenge by the United States to the valid existence of the claim.

Charge No. 2, therefore, appears to be a valid charge, and, if proven, is as much determinative of all rights of the claimant in and to the locations as Charge No. 1. The answer, therefore, which fails to deny the charge, is clearly insufficient to warrant a hearing, and must be taken as an admission of its truth under section 10 of the regulations relating to contests on report by representatives of the General Land Office (44 L. D. 572), equally applicable to those preferred by representatives of the Forest Service, which section provides—

If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charge immaterial, * * * such failure will be taken as an admission of the truth of the charges and will obviate the necessity of the Government submitting evidence in support thereof. * * *

No merit is seen in the contention that the claimant was deprived of his day in court to file briefs and arguments in support of his legal position assailing the materiality of the charge. If the claimant did not choose to support his contention as to the legal insufficiency of the charge by filing briefs and arguments, that omission is attributable solely to his own neglect. Rule No. 70 of Practice (51 L. D. 547, 559) provides:

If brief is not filed before a case is reached in its order for examination, the argument will be considered closed, and no further argument or motion of any kind will be entertained, except upon application and upon good cause appearing to the commissioner therefor.

While no error is perceived in the action of the Commissioner, on account of the importance of the question raised by the claimant's contention, which advances a theory of law counter to the declared policy which the department is pursuing in regard to oil shale claims, in default as to assessment work and not cured by resumption, opportunity will be given before action is directed in the case to file, within 30 days from receipt of this decision, such written brief and arguments as claimant's attorneys may desire to submit, or apply for

oral argument of the question before the department, or both, at their option. If oral argument is desired, claimant's attorneys are requested to name a date when it will be convenient for them to present their argument.

FRANCIS D. WEAVER (ON REHEARING)

Decided December 18, 1930

MINING CLAIM—OIL SHALE LANDS—DEFAULT IN ASSESSMENT WORK—GOVERNMENT PROCEEDINGS—ANSWER—FORFEITURE.

Where the claimant of an oil shale placer in answer to adverse charges against his claim fails to deny the charge of failure to do assessment work and that work was not thereafter resumed, and elects to stand solely on his answer denying other charges on the ground that the charge relating to mere performance of assessment work is unauthorized by law, the charge will be taken as established and the claim held void.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *The Federal Shale Oil Company* (53 I. D. 213), followed and applied.

EDWARDS, *Assistant Secretary:*

As fully and more particularly set forth in departmental decision of August 23, 1930 (53 I. D. 175), the Forest Service filed a protest against certain oil shale claims of Francis D. Weaver situated in T. 7 S., R. 94 W., 6th P. M., Colorado, charging lack of discovery of mineral and failure to perform assessment work for the years 1927, 1928, and 1929, and that the work had not been resumed. Claimant responded with denial of the charge of discovery, but as to default in assessment work did not deny it, alleging in effect as excuse that the United States was not concerned with its performance, and applied for a hearing. Upon consideration of this response the Commissioner allowed claimant 30 days to deny the charge as to nonperformance of assessment work, stating that upon failure to comply with that requirement the charge would be taken as established, and that such establishment would render the claims invalid. Thereafter claimant filed what is termed an "Election to Stand on Answer," reiterating his contentions as to the invalidity of the charge as to the nonperformance of assessment work, and setting up certain other objections as to procedure taken by the Commissioner. The case was submitted to the department for consideration.

By the decision above mentioned of August 23, 1930, the department disposed of all objections of the claimant except as to the validity of the charge as to assessment work, and while stating it perceived no error in the preferment of the charges, assigning at some length the reasons for its conclusion, acceded to the claimant's request to hear the matter further on further argument, oral and

written, before finally determining the matter. Subsequently claimant waived his privilege to present further argument but requested that decision in the case be withheld until the appeal of the Federal Shale Oil Company was considered, which presented the same question as to the right of the Government to challenge an oil shale claim for failure to perform assessment work.

By decision of November 11, 1930, for reason therein stated, the department overruled the demurrer of the The Federal Shale Oil Company in the proceedings against it (53 I. D. 213), sustaining the Commissioner's action in requiring answer to a charge therein that the assessment work had not been performed for the year ending July 1, 1929, and had not since been resumed on the oil shale claim involved therein.

The conclusions therein expressed govern in this case, and in accordance therewith, the Commissioner's action is affirmed, and as claimant has elected to stand on his answer, the oil shale placer claims involved in the contest, to wit, Ideal Nos. 2, 3, 4, 5, 11 and 12 covering lands in Secs. 30, 31 and 32, T. 7 S., R. 94 W., 6th P. M., Colorado, are declared void.

Affirmed.

ARTHUR E. MOULTON

Decided August 28, 1930

HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—ADDITIONAL—RULES AND REGULATIONS.

A regulation to the effect that one who had made a stock-raising homestead entry, whether original or additional, is not qualified to make an additional entry under section 3 of the stock-raising homestead act, even though he had not obtained the maximum acreage allowed by the stock-raising homestead law, is not authorized by that act and will no longer be applied.

EDWARDS, Assistant Secretary:

This is an appeal by Arthur E. Moulton from a decision of the Commissioner of the General Land Office dated March 27, 1930, holding for cancellation his entry under the stock-raising homestead act embracing SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 34 and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 35, T. 6 S., R. 54 E., M. M., Montana (200 acres).

The decision was based on the provisions of paragraph 6 of the regulations of January 2, 1925, Circular No. 523, (51 L. D. 1), reading as follows:

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

It appears that Moulton made entry under the enlarged homestead act for S $\frac{1}{2}$ N $\frac{1}{2}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 35, said township, and an addi-

tional entry under section 4 of the stock-raising homestead act for $N\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 35. Both entries were perfected. The entry in question was made November 7, 1929, and in his application Moulton stated that he had given his son a deed for the original entry, "reserving a life lease."

In the decision appealed from it was held that as the entryman did not own and reside on his original entry, the entry in question is not governed by section 5 of the stock-raising homestead act, and must therefore be canceled, as the entryman was not qualified to make an additional entry under section 3 of the act.

The first proviso to said section 3, as amended by the act of October 25, 1918 (40 Stat. 1016), reads as follows:

That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this Act, which, together with the former entry, shall not exceed six hundred and forty acres, subject to the requirements of law as to residence and improvements, except that no residence shall be required on such additional entry if the entryman owns and is residing on his entry.

Upon mature consideration the department concludes that there is no proper foundation for the paragraph of the regulations above quoted, and it will no longer be followed.

The entry will remain intact subject to compliance with the law as to residence and improvements, the decision appealed from being
Reversed.

UNITED STATES v. McABEE¹

Decided September 25, 1930

HOMESTEAD ENTRY—AGREEMENT TO PURCHASE—DEEDS—PROPRIETOR.

One is a proprietor within the meaning of section 2289, Revised Statutes, as amended, who enters into an agreement to purchase land and takes possession, notwithstanding that the contract included among the tracts a certain tract that could not be conveyed, if he accepts a deed for the tracts that were subject to purchase under the agreement. *Alfred R. Thomas* (46 L. D. 290).

EDWARDS, *Assistant Secretary*:

The appeal of Samuel T. McAbee from a decision of the Commissioner of the General Land Office dated April 19, 1930, presents for determination the question whether he was the proprietor of more than 160 acres of land in the United States when he made entry under section 2289, Revised Statutes, for lots 15 and 16 of Sec. 3 and lots 13 and 20 of Sec. 2, T. 12 N., R. 14 W., M. D. M., California.

¹ See decision on motion for rehearing, p. 183.

The entry was made on November 18, 1921, pursuant to an application filed October 19, 1921, which application was amended November 18, 1921. On the latter date he applied to make entry under section 4 of the stock-raising homestead act for lot 4 of Sec. 4 and lot 8 of Sec. 3, said township, which application was allowed on January 22, 1923.

On February 24, 1927, entryman submitted final proof on the combined entries. Final certificate was not issued.

Under date of May 14, 1928, the Commissioner of the General Land Office instituted proceedings against the entries, charging insufficient residence and that entryman was not qualified to make a homestead entry on October 19, 1921, nor at any date since, for the reason that he was on said date, and has been ever since, the proprietor of more than 160 acres of land in the United States.

The charges were denied and a hearing was had. By decision dated August 29, 1929, the register of the district land office held that the entryman had substantially complied with the law as to residence, but that he was not qualified to make the entries. The decision appealed from affirmed the decision of the register.

It appears that on May 11, 1921, entryman entered into an agreement with Nicholas B. Campbell to purchase lots 4, 5, 6, 7, 8, 12, 13 and 14 of Sec. 3, lots 1, 2, 3, 5, 6, 7 and 8 of Sec. 4, lots 1, 8 and 9 of Sec. 5, T. 12 N., R. 14 W., M. D. M., SE $\frac{1}{4}$ Sec. 31, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 32, T. 13 N., R. 14 W., M. D. M., together with about 400 head of sheep which were on the land, for \$11,000. McAbee went into possession of the land at once, and on December 7, 1921, there was recorded a deed whereby said Campbell conveyed to McAbee all the land described in the agreement except lot 8 of said Sec. 3, as to which it developed Campbell did not have title. The deed had been executed May 11, 1921, and was delivered a day or two before it was recorded.

The department has repeatedly held that one is a "proprietor" within the meaning of section 2289, Revised Statutes, as amended, if he has complete valid right to acquire legal title, or if, without that complete right, he has a valid and enforceable right to acquire legal title, subject to defeat only by his own act or default. See *Alfred R. Thomas* (46 L. D. 290) and cases there cited.

The execution of the contract on May 11, 1921, pursuant to which McAbee went into possession of more than 160 acres of land, made him the proprietor of the land within the meaning of the statute, and he was not thereafter qualified to make a homestead entry. The fact that the contract of sale described one legal subdivision as to which Campbell did not have title did not affect the force and effect of the contract as to the remainder of the land, McAbee having elected to proceed thereunder as to all save one legal subdivision.

Counsel for appellant has presented nothing in his argument on appeal which convinces the department that his client does not come within the well-established meaning of the word "proprietor" as used in the statute.

The decision appealed from is

Affirmed.

UNITED STATES v. McABEE (ON REHEARING)

Decided December 4, 1930

HOMESTEAD ENTRY—AGREEMENT TO PURCHASE—EQUITABLE TITLE—PROPRIETOR—WORDS AND PHRASES.

The word "proprietor" as that term is used in section 2289, Revised Statutes, simply means an owner of land, that is, one who has a fee simple title or who may acquire such title by carrying out his own obligations or by enforcing a vested right. *Siestreem v. Korn* (43 L. D. 200).

EDWARDS, *Assistant Secretary*:

A motion has been presented by Sam T. McAbee for rehearing of the decision of the department of September 25, 1930 (53 I. D. 181), which affirmed a decision of the General Land Office, dated April 19, 1930, holding for cancellation his original and additional homestead entries.

The admissions by claimant of all facts relative to contract of sale and its subsequent consummation made it unnecessary to adduce proof of ownership in vendor of the property at date of contract of sale.

A person is "owner" of property although he holds equitable title only. *Finkbohner v. Glens Falls Insurance Company* (Cal.) (92 Pac. 318). Thus one who is in possession of land under a contract for conveyance of fee on payment of purchase money, is equitable owner in fee. *Imperial Fire Insurance Company v. Dunham* (Penna.) (12 Atl. 668); Section 55, title Property, 22 R. C. L. 76.

In the case of *Siestreem v. Korn* (43 L. D. 200), the department held—

The word proprietor, as employed in this statute, (Section 2289, Revised Statutes), 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. See *Gourley v. Countryman* (27 L. D. 702); *Smith v. Longpre* (32 L. D. 226). [Parenthetical matter supplied.]

No error in the departmental decision complained of has been pointed out and none appears.

The motion is

Denied.

RAINBOW PINNACLE COAL COMPANY AND PACIFIC COAL COMPANY

Decided October 3, 1930

COAL LANDS—LEASE—ASSIGNMENT—SECRETARY OF THE INTERIOR.

The authority of the Secretary to recognize and approve assignments or transfers of coal leases or interests therein is not limited by the leasing act to those effected by acts of the parties, but it extends to those effected also by operation of law.

COAL LANDS—LEASE—ASSIGNMENT—ASSIGNEE—SECRETARY OF THE INTERIOR.

It is within the province of the Secretary, before approving an assignment of a lease, to decide whether it has been satisfactorily shown that the right, title and interest in the lease have been transferred to the one claiming under the assignment, and, if so, whether the assignee is competent and qualified to take and hold the lease under the leasing act and the regulations issued thereunder.

COAL LAND—LEASE—ASSIGNMENT—MORTGAGE—SECRETARY OF THE INTERIOR.

While the validity of an assignment of a coal lease is dependent upon the approval of the assignment by the Secretary of the Interior, yet the binding force and effect of a pledge of a lease as security for a debt as between the parties is not contingent upon its prior authorization by that official.

EDWARDS, *Assistant Secretary:*

The Rainbow Pinnacle Coal Company has appealed from a decision of the Commissioner of the General Land Office denying its application to be substituted as assignee of coal lease, Denver 038163, now held by the Pacific Coal Company.

It is alleged in support of the application that the Pacific Coal Company of which Andrew Walker was and is president became financially involved and borrowed \$1100 from the six persons who comprise the sole personnel and only stockholders of the Rainbow Pinnacle Coal Company and who were stockholders in the Pacific Coal Company when the loan was made; that Walker as president of the latter executed a collateral note payable to W. W. Byrd, one of the six persons making the loan, for \$1100, pledging the coal lease as security for the payment of the loan, which was the sole inducement for the extension of credit to the Pacific Coal Company; that the note, being unpaid at maturity, foreclosure of the note was made in strict accordance with the laws of the State of Colorado, to which Walker interposed no objection; that Byrd, one of the incorporators of the Rainbow Pinnacle Coal Company, has paid the annual rental due the Government, and that Walker, subsequent to the Commissioner's decision denying the application, has sent notice of further rental due to Byrd with request that he pay it.

Applicant has filed as exhibits its certificate of incorporation, photostatic copies of the collateral note, notice by advertisement of the public sale of the collateral, affidavit of publication of the notice

and of an instrument executed by one Creamer as crier of sale reciting, among other things, that at the time and place advertised, as attorney for W. W. Byrd, he sold to the latter the lands described in the instrument, there being no other bidders at the sale. The lands so described include the lands embraced in the coal lease, but no mention is made of the coal lease, nor are formal words of conveyance or assignment of an interest in real property used therein.

The collateral note is dated May 15, 1929, is made payable in 90 days to Byrd and purports to be signed by Andrew Walker as president and by another of illegible name as secretary of the Pacific Coal Company. It provides at maturity for the sale of the collateral, the coal lease, at public or private sale by the legal holder or owner of the note, his agents, etc., without notice and without demand of payment, and that the legal holder or owner of the note may become the purchaser of the collateral.

Walker, as president of the Pacific Coal Company and professing to represent 75 per cent of its capital stock, protests against the application. He sets forth that there are three directors of the said company and on March 5, 1929, two of them, Stanton and Hemler, came to the office of the company and informed him they were going to have a meeting of the board of directors and that the minutes of such meeting read as follows:

A meeting of the board of directors of the Pacific Coal Company was held at the office of the company, 415 Quincy Building, Denver, Colorado, at 2 p. m. March 5, 1929. Present, Andrew Walker, W. Stanton, W. W. Byrd. It was proposed by S. F. Hemler to turn over the lease of the Pacific Coal Company to W. W. Byrd—viz—the SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ of section 4, N $\frac{1}{2}$ NE $\frac{1}{4}$ of section 9, all in township 6 N., Range 86 W., 6 P. M., Colorado, containing 320 acres as security for money loaned the company, seconded by W. Stanton.

Walker further avers that he protested against the action taken at the meeting for the reason that the lease could not be assigned or sublet without the written consent of the lessor and that he thereafter filed with the secretary of the company a written protest, the contents of which he purports to set out, and which in substance states that the meeting was irregular, was not called by the president and secretary as provided in the by-laws; that the board of directors have no authority to "dissipate" the assets under the by-laws, except with the consent of the holders of at least three-fourths of the capital stock outstanding of record, at a regular or special meeting called for the purpose; that the deliberations of the board were in violation of statute, the charter and by-laws and that he did not sanction the adoption of the resolution above quoted; that the directors mentioned resigned September 29, 1929, and thereafter formed the Rainbow Pinnacle Coal Company to take over the lease

without informing the majority of the stockholders of the Pacific Coal Company.

The Commissioner's reasons for denying the application are stated as follows:

No formal assignment from the Pacific Coal Company to the Rainbow Pinnacle Coal Company has been furnished. Thus, in effect, the application is not an application for an assignment, but one for substitution of the Rainbow Pinnacle Coal Company as lessee in place of the Pacific Coal Company.

The only method by which the department can eliminate involuntarily is under paragraph 6 (*d*), of the lease form, and as a sufficient showing is not presented to warrant adverse action under paragraph 6 (*d*), the application of the Pinnacle Coal Company filed March 25, 1930, is hereby denied subject to the usual right of appeal.

In so far as the Commissioner's statements imply that the authority of the department to recognize and approve assignments or transfers of a coal lease or interests therein is limited to those effected by the act of the parties and does not extend to those effected by operation of law, they announce a restriction of power that the leasing act does not impose. Paragraph 6 (*d*) of the lease which provides for forfeiture proceedings in the event the terms of the lease are not kept does not support the proposition announced by the Commissioner and does not apply. Furthermore, if the law was as he states, interest in such leases would be absolutely exempt from sale by judicial process and incapable of being applied in satisfaction of the debts of the owner, thereby, in many instances, seriously crippling the holder of the lease from financing his operations. The transaction disclosed, however, was not an involuntary transfer or assignment of the lease interests. A pledge or mortgage and a power given to sell the property pledged for nonpayment of debt is as much voluntary as an absolute conveyance.

The pertinent inquiry here is, has it been satisfactorily shown that the right, title and interest in the lease has been transferred to the applicant company, and if so, is it otherwise competent and qualified to take and hold the lease under the general leasing act and regulations thereunder, a question within the province of the department to decide. *Taylor and McIntosh v. Pruitt* (51 L. D. 645).

Considering now Walker's grounds of protest, it may be observed that there is no merit in the suggestion that the pledge of the coal lease as security for debt without previous authorization of the department did not have force and effect as between the parties. While the power of the department to withhold approval is undoubted, and assignments without such approval effects no change in the leaseholder's relation to the Government, and the refusal to approve may result in the assignee losing the fruits of his transaction, yet if in this case, the pledge of the lease was made by the Pacific Coal Company, a court of equity would hold it to the obligations so assumed.

See *Isaacs v. De Hon* (11 Fed. (2d) 943), *Aronow v. Hill* (Mont.) (286 Pac. 140). Nor is it perceived how the pledge of a coal lease as security for a loan to the holder in financial straits would, without the disclosure of other facts and circumstances, be a dissipation of assets of the company, or why nonconcurrence of Walker as one member of the board of three directors rendered a resolution of the board invalid; nor, why, if Walker as he alleges, in effect believed the action of the board *ultra vires*, he subsequently executed the collateral note for the corporation and thus carried into effect the challenged resolution. As to the allegation that the action of the board was invalid because the meeting was irregularly called, the department has nothing before it sufficient to express a view.

Aside from Walker's protest the department is not satisfied that the instrument reciting the sale to Byrd at public auction of certain of the lands included in the lease is sufficient in form to divest the Pacific Coal Company of its title to the lease, or puts that company out of power to make further disposition of it, but assuming that it is sufficient to show an assignment to Byrd, there is no instrument furnished transferring the interest so acquired to the applicant company. In addition, Walker's protest raises questions as to whether or not the pledge of the lessee was in law the act of the Pacific Coal Company, a matter that more properly should be settled by the local courts. If the applicant company is equitably the owner of the lease, it would seem that it could compel a formal assignment from the Pacific Coal Company.

In the absence of more certain evidence of its rights to recognition as assignee, but without prejudice to the presentation of a more satisfactory showing, the Commissioner's decision is affirmed.

TAXATION OF SAC AND FOX INDIAN LANDS IN THE STATE OF IOWA

Opinion, October 8, 1930

SAC AND FOX INDIAN LANDS—TAXATION.

A reservation in a legislative act of the State of Iowa which ceded jurisdiction over the lands of the Sac and Fox Indians in that State to the United States, reserving the right of taxation, became binding and enforceable upon its acceptance by the United States, and the right of the State to tax those lands is governed by the legislative compact so entered into.

FINNEY, *Solicitor*:

At the suggestion of the Commissioner of Indian Affairs you [Secretary of the Interior] have requested my opinion as to whether the lands hereinafter referred to constituting what is known as the

Sac and Fox Indian Reservation in the State of Iowa, are subject to taxation by the State.

By the treaty of October 11, 1842 (7 Stat. 596), the Sac and Fox Indians ceded to the United States all their lands west of the Mississippi River, the United States agreeing to assign them as a reservation and permanent place of residence, a tract of land on the Missouri River or some of its tributaries, to which the Indians were to remove within three years, the Government also agreeing to pay the Indians certain annuities and furnish certain supplies. In conformity with this treaty, a reservation was set apart for the Indians within what are now the boundaries of the State of Kansas, and the tribes with the exception of some individuals removed thereto. By the treaty of October 1, 1859 (15 Stat. 467), provision was made, among others, for allotments of land in severalty to the members of the tribes. Some of the Indians, however, headed by Chief Maw-mew-wah-ne-kah were bitterly opposed to receiving lands in severalty and refused to be enrolled for that purpose and it was charged that Chief Maw-mew-wah-ne-kah used his influence to impede and prevent execution of the treaty. For this conduct he was deposed from his chieftainship and thereupon with some five or six lodges who were induced to follow him he left his people in Kansas and returned to Iowa where he was subsequently joined by other members of the tribe and by straggling Pottawatomies and Winnebagoes. They established themselves in Tama County, where the nucleus of their present reservation was formed by the purchase from white settlers, with the proceeds derived from the sale of a band of ponies, some 419 acres of land.

From the time they left Kansas up to 1867 they received no aid from the Federal Government and all efforts of the Government to have them return to their people, even the withholding of annuities otherwise due them, were without avail. Attention, however, having been called to the destitute condition of these Indians, Congress, by an item in the Indian appropriation act of March 2, 1867 (14 Stat. 507), provided for the payment of annuities to them so long as they were peaceful and had the assent of the Government of Iowa to remain in that State. Such assent of the State having previously been given by an act of the General Assembly in 1856, a special agent was appointed to attend to the band and pay them their annuities, and at their request \$2000 of their first annuity money was used to purchase a tract of 99 acres of privately owned land in the State. Since then additional purchases of land amounting in the aggregate to some 3000 acres have from time to time been made in the same manner. In the acquisition of these lands, it was apparently the desire of the Indians to establish a tribal or communal title and to that end the legal title was conveyed to the Governor of the State of

Iowa in trust for the Sac and Fox Indians in Tama County, Iowa, except in a few instances where the trustee selected to hold the legal title was the United States Indian agent then in charge of these Indians.

Such was the condition and status of the lands here involved in 1896 when the legislature of the State of Iowa was induced to pass an act ceding jurisdiction to the Federal Government (Act 26th, General Assembly, Chapter 110, Page 114). The provisions of this act, being material to the question at hand, are reproduced below in full:

SECTION 1. That, except as hereinafter provided, exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them, and of all lands now or hereafter owned by or held in trust for them as a tribe, be and the same is hereby tendered to the United States, and that, as soon as the United States shall accept and assume such jurisdiction, all such jurisdiction on the part of the State of Iowa shall cease.

SEC. 2. Consent is hereby given to the United States to purchase any land in Tama county to be used for and in connection with any school or schools to be established and managed by federal authority for the education of said Indians.

SEC. 3. Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act, the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state, or to prevent the establishment and maintenance of highways and the exercise of the right of eminent domain under the laws of this state over lands now or hereafter owned by or held in trust for said Indians; or *to prevent the taxation of said lands for state, county, bridge, county road, and district road purposes, and such other purposes as the general assembly may from time to time by special statute provide.* (Italics supplied.)

By a clause inserted in the Indian appropriation act of June 10, 1896. (29 Stat. 321, 331), Congress accepted the cession of State jurisdiction in the following language:

That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, *as tendered to the United States by the act of the legislature of said State passed on the stateenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained;* and the United States Indian agent of the Sac and Fox Agency, Iowa, and the governor of the State of Iowa, respectively, are hereby authorized to transfer by deed of conveyance, for the use and benefit of said Indians, the legal title held by them in trust, respectively, and the trusteeship of the lands of the Sac and Fox Indians of Tama County, Iowa, to the Secretary of the Interior and his successors in office. (Italics supplied.)

In conformity with the foregoing legislative authority, the legal title to the lands owned by these Indians was transferred to the

Secretary of the Interior in trust for the Indians and since then some 300 acres additional have been purchased for their benefit under authority of the act of April 30, 1908 (35 Stat. 70, 80), the legal title to which was likewise conveyed to the Secretary of the Interior in trust for the Indians.

The right of the State to tax the lands has been exercised since the original acquisition by the Indians, such taxes being paid at first from the proceeds derived from leasing some of the lands and later, after the cession of State jurisdiction, from appropriations made by Congress from tribal funds for the support and civilization of these Indians. However, by item contained in the act of March 4, 1929 (45 Stat. 1562, 1583), it was provided that no part of the appropriation for these Indians "shall be available for the payment of taxes on any lands held in trust by the United States for the benefit of said Indians." A similar provision is contained in the act of May 14, 1930 (46 Stat. 279, 301).

When we come to consider the question of the right of the State to tax these lands it is well to bear in mind that they were part of the State of Iowa upon her admission into the Union in 1845. The jurisdiction of the State thereover was then full and complete. Purchase of the lands by the Indians clearly did not divest the State of that jurisdiction and it continued unimpaired until the cession of 1896. By that cession the right of the State then existing to tax the lands was reserved and that reservation was solemnly accepted by the United States in the enactment of June 10, 1896, *supra*. This seemingly should have settled the matter, but now that the tribal funds are no longer available for the payment of taxes, it is urged that the cession operated to vest in the United States exclusive jurisdiction over the lands and that the attempted reservation of the right to tax is repugnant to and inconsistent with that result and therefore should be rejected. The case of *Peters v. Malin* (111 Fed. 244), cited by the Commissioner of Indian Affairs dealt with the criminal and civil jurisdiction of the State of Iowa over these Indians and their lands and to some extent lends support to the view advanced. But that case can not be regarded as controlling for the reason that the matter of taxation was neither involved nor discussed. It has been repeatedly held that where taxable lands are purchased by or for the benefit of the Indians even with restricted funds held in trust by the Federal Government, the right of the State to tax the same continues unimpaired irrespective of the fact that the title was conveyed by deed containing restrictions against alienation or incumbrance. *Shaw v. Oil Corporation* (276 U. S. 575); *McCurdy v. United States* (246 U. S. 263); *United States v. Mummert* (15 Fed. (2d) 926); *Work v. Mummert* (29 Fed. (2d) 393). Of course,

where the United States itself acquires the title to lands for the purposes provided for in Article 1, Section 8, of the Federal Constitution, such lands being purchased with the consent of the State legislature of the State in which located, Federal jurisdiction according to the express declaration of the Constitution is exclusive of all State authority and any attempted reservation by the State repugnant thereto in ceding jurisdiction over such lands would doubtless be ineffective. See in this connection *Surplus Trading Company v. Cook* (281 U. S. 647, 657). But we are not here dealing with lands purchased or acquired by the United States under the constitutional provision referred to or any other of which I am aware. The lands were purchased by the Indians with their own funds and even now title is not in the United States but in the Secretary of the Interior in trust for the Indians. In such a case, the rights of the State and Federal Government in the matter of transfer and jurisdiction are, I think, controlled by the decision of the Supreme Court of the United States in *Fort Leavenworth Railroad Co. v. Lowe* (114 U. S. 525), the leading case upon this subject. The question there was whether a railroad running into the military reservation of Fort Leavenworth was subject to taxation by the State of Kansas. The United States had had exclusive jurisdiction over the land in question from 1803 by the cession of France until the admission of Kansas into the Union. For many years before such admission the lands had been reserved from sale by the United States for military purposes and occupied as a military post. Until the admission of Kansas, the governmental jurisdiction of the United States was complete but when Kansas came into the Union on an equal footing with the original States, the previous military reservation was not excepted from the succeeding jurisdiction of the new State. In February, 1875, however, Kansas ceded its jurisdiction to the United States but saved to itself "the right to tax railroad, bridge, and other corporations, their franchises and property, on the ceded reservation." The court held among other things that when a formal cession was made by the State to the United States, after the original purchase of the ownership of land had been made, the State and the Government of the United States could frame the cession and acceptance of governmental jurisdiction so as to divide the jurisdiction between the two as the parties might determine, provided only they save enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction. The court therefore held that the saving clause in the language of the cession requiring that the railroad should pay taxes was not invalid but was in accord with the power of both parties and might be enforced. See also *Palmer v. Barrett* (162 U. S. 399, 404), wherein the Supreme Court, upholding

the validity of a somewhat similar reservation in an act of the State of New York ceding jurisdiction to the Federal Government over certain lands in that State said—

* * * In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for governmental purposes of the United States therein specified. Assuming, without deciding, that if the cession of jurisdiction to the United States had been free from condition or limitation, the land should be treated and considered as within the sole jurisdiction of the United States, it is clear that under the circumstances here existing, in view of the reservation made by the State of New York in the act ceding jurisdiction, the exclusive authority of the United States over the land covered by the lease was at least suspended whilst the lease remained in force.

In view of the manner in which title to the lands under consideration was acquired and is now held and upon authority of the decisions just cited, I am of the opinion that the cession of jurisdiction by the State of Iowa, saving to itself the right of taxation became valid and binding when accepted by the United States and that the acts of cession and acceptance are determinative of the right of the State to tax the lands in controversy.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

HEIRS OF BURROUGHS v. LEEA

Decided October 21, 1930.

CONTEST—CONTESTANT—JOINDER OF PARTIES—HEIRS—PREFERENCE RIGHT.

Where a contestant dies before the termination of a contest one of the heirs of the deceased contestant may continue the prosecution of the contest without joinder of the other heirs, but whatever rights may accrue as a result of the contest will inure to the benefit of all the heirs.

EDWARDS, *Assistant Secretary.*

Appeal has been filed on behalf of Nettie Burroughs Hansen, daughter, and one of the heirs of Jesse B. Burroughs, deceased, from a decision of the Commissioner of the General Land Office dated May 27, 1930, dismissing Burroughs's contest against the stock-raising homestead entry of Lawrence E. Leea.

The material facts in the matter, as shown by the record, are as follows: October 5, 1926, Leea made stock-raising homestead entry for lot 2, SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 30, T. 2 S., R. 2 W., NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 25, S $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 26, N $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$

SW $\frac{1}{4}$ Sec. 23, T. 2 S., R. 3 W., S. L. M., Utah, containing 640.64 acres. June 25, 1929, Jesse B. Burroughs filed affidavit of contest alleging—

That said entryman has failed to build a house or other habitable structure or establish a residence or maintain it on said land, nor has he made any improvements whatever thereon, but permits his father-in-law to lease the land to stockmen for revenue.

Answer was filed denying the charges, and the case was set for hearing before the register. Before the matter came on for hearing Burroughs died, his death occurring June 28, 1929, at Salt Lake City. Continuance was granted by the register to September 30, 1929, to enable the attorney who appeared for Burroughs to show authority from his heirs to continue the prosecution of the contest. When the case was reached for hearing said attorney filed authority from Mrs. Nettie Burroughs Hansen to represent her in the prosecution of the case. No appearance was made by the other heirs, shown by affidavit executed by Mrs. Hansen November 21, 1929, to be Glen Burroughs, a son, of Austin, Minnesota, and Mrs. S. T. Johannessen, a married daughter, of Idaho Falls, Idaho. The register ruled, in effect, that all the heirs were necessary parties; that one heir alone had no right to continue the prosecution of the contest, and that unless appearance was made for all the heirs the contest would be dismissed. Counsel took exception to that ruling, and refused to state that he appeared for the other heirs. The dismissal of the contest resulted. The Commissioner affirmed the action of the register and from that decision Mrs. Hansen has appealed.

The department is not in accord with the action of the Commissioner. The heirs of a deceased contestant who dies before the termination of a contest are united in interest and have a joint right to continue the prosecution of the contest. No valid reason is seen, however, why all the heirs should be required to appear as parties plaintiff. If the contest terminates successfully one of the heirs may make entry in exercise of the preference right for the benefit of all the heirs, and the requirements of the law may be fulfilled by one for the benefit of all. *Heirs of Robert M. Averett* (40 L. D. 608); *Heirs of Jephth H. Brasher* (52 L. D. 79). Under the circumstances there would seem to be no objection to allowing one of the heirs to continue the prosecution of the contest for the benefit of all. Obviously the rights and interests of the co-heirs can not in any manner be prejudiced whatever may be the result of the proceeding. Moreover, under the Utah Civil Code of Procedure (section 6512), all persons holding as tenants in common or as joint tenants may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Under a similar statute in California it has been ruled that one of several co-distributees of an estate of a decedent may maintain an action in ejectment (*Moulton v. McDermott et al.*, 22 Pac. 296).

For the reasons stated the action of the Commissioner is reversed, and Mrs. Hansen will be allowed to proceed with the contest.

Reversed.

FRANK ST. CLAIR (ON PETITION)

Decided October 24, 1930

ALASKAN NATIVES—ALLOTMENT—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

The Secretary of the Interior has the discretionary authority to allow an allotment under the act of May 17, 1906, to an Alaskan native for any area of nonmineral land not exceeding 160 acres as may be sufficient for the needs of such native.

PRIOR DEPARTMENTAL DECISION—MODIFIED.

Decision of April 13, 1929 (52 L. D. 597), modified.

EDWARDS, *Assistant Secretary*:

By decision of April 13, 1929 (52 L. D. 597), the department discussed a decision of the Commissioner of the General Land Office on the application of Frank St. Clair, a native-born Indian of Alaska, under the act of May 17, 1906 (34 Stat. 197), to have allotted to him as head of a family an unsurveyed tract of land containing 160 acres on the south side of Berg Bay, a tributary of Glacier Bay, Icy Straits, Alaska, and held that it was in accord with the finding of the General Land Office that the Indian's use and occupancy of the land could fairly be regarded as reasonable, but overruled the proposed reduction of the area of the land from 160 acres to 9.38 acres.

By decision of April 14, 1930, the department denied a petition for the exercise of supervisory authority filed by the solicitor for the Department of Agriculture, but by order of June 11, 1930, that decision was recalled and vacated, and the petitioner was allowed to serve a copy of the petition on St. Clair.

A copy of the petition was served on St. Clair on August 2, 1930, and under date of September 20, 1930, he advised this department that he believed he was entitled to the entire 160 acres.

The land is within the boundaries of the Tongass National Forest, and it is apparent from the record that St. Clair has used it exclusively for fishing purposes at certain times during the year. None of the land has been cultivated, it being covered by a dense growth of cottonwood, spruce, and hemlock timber of small diameter.

A person qualified for an allotment under the act of May 17, 1906, *supra*, may, in the discretion of the Secretary of the Interior, secure

by allotment the nonmineral land occupied by him not exceeding 160 acres. St. Clair has not occupied 160 acres, but only a small space on the shore, in handling his nets or other fishing apparatus.

A mineral examiner of the General Land Office who made an examination and survey on July 15, 1924, concluded his report as follows:

In view of the fact that it has been nine years or more since the applicant filed his application for the allotment, and has not cleared or cultivated any portion of the land or made other improvements tending to show that he intended to make his permanent home thereon, and since the evidence indicates that he has used and intends to use the land as a fishing site, it appears that 10 acres are sufficient for his purpose. Accordingly, a survey, embracing the land upon which the house is located and about 600 feet of water front, with a total net area of 9.36 acres, was made.

The recommendation of the field examiner was approved by the present Governor of Alaska and the district superintendent of the Bureau of Education.

Reconsideration of the matter in the light of the motion for rehearing has led to the conclusion that the 9.36 acres surveyed by the field examiner is sufficient for the needs of St. Clair, and his application will be allowed only to that extent.

The decision of April 13, 1929, is modified to agree with the foregoing.

Pétition allowed.

STATE OF SOUTH DAKOTA v. MADILL ET AL.¹

Decided October 30, 1930

CUSTER STATE PARK—PURCHASE—PATENT—MINING CLAIM—RELOCATION—WITHDRAWAL.

The act of March 3, 1925, authorizing issuance of patent to the State of South Dakota with mineral reservation to the United States to any unpatented lands within the Custer State Park held or claimed under the Federal mining laws under locations made prior thereto upon payment of \$1.25 per acre and proof of transfer to the State or abandonment of the claims did not *ipso facto* withdraw lands so claimed from the operation of the mining laws, including rights of relocation, but did enable the State to initiate a right which would defeat attempts at subsequent location or relocation.

MINING CLAIM—ABANDONMENT—EVIDENCE—WORDS AND PHRASES.

Abandonment is the giving up or relinquishment of property to which a person is entitled with no purpose of again claiming it and without any concern as to who may subsequently take possession, and does not depend upon any rules or regulations or customs of mining, but is largely, if not entirely, a matter of the locator's intention to be determined from his acts and statements together with the circumstances of the particular case.

¹ See decision on motion for rehearing, p. 203.

MINING CLAIM—ASSESSMENT WORK—REVERSION—ABANDONMENT.

Failure to do assessment work, unlike abandonment, does not cause the land to revert to the public domain, and proof merely of such failure does not suffice to establish the right of the State of South Dakota to purchase lands in the Custer State Park under the act of March 3, 1925.

MINING CLAIM—TRANSFER.

A perfected mining location is real estate and the same formalities for conveyancing are necessary to transmit title as in cases of other real property.

MINING CLAIM—BOUNDARIES—MONUMENTS—STATE REGULATIONS.

State requirements as to location of a mining claim and description of each corner with the markings thereon are not repugnant to Federal laws and noncompliance therewith renders the claim invalid.

MINING CLAIM—RELOCATION—ABANDONMENT—STATE LAWS.

A State law requiring one making a relocation of a mining claim to declare that the new location is located as abandoned property is mandatory and the relocation will be void for failure so to state.

CUSTER STATE PARK—MINING CLAIM—LAND DEPARTMENT—JURISDICTION—PURCHASE MONEY—PATENT.

The act of May 12, 1928, granting publicly owned lands in the Custer State Park to the State of South Dakota virtually repealed the act of March 3, 1925, and terminated the jurisdiction of the Land Department to determine controversies between the State and mining claimants as to any asserted mining claims within the grant and to accept purchase money and issue patents on applications unperfected under the latter act at the date of the grant.

EDWARDS, *Assistant Secretary*:

This is an appeal of E. L. Madill *et al.* from a decision of the Commissioner of the General Land Office dated April 9, 1930, affirming the local register in holding invalid certain asserted mining claims of appellants, namely, the Rosebuds Nos. 1 and 2, situated in the SE $\frac{1}{4}$ Sec. 18 and lots 5, 6, and 8, Sec. 19, T. 3 S., R. 6 E., B. H. M., and within the Custer State Park, South Dakota.

On November 5, 1927, the State of South Dakota, through the Custer State Park Board, filed application Pierre 025329 to purchase, under the provisions of the act of March 3, 1925 (43 Stat. 1185, U. S. C. Title 16, Sec. 679), the above-described tracts and others within the Custer State Park. Affidavits accompanied the application, alleging abandonment of mining locations therein. On February 18, 1928, in consequence of a notice of the application served upon Madill, he and his associates filed a protest against the allowance of the application, alleging, in substance, that it was in conflict with the Rosebud Nos. 1 and 2 lodes; that long prior to 1913, Alex Madill and Lou Parrish located the ground now included in the Rosebud Nos. 1 and 2 as the Parrish No. 1 and Parrish No. 2 lodes; that subsequent thereto one, Dan Wise, acquired the right, title and interest of Parrish, and in 1923 E. L. Madill acquired, by purchase, all

the right, title and interest of both Wise and Alex Madill in said Parrish claims; that since said purchase he at all times kept up the assessment work required by law, and that on December 15, 1925, he made "an amended or relocation" of said lodes, changing the names to Rosebud Nos. 1 and 2, respectively, but making no material change in the lines and boundaries of the prior claims, which claims were duly posted and certificates of locations filed and recorded; that in October, 1926, he conveyed an undivided one-half interest to two of the protestants herein, Alberta A. Moody and R. S. Pinkerton, and in January, 1928, he caused a survey of the claims to be made by a competent surveyor, in which survey the boundaries of the claims were not extended, but in some instances the original lines were receded from. It was also alleged in the protest that the land was mineral in character, and had been so adjudged by competent authority, the result of certain assays showing mineral content in the ore being set forth. Protestant applied for a hearing and for a judgment thereupon that the claims were valid as against the application of the State.

The answer of the State filed March 8, 1928, traversed generally the allegations of protest, and specially alleged that the Rosebud claims were not properly located at the date of the filing of its application; that E. L. Madill did not purchase the interests of Alex Madill and Wise in the Parrish claims; that on the contrary he attempted a relocation of the claims and that subsequent to the act of March 3, 1925, *supra*, no new rights under the mining laws could be initiated upon said lands.

In instructions to the register dated July 18, 1928, the Commissioner directed a hearing between the parties to determine the validity of the Rosebud claims as of the date of the filing the State's application to purchase, and placed the burden on the State to overcome the *prima facie* title of the mineral claimants as set forth in the protest, and directed personal service of the proceedings be served on the mineral claimants or the heirs of any that might be dead. Pursuant to such instructions and in accordance with certain stipulations entered into by the parties, hearing was held September 18, 1928, before a designated officer and testimony was adduced by both parties in support of their respective contentions. Upon the consideration of the evidence thus adduced, the Commissioner held in the decision from which this appeal is taken that—

The validity or invalidity of these claims must be determined as of the date the State filed its application to purchase, November 5, 1927. On and prior to that date the evidence, by a clear preponderance, shows that the claims had not been located, staked and worked as required by the U. S. mining laws and the laws of South Dakota (sections 2324 of the Revised Statutes of the United

States and Sections 8728, 8729, 8731 and 8739 of the 1919 Revised Code of South Dakota).

Notwithstanding the work subsequently done the claims are, therefore, held invalid * * *.

The act of March 3, 1925, as codified (U. S. C., Tit. 16, Sec. 679), reads as follows:

The Secretary of the Interior is authorized and directed to issue to the State of South Dakota patents conveying title, but reserving the minerals therein, to any unpatented lands of the United States held or claimed by virtue of locations made prior to March 3, 1925, under the United States general mining laws, within the Custer State Park, not exceeding a total of two thousand acres, upon payment to the United States of \$1.25 per acre therefor, and upon evidence being furnished that all claim, right, title, and interest of such claimants have been transferred to the State or have been abandoned. Patents so issued to the State of South Dakota shall be conditioned upon the lands being used for park purposes, and provide for the reversion of the lands of the United States in the event of failure to so hold and use. The United States reserves all coal, oil, gas, or other minerals in the lands patented under this section with the right, in case any of said patented lands are found by the Secretary of the Interior to be more valuable for the minerals therein than for park purposes, to provide, by special legislation, having due regard for the rights of the State of South Dakota, for the disposition and extraction of the coal, oil, gas, or other minerals therein. The provisions of this section are limited to lands lying within the limits of the Custer State Park, within townships 3 and 4 south, range 6 east, and the east one-third of townships 3 and 4 south, range 5 east, Black Hills meridian. (Mar. 3, 1925, c. 465, 43 Stat. 1185.)

The Custer State Park was created by the State (act of March 12, 1919, chapter 165, Session Laws of South Dakota, 1913, pages 152-3), and did not originate under a grant from the United States. The act creating it authorized the purchase of lands for park purposes by the Custer State Park Board in the same area as is defined in the Congressional act of 1925.

By the Federal act, Congress enabled the State to acquire for park purposes its paramount title to the surface of lands within that area "held or claimed" by virtue of unpatented mining locations made prior to its date, upon furnishing evidence of purchase or abandonment of the title by possession of the mining claimants. This act did not *ipso facto* withdraw lands within such claims from the operation of the mining laws, including the right of relocation upon the abandonment of such claims, but did enable the State to initiate a right, which, if exercised and perfected, would defeat any attempt to originate new rights under the mining law by any subsequent location or relocation. In the absence of purchase the duty was imposed on the State to show abandonment of a mining claim in order to be allowed to exercise its right to purchase the surface title from the United States.

Abandonment is a question of intent. Legally defined it may be said to be the giving up or relinquishment of property to which a person is entitled with no purpose of again claiming it and without any concern as to who may subsequently take possession. It does not depend upon any rules or regulations or customs of mining, but is largely, if not entirely, a matter of the locator's intention, which is to be determined from his acts and statements, together with any circumstances of the particular case. (See title Mines and Minerals, Sec. 291, 40 C. J. 839, 840; Lindley on Mines, Section 643, and cases there cited.) In this it differs from forfeiture under section 2324 of the Revised Statutes, which involves only the question whether the terms of the law as to the doing of annual assessment work has been complied with. (Lindley on Mines, Sec. 643; Costigan on Mining Law, p. 303.) Lapse of time, absence from the ground, or failure to work it for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. (Lindley on Mines, Sec. 644, and cases cited.) It is settled law that upon abandonment of a mining claim the land therein reverts to the public domain. *Farrell v. Lockhart* (210 U. S. 142); 40 C. J. 843. But according to the rule in *Wilbur v. Krushnic* (280 U. S. 306, 317), it must be held that failure to do annual assessment work is of no effect as against the United States. It only subjects the claim to loss by relocation. It would not, therefore, have sufficed for the State in this case, under the act of March 3, 1925, to show merely that there has been a failure to perform annual assessment work, for by such failure the land does not revert to the public domain and become subject to purchase by the State.

Applying the above-stated principles to the facts shown by the record in this case, it is clear that the State did not show that the Parrish Nos. 1 and 2 lodes, the locations made prior to the act of 1925, were ever abandoned. Furthermore, it does not appear that the record title holders of those claims or their heirs, in cases where it is shown that such title holders are dead, were ever personally served with process, such as bind them by any judgment rendered in the matter.

The abstracts of title certified as of February 23, 1928, show that L. E. Parrish, Daniel Wise, and John L. Buckingham located the parish lodes in 1893, and that Wise acquired Buckingham's interest in the Parrish No. 1 in 1896 and his interest in the Parrish No. 2 in 1904. There is no record of any further transfer by instrument in writing of these claims, nor is there any suggestion that the interests of Parrish and Wise were extinguished by the summary process authorized by the mining law, commonly known as "adver-

tising out." The record shows that no attempt at the hearing was made by appellants to establish they were privies in title or interest with the locators of the Parrish lodes. Appellant Madill testified on cross-examination, however, that he and his father Alex Madill acquired their interest therein by doing work upon the claims; that his father turned over his interest to him verbally, and that he acquired the interest of Wise by relocation, that the Parrish claims were never abandoned; that Wise did work on them until 1923 and he did the work in 1923; that Wise moved away and was dead, but he did not know when he died, and after Wise went away he did not intend to go ahead and keep up the work for Wise. The evidence of the State throws no light on the question whether the prior claims were abandoned or were even subject to forfeiture at the time of location of the Rosebud claims, and the perfection thereof, including discovery, is not questioned. There is no competent evidence to show that the appellants, claimants of the Rosebud locations, acquired any interest in the prior locations. The rule is general in every State or Territory subject to the general mining laws that a perfected mining location is treated as real estate and that the same formalities are necessary to transmit the title as in cases of other real property. (Lindley on Mines, Section 642.) Such rule has been recognized by the Supreme Court of South Dakota. (*Reagan et al. v. McKibben*, 11 S. Dak. 270; 76 N. W. 943.)

In the certificates of location of the Rosebud claims, the land is claimed "by right of relocation." There does not seem to be room for doubt from this and from the evidence of Madill that a location was attempted, hostile to the interests of the prior locators, by one a stranger to the prior title, and not one as amendatory of the prior ones for which no authority to make appears. The concurring decisions below involve the finding that the boundaries, relocations as the Rosebud claims, were not marked on the ground as required by the Federal Statutes and as required by State Law (Section 8739, Revised Code of South Dakota) prior to the filing of the State's application. As to marking boundaries, posting notices, recording certificates required by the Federal or State laws, the original locator and relocater are on the same footing. *Wight et al. v. Tabor et al.* (2 L. D. 738, 740); Lindley on Mines, Sec. 408. State regulations as to location and description of each corner with the markings thereon are not repugnant to Federal laws and noncompliance therewith renders the location invalid. *Butte City Water Co. v. Baker* (196 U. S. 119). A large part of the evidence in the case was addressed to the issue whether the relocations were marked on the ground as the Federal and State laws require and appellants assail the findings below that the requirements in this respect were not met prior to inception of the State's application, but a deter-

mination of this question would not seem to be decisive of the legal status of the relocation as the certificate of relocation did not state that the whole or any part of the new location is located as abandoned property. Section 8739, *supra*, of the State Code prescribes that the relocations "must" [italics supplied] so state. Laws of this character have been held to be mandatory, where the locator relied upon the abandonment of a prior location. The Supreme Court upheld such a State regulation of the same import and held it was not repugnant to the spirit or the letter of the mining laws of the United States and affirmed the decision of the Supreme Court of Arizona, holding the relocation void for failure to state the location was made on forfeited and abandoned property. (*Clason v. Matko*, 223 U. S. 646; *Lindley on Mines*, Sec. 408.) While in the case of a mineral entry based upon a relocation of an abandoned claim, the mineral applicant is not required to prove abandonment because it is a matter that can be raised by the original locator in an adverse suit provided for by the mining law (*The Manhattan and San Juan Silver Mining Company*, 2 L. D. 698), nevertheless, as it is a question that the title holders of the Parrish locations, or their privies in interest, could yet raise, it has in the present case a material bearing in determining whether the asserted relocations are shown to have been validly initiated so as to operate as an extinguishment of the rights under the prior locations.

As there is no proof of abandonment of the Parrish locations, to the contrary positive declarations that they were not abandoned, any judgment rendered in the cause would not bind the locators of those claims or their successors in interest. The record does not show valid service of notice upon them in these proceedings. Evidence that a letter containing such notice, addressed to Dan Wise at his last known post office address, and returned by the postmaster marked unclaimed and "deceased," is plainly not sufficient notice. (*Board of Supervisors, Mohave County, Arizona*, 52 L. D. 378.) So had the Commissioner any jurisdiction to render a decision upon the validity of this application at the time it was rendered, a question which now must be considered, the decision merely that the Rosebud locations were invalid was insufficient to establish proof of the abandonment, under the act of March 3, 1925, of the Parrish lodes, being the locations held or claimed by virtue of location made prior to its date.

By letter of June 21, 1928, to the local register, the Commissioner called attention to the act of May 12, 1928 (45 Stat. 501), which reads—

That there be, and is hereby, granted to the State of South Dakota, for public park purposes, the publicly owned lands within the boundaries of the Custer State Park in townships 3 and 4 south, range 6 east, and the east one-

third of townships 3 and 4 south, range 5 east, Black Hills meridian: *Provided*, That in the event of the failure on the part of the State of South Dakota to use the lands hereby granted for public park purposes the title thereto shall revert to the United States, and the Secretary of the Interior is hereby authorized and empowered to determine the facts and to declare such forfeiture and such reversion and to restore said lands to the public domain: *Provided*, That this grant shall not include any land which on the date of the approval of the Act is covered by any existing bona fide right or claim under the laws of the United States, unless and until such right or claim is relinquished or extinguished.

This letter stated, and it is believed correctly, that the act last above quoted virtually repealed the act of March 3, 1925, and under the present act no payment and no patent or other formal conveyance is required, the grant taking effect as of the date of its approval as to all public-owned lands within the limits described therein, subject to reversion of title to the United States on failure by the State to use the land for park purposes, and subject to any *bona fide* right or claim under the laws of the United States.

It appears that thereafter, on September 8, 1928, the State withdrew its application for all the other lands and applied for refund of the purchase money theretofore tendered, except the lands here in question, which it requested be retained. By letter of August 21, 1928, to the attorney for the Custer State Park Board, the Commissioner stated that the State might perfect its application under the former act, if it so desired, as to such lands as it might desire to retain in the application, in which case patent would issue under the act of March 3, 1925, as to such lands as are found to be subject thereto, and the purchase price would be accepted. The reason assigned for this view was that the application was made prior to the grant to the State and the application was in accordance with the law and regulations.

It is true that the rules are settled: (1) that when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the Government holds the legal title in trust for him; (2) that the right to patent once vested is, for most purposes, equivalent to a patent issued, the patent relating back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or disposal, and no change of conditions subsequently occurring can impair or in any manner affect his rights (*Wyoming v. United States*, 255 U. S. 489, 503). But in this case, as stated above, it appears that the proceedings confining the issue of abandonment to the facts

regarding the Rosebud relocations was a misconception of the character of proof that would establish abandonment, therefore, the evidence furnished and established was insufficient and the application incomplete. No right to the lands, therefore, vested in the State. It did not become the owner by purchase, and the application did not serve to except the lands from the grant of May 12, 1928, if publicly owned. If, therefore, the State has any title to the land, it passed by the said grant and not by purchase under the act of 1925. So far as adjudications affecting title are concerned, it is well settled that the functions of the Land Department necessarily cease when title has passed from the Government. *Moore v. Robbins* (96 U. S. 530, 533); *Frasher v. O'Connor* (115 U. S. 102); *State of California v. Boddy* (9 L. D. 636); *Reid v. State of Mississippi* (30 L. D. 230, 235); *Shores v. State of Utah et al.* (52 L. D. 503).

The department has now no authority to accept the purchase price or issue patent for the land, or any further occasion to allow the perfection of the application by additional proof of abandonment, and as no title is being sought by application for mineral patent adverse to the grant, the department has no further occasion to make a determination as to the validity of any asserted mining claims within the tracts mentioned. If the State wishes to remove the cloud on its title under the grant occasioned by the claim of appellants, its remedy is in the courts. The application, therefore, and the proceedings thereunder should be dismissed. The Commissioner's decision is, accordingly

Reversed.

STATE OF SOUTH DAKOTA v. MADILL ET AL. (ON REHEARING)

Decided January 13, 1931

CUSTER STATE PARK—STATE GRANT—MINING CLAIM—PURCHASE.

The granting act of May 12, 1928, governs in determining the rights of the State of South Dakota to lands in the Custer State Park where the application of the State to purchase under the act of March 3, 1925, was perfected by the acquisition of the mining title subsequent to the date of the later act.

CUSTER STATE PARK—STATE GRANT—MINING CLAIM—LAND DEPARTMENT.

The title of the State of South Dakota to lands in the Custer State Park under the granting act of May 12, 1928, attaches if and when the rights of the mining claimants are extinguished, and as between the State and such claimants the Land Department will not concern itself unless and until rights under the mining locations are asserted, as the basis of an application for patent under the mining laws.

EDWARDS, *Assistant Secretary*:

The State of South Dakota, through the Custer State Park Board, has filed a motion for rehearing in the matter of departmental de-

cision of October 30, 1930 (53 I. D. 195), denying its application to purchase under the act of March 3, 1925 (43 Stat. 1185, U. S. C., Title 16, sec. 679), certain lands within the Custer State Park, covered by mining claims asserted by E. L. Madill *et al.*, known as the Rosebud Nos. 1 and 2 claims, situated in SE $\frac{1}{4}$ Sec. 18, and lots 5, 6, and 8, Sec. 19, T. 3 S., R. 6 E., B. H. M.

In the decision complained of, the department held that in view of the grant to the State of all publicly owned lands within the township mentioned and other townships, by the act of May 12, 1928 (45 Stat. 501), it is now without authority to accept the purchase price or issue patent for the land under the act of March 3, 1925, *supra*, and that there is no further occasion to allow the perfection of the State's application under said act by additional proof.

The State, however, submits additional evidence purporting to show that it has acquired the mining title and contends that the department's holding was in error and insists that it is entitled to patent under its application in accordance with the provisions of the act of March 3, 1925, *supra*.

The act of March 3, 1925, reserves to the United States (U. S. C., Title 16, Sec. 679)—

all coal, oil, gas, or other minerals in the lands patented under this section with the right, in case any of said patented lands are found by the Secretary of the Interior to be more valuable for the minerals therein than for park purposes, to provide, by special legislation, having due regard for the rights of the State of South Dakota, for the disposition and extraction of the coal, oil, gas, or other minerals therein.

The act of May 12, 1928, grants the publicly owned lands within the boundaries described therein to the State without reservation, but with a proviso—

that this grant shall not include any land which on the date of the approval of the act is covered by any existing *bona fide* right or claim under the laws of the United States, unless and until such right or claim is relinquished or extinguished.

This act supersedes the former act and conveys the title of the United States without cost and without reservation, subject, of course, to existing *bona fide* rights or claims under the laws of the United States.

The State contends that it has acquired the rights of the claimants under the mining locations and that it is entitled to patent under the act of March 3, 1925.

It seems clear that the granting act of May 12, 1928, obviates the necessity for any further inquiry into the title under the mining locations in question. If and when the rights are extinguished the grant to the State attaches. There is nothing more for the department to do unless or until rights under the mining locations are

asserted as the basis of an application for patent under the mining laws, in which event it would be incumbent upon the applicants to show that they were, at the date of the granting act, possessed of an existing *bona fide* right or claim under the laws of the United States, and that they had otherwise complied with the provisions of the mining laws. This would necessarily include a showing of their title.

Upon consideration of the motion and additional showing, the department finds no reason for disturbing its former decision in the matter, and the motion for rehearing is accordingly

Denied.

**THE MELISH CONSOLIDATED PLACER OIL MINING COMPANY v.
TESTERMAN ET AL. (ON PETITION)**

Decided November 7, 1930

OIL AND GAS LANDS—LEASE—SECRETARY OF THE INTERIOR—JURISDICTION.

The leasing act confers upon the Secretary of the Interior full power to determine all questions of law and fact essential to the awarding of leases thereunder, and a lease, once granted, is beyond recall by him; thereafter the department is without jurisdiction to review his action and the lease is subject to cancellation only in the Federal courts.

SECRETARY OF THE INTERIOR—COURTS—JURISDICTION—PATENT—EVIDENCE.

Where by the terms of an act of Congress the Secretary of the Interior is required to perform certain duties he has the power to make all determinations of law or fact essential to the performance of those duties, and, after the issuance of patent or other like instrument, his findings of fact are conclusive in the absence of fraud or mistake both upon the department and the courts, although there be demonstrable error in the estimation or appreciation of evidence, and his rulings on matters of law, though reviewable in the courts, are not subject to reexamination in the department.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—JUDGMENT—SECRETARY OF THE INTERIOR—COURTS—JURISDICTION.

The leasing act confers upon the Secretary of the Interior the authority to approve the assignment of leases issued thereunder, and, in the absence of a showing of fraud or imposition upon the Government, that officer may disapprove, as an interference with his award, a decree of assignment by a State court of an oil and gas lease granted by him where the decree resulted from a determination of facts that were or should have been presented to the department before the award was made or arose from a different construction or without regard to the provisions of the act.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—TRUSTEE.

An exception to the rule that one placed in such relation to another that he becomes interested with him in any subject, property, or business is prohibited from acquiring antagonistic rights arises where those interests accrue at different times and under different instruments and neither party has superior means of information respecting the state of the title.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—CONSTRUCTIVE TRUST—AGENT—
SECRETARY OF THE INTERIOR—COURTS—JURISDICTION.

Where a State court seeks in its decree to impress a constructive trust upon an oil and gas lease issued by the Secretary of the Interior in favor of the petitioner on the ground that the lessee, as agent of the petitioner to present his claim to the Land Department, was in duty bound to acquire the leased area only for the petitioner, but disregarded his duty as fiduciary by not doing so and fraudulently neglected to exhibit the claim of the petitioner to the department, that officer, in determining whether or not to approve the assignment directed by the court, may decide for himself whether the facts found by the court establish the grounds of fraud and breach of trust upon which the decree is founded.

DIXON, *First Assistant Secretary*:

The Melish Consolidated Placer Oil Mining Association in Red River has filed a petition requesting the Secretary to approve a decree of the District Court of Tillman County, Oklahoma, assigning to petitioner, subject to the approval of the Secretary of the Interior, an oil and gas lease, Guthrie 014154, issued under the authority in the acts of February 25, 1920 (41 Stat. 437), and March 4, 1923 (42 Stat. 1448), to Tom Testerman, Thomas P. Gore, and Leslie C. Garnett, pursuant to an award made to the above-named lessees September 25, 1925.

The contents of the decree are fully set forth in departmental decision [unpublished] of January 24, 1929, in the case entitled *Tom Testerman et al.* and need not be restated. In that decision the assignment to petitioner in the decree of this identical lease was disapproved, and the reasons therefor fully stated. Petitioner now, however, invites attention to the affirmance of the decree by the Supreme Court of Oklahoma, and quotes at some length that court's opinion in the case reported [*Testerman et al. v. Burt et al.*] in 289 Pacific 315-331, and avers that motions for rehearing in that case have been denied and the decree has become final.

It was brought to the notice of the department when its decision disapproving the decree was rendered that an appeal from the decree was pending in the Supreme Court of the State, and petitioner then resisted the application to disapprove it at that time for that reason, as well as others.

The department overruled this objection by stating—

It is the department's view that if the assignment decreed by the court, whether affirmed or not affirmed, resulted from a consideration and determination of facts and circumstances by the court that were or should have been presented to the department before the award was made, or arose from a different construction or without regard to the provisions of the act of March 4, 1923, *supra*, vesting in the Secretary of the Interior the authority to adjust and determine the equitable claims asserted and find who were equitably entitled to leases and permits under said act, then, and in such a case, in the absence of a

showing of fraud or imposition upon the Government, the department may disapprove such decree as an interference with its award, notwithstanding disclaimers to the opposite effect therein, and as a decree, so far as it covers the assignment of the lease, without the court's jurisdiction to render.

It was also held that no evidence of fraud or imposition by Testerman and his colessees had been presented to the department.

The recital of facts in the opinion of the Supreme Court of Oklahoma in the case, as reported, have been carefully considered. In them we find no material fact that was not considered by the department when it decided to disapprove the decree of assignment. The petition then is in effect one for the exercise of supervisory power by the Secretary to vacate the previous decision of his predecessor and accept the conclusions of fact and law by the court as to the proper party entitled to the lease in the first place. It is settled that where, by the terms of an act, the Secretary is required upon an application of the claimant to issue a patent, certify a list, approve a location of right of way, make a survey or approve a selection, the Secretary has power to make all determinations of law or fact essential to the performance of the duties specifically imposed, and after issue of patent or other like instrument, his finding of fact is conclusive in the absence of fraud or mistake, not only upon the department, but upon the courts, though his rulings on matters of law are reviewable in the courts they are not subject to reexamination in the department, and his determinations of fact are conclusive, although there is demonstrable error in the estimation or appreciation of evidence. *West v. Standard Oil Co.* (278 U. S. 200, 219), and cases therein cited.

Under the acts under which the award and lease to Testerman and his colessees were granted, the department had full power to determine all questions of fact and law essential in properly making such awards and granting leases pursuant thereto. The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal courts (Sec. 31, act of February 25, 1920). Jurisdiction of the department to review his action in granting it ceased.

But by the terms of the act of 1920, assignments of leases are subject to the approval of the Secretary. There is presented here an involuntary assignment by decree of a State court. In the exercise of the discretion whether or not to approve such an assignment, it is believed to be within the province of the Secretary to determine whether the court had jurisdiction to render the decree. And where, as in this case, a constructive trust is sought to be impressed upon the lease by the court in favor of petitioner, on the ground that the lessees, as agents of petitioner to present its claim to the Land Department, were in duty bound to acquire the leased area only for

the petitioner, but disregarded their duties as fiduciaries by not doing so and fraudulently neglected to exhibit the claim of the petitioner to the department, as should have been done, it is also considered proper for the Secretary to determine for himself whether the facts found by the court establish the grounds of fraud and breach of trust or inequity upon which the decree is founded. It is not doubted that a court of equity may impose such a trust in a proper case on grounds of fraud or mistake, but it must be alleged and proved that complainant has an equitable title superior to the legal title. *Lee v. Johnson* (116 U. S. 48); *Duluth, etc. R. R. Co. v. Roy* (173 U. S. 587), and that the fraud in respect to which relief is prayed prevented him from exhibiting his case fully to the department, so that it may properly be said there never has been a decision in a real contest about the subject matter of inquiry. *Vance v. Burbank* (101 U. S. 514, 519); *Greenmeyer v. Coate* (212 U. S. 434, 444).

Nothing is found in the recital of facts by the Supreme Court of Oklahoma which suggests that Testerman and his attorneys did not in good faith present fully for petitioner the possession and development on the Border Line claim which was relied upon by it to establish its equitable claim to the area therein. The department decided that it had no equitable claim to the area embracing Testerman's award. Had Testerman's claim never been presented, that would not have increased petitioner's award. The award of Well 156 on the Border Line claim was based upon the improvement and development of F. F. Moore, an independent claim, which Testerman alleged before the department that he had acquired by assignment. Now if the facts as found by the court show that petitioner was in fact the owner of Moore's equitable claim and Testerman had concealed that fact from the department for the purpose of preventing the award of the same to petitioner and to get it for himself, or that Testerman was asserting a possible personal interest in the subject matter of his agency, that is, a claim for himself adverse to that of petitioner without its knowledge or acquiescence, then undoubtedly a sufficient case of fraud in the procurement of the lease, prejudicial to petitioner's superior rights, would be made out.

Now it is observed in the statement of facts upon which the conclusions of the Supreme Court of Oklahoma are based (page 325) that the acquisition of Moore's equitable claim by Testerman, and the issuance of certificates of petitioner to himself in 1921 to reimburse him for the expense in acquiring that claim, with a view to strengthening petitioner's claim to the Border Line acreage, is set forth.

But the court then proceeds to state—

On May 3, 1923, Testerman filed in the United States Land Office a declaration of interest in the Texas Strike claim, and in support thereof referred to the

assignment which he held from E. F. Moore, and asserted therein that the Moore well had been drilled on the Texas Strike claim, and asked that his (Testerman's) right in the Texas Strike claim be recognized and protected. Six days after filing such declaration of interest he canceled certificates held in his name in the Melish Association to an amount equal to the sum of \$3,150, and in explanation of the cancellation of the units which had been issued for the Moore assignment he testified that prior to the return and cancellation of the certificates on April 30, 1923, he had submitted a general written report of the affairs and management of the association at a meeting of the unit holders or trustees, in which he advised them that he was surrendering the certificates because it appeared then that the Moore well was not on the Border Line claim, but on the Texas Strike claim, and that the Moore assignment would not be needed in support of the association's claim to Border Line acreage, and because some of the trustees or unit holders did not desire to purchase the assignment for the association.

Nowhere is any evidence contrary to this stated, nor is found that what Testerman stated as to this transaction was not the fact, nor is it found that petitioner did not acquiesce in the return to them of the consideration paid for the Moore claim and the act of Testerman taking back the title thereto.

It is not doubted as an abstract proposition that the rule stated by the court is established law, which, in its abbreviated form, is that "a person placed in such relation to another that he becomes interested with him in any subject, property or business is prohibited from acquiring antagonistic rights." But this rule is not without its exceptions, for it has been held that the rule does not go beyond the reason that supports it. As in a case of cotenancy, the rule is based upon considerations of mutual trust and confidence that exists between the parties. But if their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises. *Freeman on Cotenancy*, Sec. 155; *Hodgson v. Federal Oil Co.* (274 U. S. 15, 19, and cases therein cited.) In such a case—

The purchase made by a cotenant of an outstanding title or incumbrance is not void, nor does the interest so acquired by him, or any part of it, by operation of law, vest in his cotenants. They may not wish to share in the benefits of his purchase, for, in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives them the privilege that they may assert. This privilege consists in the right to obtain the conveyance of the title bought in, upon their paying the price at which it is bought. The privilege may be waived by an express refusal to reimburse the cotenant for his outlay, or by such a course of action as necessarily implies such a refusal. (*Freeman on Cotenancy*, Sec. 156.)

The question whether Testerman, assignee of Moore, had any equitable claim to a part of the area on the Border Line claim, depended upon a determination of the location of the boundary of that claim. That question had not been resolved at the time Testerman advised petitioner that the Moore assignment would not be needed to support its claim. Testerman had no superior knowledge or information over any other trustee or member of the Melish Association how the question would be resolved, nor is there any evidence that suggests that Testerman's representation to petitioner was not the expression of an honest opinion. The petitioner apparently accepted it and elected not to retain the outstanding equity of Moore and to take back the consideration that was paid for it. As stated in the decision disapproving the assignment, the question whether Testerman's fiduciary relation to petitioner did not debar him from securing the award of the Moore equity, was presented and considered on the protest of Green and his associates in behalf of the petitioner, and the protest dismissed. As indicated above, in the light of the court's review, it is not perceived that such action of the department was affected by the suppression by Testerman or his colessees of any material fact. It is not understood, consequently, how the lease can be held to inure to the petitioner by reason of fraud or violations of the obligations of an agent.

If the Secretary that made the award merely erred in his estimation and appreciation of the evidence, which is not admitted but which seems to be the basis for the decree, neither the courts nor this successor have any jurisdiction to correct it. The petition will, accordingly, be denied.

Petition denied.

SANTA FE PACIFIC RAILROAD COMPANY

Instructions, November 8, 1930

WATER RESERVE—WITHDRAWAL.

A withdrawal for a public water reserve does not contemplate the inclusion of a tract of land containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use, and an order withholding such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon should be revoked.

Assistant Secretary Edwards to the Director of the Geological Survey:

There is pending before the department on appeal the application of the Santa Fe Pacific Railroad Company, to select the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 15, T. 38 N., R. 5 W., G. & S. R. M., Arizona.

The selection was rejected by the Commissioner of the General Land Office in his decision of June 20, 1930, for the reason that said tract was withdrawn April 17, 1926, and included in Water Reserve No. 107, as interpreted by Order of Interpretation No. 131 dated June 5, 1930, and was not subject to selection on October 9, 1929, when the application was filed.

It is shown that this selection was made in behalf of Robert A. Jackson, who constructed a pond or reservoir on said tract several years prior to the date of selection, and who has used the same for stock-watering purposes. The field agent who reported on the case stated that there are no springs or seeps feeding the reservoir and that it is dependent entirely on the rainfall or snow which falls along two draws which drain into it. It is further shown that Jackson obtained a permit from the State of Arizona dated November 29, 1929, for the appropriation of waters and the use of the reservoir, which is described as 10 rods square, covering three-fifths of an acre, situated in a dry wash and designed to collect the flood waters for use for watering livestock.

It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.

You will, therefore, prepare and submit a suitable order for revocation of the said Order of Interpretation No. 131.

SOUTHERN PACIFIC RAILROAD COMPANY

Decided November 11, 1930

RAILROAD GRANT—INDEMNITY—HOMESTEAD ENTRY—WITHDRAWAL

Neither the act of July 27, 1866, nor the act of March 3, 1871, authorizes the Secretary of the Interior to withdraw unselected lands within the indemnity limits of the grant to the Southern Pacific Railroad Company for the sole and exclusive purpose of satisfying the deficiency in the grant to the exclusion of persons desiring to acquire them under the homestead and other public-land laws, notwithstanding that the deficiency has been ascertained and is recognized. *United States v. Northern Pacific Railway Company* (256 U. S. 51), distinguished; *Southern Pacific Railroad Company v. Bell* (183 U. S. 675), applied.

EDWARDS, *Assistant Secretary*:

This is an appeal by the Southern Pacific Railroad Company from a decision of the Commissioner of the General Land Office dated

June 3, 1930, denying the request of said company, dated May 20, 1930, for the withdrawal of the unselected lands within the indemnity limits of the land grant to the company under the act of March 3, 1871 (16 Stat. 573), for the sole and exclusive purpose of satisfying the deficiency in the grant to the Southern Pacific Railroad Company made by the act of March 3, 1871, *supra*.

Section 23 of the act of March 3, 1871, provides as follows:

That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroads from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

The records show the whole area of the grant to said company to be 4,064,373.25 acres, that there have been charged against the grant 2,516,384.86 acres, leaving still due under the grant an apparent deficiency of 1,547,988.39 acres as of December 31, 1929.

The company in its application of May 20, 1930, cited the case of *United States v. Northern Pacific Railway Company* (256 U. S. 51) as authority for complying with its request.

The Commissioner in his decision appealed from stated that while the Supreme Court in the *United States v. Northern Pacific Railway Company case* held that the Government could not reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits, it did not hold that it may withdraw such lands for the benefit of the company to the exclusion of persons desiring to acquire the same under the homestead and other general public-land laws.

After a careful study of the decision in question, the department concurs in the views expressed by the Commissioner.

The Supreme Court in the case of *Southern Pacific Railroad Co. v. Bell* (183 U. S. 675), involving the grant under the act of July 27, 1866 (14 Stat. 292), which grant is the same as that made under section 23 of the act of March 3, 1871, *supra*, held that the act of July 27, 1866, did not authorize the withdrawal of the indemnity lands. The syllabus of that case reads in part as follows:

The Atlantic and Pacific Railroad Company took no title to lands within the indemnity limits of its grant until the deficiency in the place limits had been ascertained, and the company had exercised its right of selection.

The Secretary of the Interior had no authority, upon the filing of a plat in the office of the Commissioner of the General Land Office, to withdraw lands lying within the indemnity limits of the grant from sale or preemption.

The Supreme Court has repeatedly held in substance that the granting acts conferred no rights to specific tracts within the indemnity limits until the grantee's right of selection had been exercised. *Ryan v. Railroad Company* (99 U. S. 382); *Cedar Rapids etc. Railroad Co. v. Herring* (110 U. S. 27); *Kansas Pacific v. Atchison Railroad* (112 U. S. 414); *St. Paul Railroad v. Winona Railroad* (112 U. S. 720); *United States v. Missouri etc. Railway Company* (141 U. S. 358); *Hewitt v. Schultz* (180 U. S. 139); *Southern Pacific Railroad Co. v. Bell* (183 U. S. 675); *Payne v. Central Pacific Railway Company* (255 U. S. 228).

It is argued in behalf of the claimant that this general rule has no application where, as here, there is a recognized deficiency in the grant. But it is clear that the exception to the general rule is to be made only as between the grantee and the Government, and not as between the grantee and settlers. That distinction is emphasized in the case of *United States v. Northern Pacific Railway Company*, *supra*, wherein the court said on page 64, referring to the terms of the grant, "All lands in the indemnity limits were to be and remain subject to the operation of the preemption and homestead laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant the company must submit to whatever of disadvantage results from it." The contention of claimant finds no support in that decision as to unreserved areas in the indemnity limits.

If the Southern Pacific Railroad Company desires to acquire the lands within the indemnity limits of its grant which are now available in satisfaction of losses in the place limits, it should file its selection therefor.

The decision of the Commissioner appealed from was correct and is accordingly.

Affirmed.

THE FEDERAL SHALE OIL COMPANY

Decided November 11, 1930

OIL SHALE LANDS—LEASE—MINING CLAIM—SECRETARY OF THE INTERIOR.

The leasing act conferred upon the Secretary of the Interior full power to administer that act and clearly in its administration it is his duty to determine what lands are subject to lease and what lands are within the exception of valid claims.

MINING CLAIM—LAND DEPARTMENT—ADVERSE PROCEEDINGS—JURISDICTION—PATENT.

The Land Department has jurisdiction to inquire into and determine in the public interest any matter affecting a mining location without awaiting the filing of an application for patent, and if the charge of invalidity is established to declare the claim null and void.

OIL SHALE LANDS—MINING CLAIM—VALID CLAIM—RAILROAD GRANT—STATUTES.

The excepting clause in section 37 of the leasing act differs essentially from the excepting clauses in grants of lands to railroad companies in that the former saves valid claims existent at the date of the act so long as they are maintained in compliance with the laws under which they are initiated while the latter excluded the excepted lands effectually and completely from the grants.

OIL SHALE LANDS—MINING CLAIM—VALID CLAIM—ASSESSMENT WORK—LAND DEPARTMENT—ADVERSE PROCEEDINGS.

Under the saving clause in section 37 of the leasing act maintenance of a mining claim is the test of validity, not merely the status of the claim at the date of the act, and the Land Department may challenge the validity of the claim for default in assessment work at any time prior to a resumption of work and if the default is established the land becomes subject to the operation of that act.

OIL SHALE LANDS—MINING CLAIM—ASSESSMENT WORK—LAND DEPARTMENT—JURISDICTION—RULES AND REGULATIONS.

Rule 55 of the General Mining Regulations of the Land Department disclaiming its jurisdiction to determine questions as to the performance of assessment work upon mining claims has no force with respect to minerals mentioned in the leasing act.

OIL SHALE LANDS—MINING CLAIM—NOTICE—REPOSSESSION—ADVERSE PROCEEDINGS.

The United States, like any property owner, may assert a claim by the posting of notice and peaceably taking possession of the premises which it believes it owns and has a present right to occupy, preliminary to any adjudication as to its rights to the possession, but if the nonexistence of the facts upon which the act of repossession is founded be established the notice becomes of no effect.

MINING CLAIM—NOTICE—REPOSSESSION—ADVERSE PROCEEDINGS.

Dual forms of challenge as to the validity of a mining claim asserted under the mining law by institution of proceedings and by posting of notice of actual repossession of the ground are proper and consistent with the letter and spirit of the leasing act.

WILBUR, Secretary:

The Federal Shale Oil Company has appealed from the decision of the Commissioner of the General Land Office of July 10, 1930, overruling its demurrer to a charge preferred in adverse proceedings against the Buck Canyon Oil Shale Placer No. 1, covering tract number 57 in Secs. 31 and 32, T. 5 S., R. 97 W., 6th P. M., Colorado, and giving notice that the claim would be held void unless

answer was made to the charge within a given time. Proceedings were directed against the claim by letter of March 27, 1930, charging—

That assessment work to the value of \$100 was not performed upon the Buck Canyon No. 1 oil shale placer for the year ending July 1, 1929, and that work had not since been resumed.

The local register was directed therein to also "Notify the claimant that by reason of the default in the assessment work the United States has taken possession of the land for leasing under the act of February 25, 1920."

The charge is based upon a report of an examination of the claim by a mining engineer of the General Land Office; and recommendations therein that such charge be made by the chief of field division, Denver, Colorado, received March 14, 1930. Such reports were made pursuant to instructions [unpublished] approved by the department January 15, 1930, which, among other things, directed the submission as soon as possible of reports in all cases where shale locators defaulted in annual labor and there was no evidence of resumption of work.

The grounds of appeal are stated as follows:

First, that neither the Department of the Interior nor the Commissioner of its General Land Office has any jurisdiction over the subject matter of the said notice, said jurisdiction being vested solely in the Judicial Department of the United States and of the State of Colorado, and that the assumed action of the said department makes it accuser, party complainant and judge of the matters and things therein charged and set forth.

Second, that the honorable Commissioner erred in overruling contestants demurrer, that nothing in the Act of February 25, 1920, authorized, permits or justifies the Department of the Interior in assuming to declare a default or delinquency in the performance of assessment work upon said Buck Creek Canyon Number 1 Shale Placer Claim or to attempt to dispossess the respondent of said premises or any part thereof, because, as the respondent says, the said shale claim is not and never was covered or affected by the said act.

Third, that the said decision of the honorable Commissioner is contrary to and forbidden by Rule 55 of the rules and regulations of the General Land Office now in force and amendments thereto.

Fourth, that the said notice and proposed action of the honorable Commissioner is inconsistent with and contrary to the decision of the Supreme Court of the United States in the recent case of *Wilbur, Secretary of the Interior, v. Krushnic*, and not authorized thereby as contended in said opinion.

Fifth, that the Commissioner erred in holding that the act of February 25, 1920, empowering the Secretary of the Interior to administer its provisions, empowers said Secretary or the honorable Commissioner to apply the provisions of said act to those placer claims which are expressly excluded by said act from its operation.

Sixth, this respondent further avers that the said honorable Commissioner and the Department of the Interior was without jurisdiction to file the said charges against said oil shale placer claim for the additional reason that no application for patent for said claim has ever been made by the respondent.

and, until such application has been made and duly filed, the department is without power to initiate charges against said claim.

The sixth assignment of error should be noticed first, for it avers that the department has no jurisdiction to inquire into and determine the validity of the claim for any cause, for the reason that no application for patent to the claim has been filed. Counsel for appellant in their brief contend that the rulings in *Clipper Mining Co. v. Eli Mining Company* (194 U. S. 220), and *Cameron v. United States* (252 U. S. 450), upholding the jurisdiction of the department to determine the validity of mining claims for which no patent had been sought, do not apply for the reason that the claims in both of those cases were in territory "previously withdrawn from exploration and purchase." The premise can not be admitted that the territory containing oil shale lands was not withdrawn from exploration and purchase under the mining laws. By the leasing act such lands were excluded from the operation of the general mining law and the oil shale deposits reserved for disposition only as therein provided, except "valid claims." Full power was given the Secretary to administer that act, and clearly in its administration it would be his duty to determine what lands are subject to lease, and what lands are within the exception of valid claims, as much so as it was to determine what lands were "valid claims" within the exception in the Monument Reserve in the *Cameron case*. Putting aside for the moment the question, whether departmental authority exists to attack mining claims for failure to do annual work, it can not be disputed that such authority exists to determine whether a valid claim was initiated prior to the date of the act by doing the acts the mining law prescribed, such as marking the boundaries so that they might be readily traced, making a discovery of mineral prior to the act, or thereafter as a result of work diligently in prosecution at its date. The public interest dictates that the facts bearing upon such inquiry should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within the purview of the act or within the exception of valid claims would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims would have to be permitted to stand for lack of evidence to establish their invalidity. In the *Cameron case, supra*, (p. 463) the court declared—

It is rightly conceded that in the case of a conflict between a mining location and a homestead claim the department has authority to inquire into and de-

termine the validity of both and, if the mining location be found invalid and the homestead claim valid, to declare the former null and void and to give full effect to the latter; and yet it is insisted that the department is without authority, on a complaint preferred in the public interest, to inquire into and determine the validity of a mining location, and, if it be found invalid, to declare it of no effect and recognize the rights of the public. We think the attempted distinction is not sound. It has no support in the terms of the mineral land law, is not consistent with the general statutory provisions before mentioned, and if upheld would encourage the use of merely colorable mining locations in the wrongful private appropriation of lands belonging to the public.

In that case the court referred to, as precedents for its conclusions, the *Yard Case* (38 L. D. 59), and *Nichols-Smith case*, on rehearing (46 L. D. 20), where the jurisdiction of the department to determine the validity of mining locations situated in a national forest, from which mineral locations are not excluded, was upheld. In the *Yard case* (p. 66) the department said—

In general, discovery, marking on the ground, posting and recording notice, and compliance with law are essential elements in the initiation of rights under a mining claim and constitute the foundation upon which the right of obtaining the legal title is predicated. Many reasons are apparent why the land department, in a proper proceeding, upon due notice, with full opportunity for claimants to be heard, should investigate such matters prior to application for patent, as well as when legal title is sought, if due occasion therefor arises in connection with the administration of laws applicable to the public domain. Clearly the consent or nonconsent of the parties claimant, their invocation of or failure to invoke the jurisdiction of the department, in no way affect or govern the general question as to jurisdiction over the subject matter, that is to say, the cause of action.

Other reasons justifying the power now challenged in the sixth specification are elaborated in the opinions in those cases and need not be repeated. The exercise of such jurisdiction by the department has received authoritative judicial sanction, and it is believed that as to oil shale locations on land where the legal title is still in the United States, the department has jurisdiction to inquire into and determine now in the public interest any matter that affects the validity of the locations, and if the charge of invalidity is established to declare the claims null and void.

The second and fifth assignments of error appear to be based upon the contention stressed in the written brief and oral argument before the Secretary, that lands upon which there were valid and existent claims at the date of the leasing act are expressly excluded forever from its operation. If this contention is sound it logically follows that notwithstanding the provisions of the leasing act, the ground within the claim is subject to relocation by others under the mining law upon default in the doing of assessment work, and able counsel for appellants maintain that it would be. It is, however, admitted that the land "can lapse back into the public domain by abandonment only." (Brief and argument, p. 22.)

It is insisted that the construction placed upon the excepting clauses in grants of lands to railroads in *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S. 629), and subsequent cases following it, are decisive as to the construction of the excepting clause in the leasing act. But when the language of the excepting clause in these grants is compared with that in the excepting clause in section 37 of the leasing act it is believed that each imports an entirely different meaning, the former expressly excluding lands effectually and completely from the grant, the latter saving "valid claims" to land so long as they were maintained in compliance with the laws under which initiated and preserving the right to perfect them under such laws, and that consequently the rule of construction in the land grant cases have no application to the instant case.

The grant of July 1, 1862 (12 Stat. 489), in the *Dunmeyer case* was of lands "not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed." Miller made his homestead before the date the line was definitely fixed, but subsequently abandoned his entry. It was contended by the railroad grantee that upon abandonment of his entry the land reverted to the railroad. It was strongly argued in the *Dunmeyer case* that certain expressions in section 4 of the act of July 2, 1864 (13 Stat. 356), modified or repealed the excepting clause in the prior grant above quoted. One of these expressions was (p. 635)—

* * * any lands granted by this act, or the act to which this is an amendment shall not defeat or impair any preemption, homestead, swamp-land, or other lawful claim, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral land.

But the court held that this language did not repeal the fundamental clause of the original act in which the character of the grant and of its exceptions are fully defined; that (p. 636)—

This new provision may make other exceptions while enlarging the grant, and was undoubtedly intended to add further safeguards to the settler and further protection to the public. But how the clause can be supposed to narrow the original exception, or to be a substitute for that exception, or to repeal it, is not readily to be seen.

It had no such purpose. It had a very different purpose, and clearly leaves the original section, which it changes as to the limit of the grant, to stand as to the exception, save as further exceptions are added.

In other words, the language quoted of the subsequent grant, being as the railroad grantee contended a clause merely saving rights, did not, under the court's view, supplant the express words of exception of the lands in the original grant.

The marked distinction between saving clauses and exceptions excluding lands in grants of public lands, withdrawals and reserva-

tions has been clearly pointed out and illustrated by the department in *Navajo Indian Reservation* (30 L. D. 515), and by the Supreme Court in *Great Northern Railway v. Steinke* (261 U. S. 119, 127).

In the latter the exception in the grant involved in the *Dunmeyer case* was expressly mentioned and distinguished from the rule as to a preemption claim on a grant of right of way, where the land reverted to the railroad when the preemption claim was abandoned.

In *Wilbur v. Krushnic* (280 U. S. 306, 314), the court said: "But section 37 (U. S. C., Title 30, Sec. 193) contains a *saving clause* protecting 'valid claims existent at the date of the passage of this Act, and thereafter maintained in compliance with the laws under which initiated.'" (*Italics supplied.*)

It would seem nothing more need be said to show that Congress did not intend to exclude permanently and unconditionally from operations under the leasing act oil shale lands upon which there were at the date of the passage of the act, valid existent claims other than to observe that no matter how many claims would lapse into the public domain by abandonment, under counsel for appellants' construction of the act, the department would be forever without authority to lease the lands theretofore embraced in such claims. They would remain subject only to exploration and purchase under the mining law, although as is stated by the court in the *Krushnic case*, "the leasing act of 1920 effected a complete change of policy in respect to the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease." No such construction as the appellant contends for of the proviso in section 37, narrowing the scope of the act and practically defeating its purpose, is admissible. It would follow also under the same view that a new and independent right could be initiated by relocation and the department would be obliged to dispose of the lands under the former law if it appeared that they had formerly been embraced in a claim valid and existent at the date of the leasing act.

It may be freely admitted that a valid existent claim on February 25, 1920, "thereafter maintained in compliance with the laws under which initiated" is a valuable property right and is as good as secured by patent for all practical purposes of ownership and no clause in the leasing act was necessary to save it. But the words of the saving clause, which add nothing to the requirements of the mining law, plainly contemplate some activity to protect them from the operation of the leasing act. (Claimants are not secure in their rights merely because the claim was a valid existent claim at the date of the act. Compliance with the mining law thereafter was necessary in order to maintain their possessory right as against the Government.

The Supreme Court in the *Krushnic case* plainly recognized the condition of maintenance by annual labor as a vital matter, for as in that case the valid existence of the claim at the date of the act was admitted, the only question as the court said was whether the claim was thereafter maintained in compliance with the laws under which initiated (p. 317). Maintenance was the test of validity, not merely the status of the claim at the date of the act.

It is true, the court held that the department erred as a matter of law, in holding that resumption of work subsequent to a default therein after the passage of the act, and prior to any form of challenge by the United States, did not constitute maintenance of the claim; that, on the contrary, "Resumption of work by the owner, unlike a relocation by him is an act not in derogation but in affirmance of the original location; and thereby the claim is 'maintained.'"

But there is nothing in that opinion that suggests a lack of authority by the Secretary to attack an oil shale claim where the claimant has defaulted in assessment work and has not resumed work. On the contrary, the court appears to have expressly recognized such right in the qualifying words to the declaration of the right of resumption, "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened." Obviously the court was speaking of a claim admitted to be a valid existent claim at the date of the leasing act, and that being the case no other cause for challenge could arise other than failure to maintain it thereafter.

No matter what conclusions may be deduced from the language of the Court of Appeals of the District of Columbia in the *Krushnic case*, the department can see nothing in the opinion of the Supreme Court in the same case that supports the contention that valid existent oil shale claims at the date of the leasing act are arbitrarily excluded from its provisions, or that the department has no jurisdiction to determine whether or not they are maintained in compliance with the law under which initiated, or that default in assessment work not cured by resumption does not constitute a lawful ground of challenge to the valid existence of the claim. The inconsistency of the action of the Commissioner in instituting the proceedings on the charge assailed with the decision in the *Krushnic case*, alleged in the fourth assignment of error, is not therefore perceived.

Neither can it be admitted that Rule 55 of the General Mining Regulations (49 L. D. 15, 73), disclaiming jurisdiction to determine questions as to the performance of assessment work, continued in force with respect to claims for minerals mentioned in the leasing act. The leasing act of necessity conferred jurisdiction to inquire into and determine this question.

The limited application of the mining regulations to claims for deposits mentioned in the leasing act is expressly recognized in the headnote to the republished regulations (49 L. D. 58). No merit is seen, therefore, in the third assignment of error.

The record does not show that the claim in question was posted with a notice of charges and repossession by the United States for the purpose of holding the land for lease under the leasing act, as directed in the instructions of January 15, 1930. But assuming this was done, appellant's characterization of such acts in his argument as an "*ex parte* judgment of condemnation in advance of a hearing" as "forcible" and "illegal" and as not the form of challenge permissible under the ruling in the *Krushnic case*, seems to have little justification. The posting of such notices is in no sense an adjudication of the claimants' rights. In connection therewith claimants are entitled to full notice and opportunity to be heard as to the existence of grounds upon which the claim to the possession of the land is made by the United States, and if the nonexistence of the facts upon which the act of repossession is founded is established, the notices become of no importance. The department is not aware of any law, whereby the United States like any other property owner may not assert a claim and peaceably take possession of property which it believes it owns and has a present right to occupy, preliminary to any adjudication as to its rights to the possession, and employ the most practicable means of bringing actual notice to the claimant of the challenge of the Government to his asserted rights.

Nor is it perceived, if the department is right in its view, that a challenge for default in assessment work is a challenge to the valid existence of the claim, and, if made prior to any resumption of work, cuts off any right of resumption of work if the default is established, and subjects the land to the operation of the leasing act, why dual forms of challenge, by institution of proceedings and by notice of actual repossession of the ground, may not both be proper and consistent with the letter and spirit of the leasing act.

It is the department's view that a challenge of an oil shale claim which is in default for the nonperformance of assessment work, by notice of the preferment of a charge against the claim to that effect in a proceeding instituted in accordance with the regulations of February 26, 1916, Circular No. 460 (44 L. D. 572), while such default continues to exist, and a judgment by the department that the charge is sustained after due notice and opportunity to be heard, has the same effect in the extinguishment of the claim as would a valid relocation of a mining claim located on account of minerals other than those mentioned in the leasing act. It is believed the appellant's counsel presents strongly and fully such arguments as may be ad-

vanced in opposition to this view, but they do not persuade the department that the Commissioner's action assailed is wrong. If the department has erred in its conclusions as to its jurisdiction and authority in the premises, it is subject to correction in the courts.

The Commissioner's action will be, and is hereby

Affirmed.

STATE OF NEW MEXICO

Decided November 18, 1930

SCHOOL LAND—INDEMNITY—NATIONAL FORESTS—SURVEY—ESTOPPEL.

Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final and the State will be estopped from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction.

EDWARDS, Assistant Secretary:

The State of New Mexico has appealed from the decision of the Commissioner of the General Land Office dated June 20, 1930, relative to its indemnity school-land selections, Santa Fe 042445, 048084 and 048085, and Las Cruces 034663, formerly Roswell 049718.

The facts in the case are as follows:

Part of T. 15 N., R. 14 E., N. M. P. M., is within the Las Vegas private land grant, and the remainder is within the Santa Fe (formerly Pecos) National Forest.

By a protraction diagram Sec. 2 of the township was shown as having an estimated area of 640 acres, and as being partly within the private land grant, and partly within the national forest.

In Roswell list 030348 of indemnity school-land selections, dated March 5, 1915, the State of New Mexico assigned all of the said Sec. 2, containing 640 acres, as base for the selections specified therein. Those selections were approved by the department on April 25, 1919, in clear list No. 110.

Thereafter the said township 15 was surveyed. The plat of survey, which was approved January 9, 1919, was accepted by the General Land Office on February 1, 1919, and was filed in the local land office on May 3, 1919. The plat of survey shows that Sec. 2 is outside of the private land grant, and that it actually contains 724.80 acres, instead of 640 acres as estimated through protraction. The additional area of 84.80 acres is included in lots 1, 2, 3 and 4. These lots contain 21.08, 21.16, 21.24 and 21.32 acres, respectively, and are situated on the northern border of the section.

After this survey the State of New Mexico filed other selection lists wherein it sought indemnity on account of the additional area of Sec. 2 as disclosed by the official plat.

In indemnity selection, Santa Fe 042445, the State assigned 12.48 acres of lot 1 as base, and in indemnity selection Las Cruces 034663 the State assigned lot 4 and 13.34 acres of lot 3 as base. Those selections were approved on May 29, 1923, and November 8, 1924, respectively.

In pending selection list Santa Fe 048085 the State has assigned the remaining 7.90 acres in lot 3 as base, and in pending selection list Santa Fe 048084 it has assigned lot 2 and the remaining 8.60 acres in lot 1 as base.

In his decision of June 20, 1930, the Commissioner said, that as the State applied for indemnity on account of Sec. 2, based upon the area shown by protraction, while the section was unsurveyed and apparently was within a national forest and a private land grant, and as the selection was approved and certified, the area of Sec. 2 as shown by protraction determined the indemnity due to the State, and the adjudication of its claim for indemnity on that basis was final.

By reason of the facts aforesaid the Commissioner requested the State to designate other base lands, to the extent indicated, in support of its approved selections, Santa Fe 042445 and Las Cruces 034663.

The Commissioner held the selections included in the pending list, Santa Fe 048084 and 048085, for cancellation subject to the right of the State to apply for an amendment of the selections by substituting other base lands for those in lots 1, 2, and 3 of Sec. 2, T. 15 N., R. 14 E.

The appeal filed by the State merely is an assignment of errors, unsupported by citation of authority or argument.

The department finds that the Commissioner's action holding for cancellation the indemnity school-land selections, Santa Fe 048084 and 048085, was right.

In the case of State of New Mexico (49 L. D. 314, 316), it was said:

Section 2275 of the Revised Statutes permits, as to lands within reservations, a departure from the usual method of ascertaining what lands fall within the place limits of school sections, namely, ascertainment "by protraction or otherwise" instead of the usual surveys in the field.

In the instant case the estimated area of Sec. 2 was ascertained in a manner authorized by law. When the State of New Mexico in 1915, prior to a survey in the field, offered all of Sec. 2 as base land for an indemnity selection it, by implication, accepted the protraction diagram as correct for the purposes of the case; having received the

indemnity land for which it applied, the State is now estopped to assert anything to the contrary, or to make a further indemnity claim on account of the said Sec. 2.

Since, however, there appears to be some equity in favor of the State on account of the excess of 84.80 acres in Sec. 2 which it relinquished, and as the acreage heretofore erroneously allowed the State based on a portion of that excess is small, it is believed that no readjustment should be required on account of the said former approvals. But the pending selections should be supported by proper base.

As thus modified, the decision appealed from is

Affirmed.

STATE OF UTAH

Decided November 19, 1930.

SCHOOL LAND—MINERAL LANDS—OIL AND GAS LANDS—WITHDRAWAL—RESTORATIONS—INDEMNITY—ELECTION.

Lands in designated school sections in the State of Utah which did not pass to the State under its grant of July 16, 1894, because they were by Executive order included within a petroleum reserve prior to survey, are forever excepted from the operation of the grant of January 25, 1927, and the State must either select other lands in lieu thereof or await the extinguishment of the reservation and thereupon take under the original grant.

EDWARDS, *Assistant Secretary*:

The State of Utah claimed Secs. 2, 16, 32 and 36, T. 23 S., R. 10 E., S. L. M., as school lands in place, pursuant to the provisions of the act of July 16, 1894 (28 Stat. 107), making a grant of school land to that State.

The lands in question, while unsurveyed, were included in Petroleum Reserve No. 25, by Executive order of March 4, 1912, and they still are subject to the order of withdrawal.

During 1921 oil and gas permits were granted, covering all of the sections in question.

On March 26, 1924, the survey of the said T. 23 S. was accepted, and thereupon the school land grant made by the act of July 16, 1894, *supra*, would have attached to Secs. 2, 16, 32 and 36 of the township, except for their classification as mineral lands.

On May 24, 1924, the Acting Director of the Geological Survey reported that the records of the survey indicated that minerals other than oil and gas were not known to occur on the land in question.

On March 31, 1925, an inspector submitted a report wherein he stated that drilling in the vicinity of the lands had proved the non-existence of commercial pools of oil. The inspector recommended that the lands be classified as nonmineral in character.

During 1927, 1928, and 1929, all oil and gas permits embracing the lands in question were canceled, and there now is no pending application or claim for any of the lands, and no selection in lieu of any part of the same has been made by the State of Utah.

In the above state of facts the Commissioner of the General Land Office, in a decision dated May 27, 1930, held, as these school sections in place had been included in a petroleum reserve prior to the acceptance of the survey, that no rights of the State under its school-land grant made by the said act of July 16, 1894, had attached, and that none could attach unless the lands were restored from the petroleum reserve.

The Commissioner said, however, that the State might, if it so desired, make application to select other land in lieu of the reserved school sections, in accordance with the regulations of June 23, 1910 (39 L. D. 39).

As the act of January 25, 1927 (44 Stat. 1026), made mineral lands subject to school-land grants equally with nonmineral lands, the Commissioner also considered the application of that statute to the school sections involved in the instant case.

The Commissioner held, correctly, that by reason of the provisions of paragraph (c) of section 1 of the 1927 act, wholly excluding from the benefits of the act lands which were then within the limits of an existing reservation, the school sections in question were without the scope of that act; not only during their inclusion in the petroleum reserve, but permanently. See *Byers v. State of Arizona* (52 L. D. 488).

The State of Utah has filed an appeal from the Commissioner's decision, acting through its attorney general.

In the course of his argument on appeal, the Attorney General says—

I agree with the Assistant Commissioner in his holding that as the above school sections in place were included in the petroleum reserve prior to the acceptance of the survey, the right of the State under its school land grant of July 16, 1894, did not attach at the time of the acceptance of the survey and could not attach until the revocation of the petroleum reserve, provided always that the reservation was one justified under the law authorizing its creation and under existing law.

He also says—

I can not see where the State lost any land under the laws existing prior to the act of January 25, 1927, and I can not find any provision in the act of January 25, 1927, depriving the State of any of its numbered school sections. The State still holds full title to all numbered school sections, in reservations subject to the revocation or cancellation of the reservation, with full right to waive that title and select other lands of equal value. Of course if the reserves are never cancelled and the Government extracts the minerals or their values therefrom, then the State virtually loses all the beneficial use of the lands,

but I can not see where the law anywhere provides that the State has no election in the matter and that it must select other lands for numbered school sections in reservations or lose its base lands entirely.

It is apparent from the last quotation that the State has misinterpreted the Commissioner's decision. The Commissioner did not hold that the State must select other lands for those included in the school sections in question or lose its base lands entirely.

The Commissioner merely pointed out that the State never could, under any conditions, acquire the school sections in question under the act of January 25, 1927. The result was, that as long as the lands were classed as mineral lands, no title on behalf of the State could attach to them, and the State's only remedy was through a lieu selection under section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796).

If, however, the lands in the school sections ever should be released from the petroleum reserve and be classed as nonmineral, then the State's title to them would attach by virtue of said act of July 16, 1894, *supra*. In the meantime the State might use them as base lands in making lieu selections, should it wish to do so.

The Commissioner's decision states the law of the case correctly and it accordingly is affirmed.

By letter of even date herewith the Director of the Geological Survey has been asked for a report with a view to having the land excluded from the reserve if found to be without prospective value for oil and gas.

Affirmed.

SERNA v. HENRY

Decided December 9, 1930

CONTEST—CONTESTANT—ABATEMENT—DILIGENCE—NOTICE—PRACTICE

A clerical error by a postmaster in a registry return receipt will not be ground for the abatement of a contest where the contestant had acted diligently in all the various steps prescribed by the Rules of Practice in the prosecution of the contest and had complied with the letter of the requirement relating to proof of the mailing of the notice.

EDWARDS, Assistant Secretary:

Jack Serna has appealed from the decision of August 16, 1930, by the Commissioner of the General Land Office holding that his contest against the homestead entry of Theresa M. Henry had abated under Rules 8 and 11 of Practice.

The entry was made on July 10, 1925, under the stock-raising homestead law for 640 acres in Secs. 9 and 10, T. 5 N., R. 81 W., 6th P. M., Colorado.

The contest was filed on August 5, 1929, alleging abandonment and total failure to establish or maintain residence on the land or to improve the same.

On September 11, 1929, the register issued notice of contest for service upon the entrywoman by publication as provided by Rules 9 to 11 inclusive, of the Rules of Practice (51 L. D. 547). The notice was duly published, the first publication being on September 19 and the fourth on October 10, 1929. On October 23, 1929, the contestant filed in the local land office his affidavit, stating that on September 24, 1929, he mailed a registered letter to Theresa M. Henry at 1800 Sherman Street, Denver, Colorado (her record address), and also a registered letter addressed to the same person at Spicer, Colorado (the post office nearest the land); that said registered letters contained copy of the affidavit of contest and also notice of the contest. Attached to that affidavit were two receipts for the registered letters, but, by clerical error the receipts were identical, stating that the letter in each case was addressed to the said party at Denver, Colorado.

On November 8, 1929, the contestant filed in the local land office the registered letters above referred to which had been returned unclaimed. They show that in fact one was addressed to 1800 Sherman Street, Denver, Colorado, and the other to Spicer, Colorado, as stated in the contestant's affidavit above mentioned. The error in issuing one of the receipts was acknowledged by the postmaster in an affidavit dated September 20, 1930.

The declaration of abatement of the contest was based on the fact that the contestant did not file in the local land office the unclaimed registered letters within 20 days after the fourth publication of notice. His explanation is that he could not have done so because they were held in the post office and were not returned to him within the said 20-day period.

The discrepancy between the correct statement of the contestant in his affidavit as to mailing of notice and the incorrect statement in one of the receipts issued by the postmaster warranted inquiry, but the necessary information was supplied by the letters themselves when returned, and that has been further verified by the affidavit of the postmaster.

Rule 8 of Practice requires that publication commence within 20 days after issuance of the notice, and that proof of service of notice by publication be made within 20 days after the fourth publication.

Rule 10 requires publication once a week for four successive weeks, and that a copy of said notice be sent within 10 days after the first publication by registered mail directed to the party at his last address shown by the records of the land office, and at the address named

in the affidavit for publication and also at the post office nearest the land.

Rule 11 specifies the kind of proof required as to publication, posting, and mailing of notice. The supposed defect in the proceeding in this case relates only to the proof of mailing. The rule in respect to that reads as follows:

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

This contestant complied with the letter of that requirement. He made his affidavit and attached the registry receipts. These he filed in proper time. He had addressed the letters to the proper places within the time required. He acted diligently in all the various steps prescribed by the Rules of Practice in the prosecution of the contest. The mere fact that a public officer made a clerical error which misrepresented what had been timely and properly done, should not be held to abate the contest.

Accordingly the decision appealed from is

Reversed.

PROCEEDINGS AGAINST MINING CLAIMS WITHIN THE AREA OF THE BOULDER DAM PROJECT

Instructions, July 7, 1930

MINING CLAIM—ASSESSMENT WORK—ADVERSE PROCEEDINGS—FORFEITURE—WITHDRAWAL.

The Government is not concerned with defaults in the performance of assessment work on mining claims for minerals other than those subject to the operation of the leasing act, irrespective of how long continued or whether occurring before or after a withdrawal of the land, and such defaults can not be made the subject of adverse proceedings or a basis for an adjudication by the Land Department to declare a forfeiture.

MINING CLAIM—ASSESSMENT WORK—ADVERSE PROCEEDINGS—NOTICE—RESUMPTION OF WORK.

Posting notices on mining claims for lands containing minerals other than those subject to the operation of the leasing act, challenging their validity for defaults in the performance of annual assessment work, is not authorized by law and can not, therefore, take the place of personal service or be accepted as a substitute for statutory notice by publication, and such form of notice will not operate as a bar to the resumption of work upon those claims.

MINING CLAIM—MINERAL LANDS—ADVERSE PROCEEDINGS—NOTICE.

In proceedings against a mining claim based on a charge of the nonmineral character of the land, service of notice by publication under section 2335, Revised Statutes, is authorized against those mineral claimants who can not be found.

PRIOR DEPARTMENTAL DECISIONS OVERRULED.

Cases of *E. C. Kinney* (44 L. D. 580), and *Interstate Oil Corporation and Frank O. Chittenden* (50 L. D. 262), overruled so far as in conflict.

Secretary Wilbur to the Commissioner of the General Land Office:

I have your letter requesting further instructions relative to the procedure that should be taken against numerous mining locations within the area of the Boulder Dam and reservoir project. The only locations which are of any concern are those made prior to and conflicting with the withdrawal of May 9, 1919, under the act of June 17, 1902 (32 Stat. 388), under the first form and which are deemed assailable by adverse proceedings, because of lack of discovery or default in the performance of annual assessment work. Your letter states—

As notice of adverse charges by publication is not authorized by law in the cases of mining locations, for which patent proceedings are not pending, a notice challenging the validity of any claim would have to be posted on the land embraced in such claim, where personal service can not be obtained on the claimants.

* * * * *

In my opinion it would be advisable to post notices on all claims located prior to said withdrawal, challenging the validity thereof, where the addresses of all the claimants have not been obtained; and, also, on those where the charge relative to the assessment work is defective as above mentioned, to provide against the possibility that the charge relative to no discovery be not proven if hearing is had.

No mention is made in the letter of the mineral deposits on account of which these locations were made, but I am informally advised they are mostly gold placers. Assuming that the locations were not made for any deposits now subject to the operation of the leasing act, it appears beyond question that under the doctrine recently announced in *Wilbur v. Krushnic* (280 U. S. 306, 315), defaults in the doing of assessment work on such claims, no matter how long continued or whether occurring before or after the withdrawal mentioned is no concern of the Government, and can not be made the subject of adverse proceedings and a basis for an adjudication by the department of forfeiture. For the court said (p. 317)—

* * * While he is required to perform labor of the value of \$100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect.

It is obvious that the court did not imply that the leasing act had any effect on the possessory rights of the owners of claims made for deposits not within the purview of that act. The owners of gold placers today have the same rights as the court declared an oil shale claim owner had prior to the passage of the leasing act. And it is also plain from the court's opinion that departmental power to challenge the valid existence of the claim in default for nonperformance of assessment work and before its resumption must be deduced from the court's interpretation of the excepting clause in section 37 of the leasing act, which has no application to location for deposits other than those named in that act.

The reasons expressed in *E. C. Kinney* (44 L. D. 580), for holding that a mining claim in default for nonperformance of assessment work at the date of a withdrawal for the construction of irrigation works is not excepted from the force and effect of the withdrawal, and for holding in the *Chittenden case* (50 L. D. 262), that a withdrawal under the act of June 25, 1910 (36 Stat. 847), attaches to mining claims within its boundaries upon the occurrence of such defaults, both of which were relied upon by the Government in the *Krushnic case*, are clearly incompatible with the Supreme Court's opinion therein, and therefore can not be any longer regarded as precedents and should not be followed. Therefore, charges of defaults in assessment work will not lie against these claims and should be eliminated if heretofore preferred. Where, however, it is found upon examination of a claim that no assessment work has been done for years past, and there is also evidence that the land has not been used or occupied by the claimants thereof or their agents for mining purposes for a number of years, a charge of abandonment will lie and should be preferred. Furthermore, where it appears that gold or other minerals do not appear to exist upon the claim in such quantity and quality as can probably be worked profitably, charges should be made not only of no discovery but that the land is non-mineral in character. For it is believed that the latter charge may aid the Government in obtaining jurisdiction not otherwise obtainable over the parties in interest by publication under section 2335 of the Revised Statutes, which provides that—

In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

With respect to the suggestion that notices challenging their validity be posted on claims where defective charges were issued relative

to nonperformance of assessment work, for the reason given above, it is believed such a notice would not operate as a bar to resumption of work and would be entirely without legal effect for such purpose. Neither is it the view of the department that such notices would take the place of personal service of notice on the owners of the claims of charges on adverse proceedings or could be considered as a substitute for statutory notice by publication, as there is no law authorizing such procedure.

Nevertheless it is highly desirable that the title of the United States should be cleared of the clouds occasioned by all pretended or invalid mining claims within the area, and such measures should be adopted as would tend to give notice to all that it may concern of the Government's intent to devote the land to public use and that the land within such claims is regarded as free from prior valid appropriation.

It is possible that the posting of notices on such claims of the taking of possession thereof by the United States for public uses and purposes, and of the charges preferred on adverse proceedings with the usual citations will result in substantial advantages to the Government as evincing diligence in asserting its rights.

Appropriate instructions, in harmony with these views, directing the posting of notices, should be submitted for departmental approval,¹ in order that there may be no question of full authorization of the acts taken in that respect.

As above stated, such posting will not confer personal jurisdiction over the parties in interest not otherwise reached by personal service, so as to render an adjudication as to the invalidity of a claim binding. It is believed, however, that notice by publication in strict conformity with section 2335 of the Revised Statutes will, where the contest involves the question of whether the land is mineral in character, be sufficient to confer such jurisdiction. While in departmental instructions, M. 21882, issued July 26, 1927, it was held that there was no statutory authorization for notice by publication of adverse proceedings involving questions merely as to whether valid rights had been initiated on conceded mineral lands valuable for oil shale, it was stated as to the above-quoted provision in section 2335 that—

It is plain that the publication mentioned in this statute is authorized only in cases where the issue is as to the physical character of the land, whether mineral or agricultural. It can not be construed to extend to proceedings where the sole issues are whether mining locations on lands classified as mineral are valid or not, and there is no issue as to the character of the land involved.

¹ A form "Notice of Contest" (for publication), dated September 5, 1930, was approved by the department September 19, 1930.—Ed.

The instructions, therefore, would not seem to apply to the proceedings contemplated against the claims in the Boulder Dam area and no reason is perceived why service by publication may not be obtained against claimants not found in cases where there is issue as to the mineral or nonmineral character of the land.

ERIC LYDERS

Opinion, December 10, 1930.

MANDAMUS—ABATEMENT—PUBLIC OFFICERS—SUBSTITUTION OF PARTIES—AMENDMENT.

In the absence of a statutory provision to the contrary, an action seeking to obtain a mandamus against an officer of the Government abates on his death or retirement from office, and his successor can not be brought in by amendment to the proceeding or on order for the substitution of the parties, even though the latter consents to have the action revived against him.

REVIVAL OF ACTION—PUBLIC OFFICERS—ABATEMENT—SUBSTITUTION OF PARTIES.

Section 11 of the act of February 13, 1925, affords a remedy in a suit brought in a Federal court against a public officer which would otherwise abate upon his death or separation from office by permitting substitution of his successor upon satisfactory showing to the court within six months that there is a substantial need for continuing and maintaining the cause.

REVIVAL OF ACTION—PUBLIC OFFICERS—SUBSTITUTION OF PARTIES—NOTICE.

The provision in subsection (c) of section 11 of the act of February 13, 1925, requiring that before substitution is permitted the officer affected must be given reasonable notice of the application therefor and be accorded an opportunity to present any objection he may have, contemplates that the duty of substitution rests upon the original plaintiff no matter what his position may be in an appellate court.

SECRETARY OF THE INTERIOR—JURISDICTION—COURTS—JUDGMENT.

The Secretary of the Interior is not bound to adopt the opinion of a lower court in a proceeding to which he was not a party, where the decree was rendered after the question at issue had become moot.

FINNEY, *Solicitor*:

The letter, dated November 24, 1930, addressed to me by Mr. C. F. R. Ogilby, with reference to Whaler Island situated in Del Norte County, California, and which is forwarded to you [Secretary of the Interior] herewith, seems to justify an opinion respecting the request made therein that a patent to the land included in the island issue to Eric Lyders.

It appears that Lyders, on March 15, 1928, instituted suit in the Supreme Court of the District of Columbia, Equity No. 48087, wherein he prayed that Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, be enjoined from issuing and delivering a patent for the land known as Whaler

Island to Del Norte County, California, or to any person other than the plaintiff himself.

The grounds upon which Lyders based his bill of complaint are well known and require no restatement.

On April 30, 1928, Justice Bailey of the Supreme Court of the District of Columbia, granted a decree in the case wherein he enjoined Secretary Work and Commissioner Spry as prayed in the bill of complaint.

On the same day the defendants noted an appeal to the Court of Appeals of the District of Columbia.

On July 5, 1928, Roy O. West succeeded Hubert Work as Secretary of the Interior.

The transcript of the record on appeal was filed in the Court of Appeals on July 10, 1928.

On August 23, 1928, by an order of the Court of Appeals, Secretary West was substituted as a party to the suit in place of Secretary Work.

On March 5, 1929, you [Secretary Wilbur] succeeded Mr. West as Secretary of the Interior.

On April 21, 1929, Commissioner Spry died, and he was succeeded by Charles C. Moore, as Commissioner of the General Land Office.

In this state of the record, and without an order of court continuing the suit against you and Commissioner Moore, under section 11 of the act of February 13, 1925 (Chap. 229, 43 Stat. 936, 941), the case was argued before the Court of Appeals on October 9, 1929, by the attorney for the appellants then of record, and by the attorney for the appellee, Lyders.

The argument was made seven months and four days after the appellant West had ceased to be Secretary of the Interior, and five months and eighteen days after the death of the appellant Spry.

On November 4, 1929, eight months after the resignation of Mr. West, and more than six months after the death of Mr. Spry, the Court of Appeals rendered a decree affirming the decree of the lower court, and granting costs against "the said appellants, Roy O. West, as Secretary of the Interior, and William Spry, as Commissioner of the General Land Office." See *West v. Lyders* (36 Fed. (2d) 108).

On November 14, 1929, pursuant to a motion filed on November 8, 1929, by Mr. O. H. Graves, the Assistant to the Solicitor of the Department of the Interior, the Court of Appeals ordered that Ray Lyman Wilbur as Secretary of the Interior, be substituted for Roy O. West, and that C. C. Moore as Commissioner of the General Land Office be substituted for William Spry, as parties appellant.

In a letter dated January 23, 1930, the Attorney General advised you that the Solicitor General had decided not to apply to the Su-

preme Court of the United States for a writ of certiorari in the Lyders case for the reason that you were not in a position to make such an application.

In a memorandum dated January 22, 1930, the Solicitor General based his decision, as aforesaid, upon the fact that no substitution of Ray Lyman Wilbur for Roy O. West was made within six months of Secretary West's separation from the office of Secretary of the Interior.

The attorneys for Lyders are now requesting in their letter of November 24, 1930, that a patent for Whaler Island be issued to Eric Lyders, in conformity with the decree of the Supreme Court of the District of Columbia, as affirmed by the Court of Appeals of the District.

In my opinion the law of the case is plain, and admits of no doubt.

In the leading case of *United States v. Boutwell* (17 Wall. 604), decided at the October term 1873, the Supreme Court held that, in the absence of a satisfactory provision to the contrary, a mandamus proceeding against an officer of the Government abated on his death or retirement from office, and that his successor in office could not be brought in by way of amendment to the proceeding, or on an order for the substitution of parties.

This principle was applied to suits in equity by the Supreme Court in the case of *Warner Valley Stock Company v. Smith* (165 U. S. 28), decided January 11, 1897.

In that case a suit in equity had been instituted in the Supreme Court of the District of Columbia on January 15, 1896, against Hoke Smith, as Secretary of the Interior. A demurrer to the bill had been sustained, and the decree of the lower court had been affirmed by the Court of Appeals on June 11, 1896. On September 1, 1896, while the suit was pending on appeal to the Supreme Court of the United States, Secretary Smith resigned his office. The Supreme Court held that upon the resignation of Secretary Smith the suit against him abated, and that the bill could not be amended by making his successor in office a party defendant in his place.

The rule with respect to the abatement of actions and suits against Government officials, pending at the date of their death or retirement from office, was modified by Congress in the act of February 8, 1899 (Chap. 121, 30 Stat. 822). That act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental

petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.

In the case of *Irwin v. Wright* (258 U. S. 219), decided March 20, 1922, it was held that the act of February 8, 1899, did not authorize the revival of suits against State officers.

In order to remedy that situation Congress included section 11 in the act of February 13, 1925, Chapter 229, entitled "An Act amending the Judicial Code * * * and for other purposes" (43 Stat. 936, 941).

That section of the act reads as follows:

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

Section 13 of the act of February 13, 1925, expressly repealed the act of February 8, 1899.

While the wording of the 1925 act differs from that of the 1899 act, and while the 1925 act shortens the time within which an action or suit can be revived and continued, the purposes of the two acts are identical, and the decisions under the 1899 act clearly are applicable authorities in construing the 1925 act.

In *LeCrone v. McAdoo* (253 U. S. 217), the Court of Appeals of the District of Columbia, on November 4, 1918, affirmed a judgment of the lower court dismissing a petition for mandamus against William G. McAdoo, the then Secretary of the Treasury. On December 16, 1918, Mr. McAdoo resigned his office as Secretary of the Treasury. On February 3, 1919, the Court of Appeals received a writ of error from the Supreme Court.

In its decision in that case, dated June 1, 1920, the Supreme Court said—

* * * But we can not consider * * * arguments upon the merits of the case, because, Mr. McAdoo having resigned his office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the act of February 8, 1899.

The court held that the whole proceeding was "at an end".

It already had been held in the case of *United States, ex rel. Bernardin v. Butterworth* (169 U. S. 600), which was decided before the passage of the act of February 8, 1899, that where a suit against a United States official had abated through death or resignation, it could not be revived so as to bring in the former defendant's successor in office, even though such successor in office consented to have the suit revived against him.

The Court said (p. 605)—

In the absence, therefore, of statutory authority, we can not, after a cause of this character has abated, bring a new party into the case. Nor is the want of such authority supplied by the consent of a person not a party in the cause.

There apparently is no decision by the Supreme Court under the 1925 act, except the memorandum decision in the case of *Lapique v. Walsh* (276 U. S. 590), which was dismissed *for lack of jurisdiction in that court* under section 238 of the Judicial Code as amended by the act of February 13, 1925. (Italics supplied.)

Section 4 of Rule 19 of the Rules of the Supreme Court of the United States (275 U. S. 611), which was promulgated after the passage of the 1925 act, also shows that that court considers the substitution of a successor to a public office, within six months after the death or resignation of his predecessor, as essential to continued jurisdiction over a case brought against a public officer.

That paragraph of the Rule reads as follows:

Where a public officer, by or against whom a suit is brought, dies or ceases to hold office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office.

Applying the law and the decisions to the instant case, it is clear that on October 9, 1929, the date of the argument in the Court of Appeals, the case had abated through the resignation of Secretary West and through the death of Commissioner Spry. At that date, the case was "at an end" so far as Secretary West was concerned, although a few days remained in which it might have been revived against Commissioner Moore, provided the proceeding could have been continued against him in the absence of the Secretary of the Interior as a party to the suit.

On November 4, 1929, the date of the court's decision and decree, the case was entirely at an end with respect to all parties to the record, and the court decided a moot question only.

Thereafter Mr. Graves made a laudable effort to reinstate the case, but at that time there was nothing to reinstate. The case had died at the expiration of the six months' periods, limited by the act of February 13, 1925.

As the matter stands there is no existing decree of any court respecting Whaler Island, which is legally or morally binding upon you.

This department and its Secretaries have always believed and contended that the act of Congress of March 4, 1927 (Chap. 518, 44 Stat. 1845), was controlling with respect to Whaler Island.¹ And this also appears to be the opinion of the Solicitor General, as expressed in his memorandum of January 22, 1930.

You have never had your day in court. Your full right in that respect includes the right to ask, through a petition for certiorari, the opinion of the Supreme Court of the United States upon the important public question which this case involves; but such an opinion can not be secured in the present state of the record. You, as Secretary of the Interior, are not bound to adopt the opinion of a lower court in a proceeding to which you were not a party, where the decree was rendered after the question at issue had become moot.

Furthermore, the Court of Appeals intimated that if the case had been presented in a different way it might have reached a different conclusion. The court said (36 Fed. (2d) p. 111)—

The decision of the Secretary affirming the decision of the Commissioner of the General Land Office and sustaining the order canceling plaintiff's selection refers to certain reports of Army engineers and Acts of Congress for the improvement of Crescent City Harbor. Without expressing any opinion, we have not overlooked the bearing these reports and Acts of Congress might have on this case had the question been properly raised, in so far as they suggest an intended appropriation of the island by the government for a public use.

Under all of the circumstances of the case it would seem that the proper course is to proceed in accordance with the requirements of the act of March 4, 1927, *supra*, and to issue a patent for Whaler Island to Del Norte County, California.

That will leave Lyders free to assert his claim to the land in the appropriate courts in California.

Section 11(c) of the 1925 act makes it plain, that in a case of this kind the duty of substitution rests upon the original plaintiff, no matter what position he may occupy in an appellate court. That subsection of the act provides that before a substitution is made the

¹ See departmental decision in *Eric Lyders, on rehearing* (52 L. D. 226).—Ed.

officer to be affected "must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

The provision for notice and the right given the officer to object to substitution, make it clear that in the instant case the plaintiff was the person charged with the duty of applying for substitution. No legal or moral obligation rests upon an official of the Government to renew litigation started against his predecessor in office.

It may be conceded that it was unfortunate that the attorneys on neither side directed the attention of the Court of Appeals to the fact that the case in question had abated, and so permitted that court to proceed to hear and determine a moot question. You, however, were in no way to blame for their failure to do so. You were not a party to the suit, and you were not concerned with the manner in which it was conducted.

I recommend that the request made by Lyders, that a patent to Whaler Island be issued to him in conformity with the decrees of the courts of the District of Columbia, be denied, and that Lyders be advised, through his attorney, that under the circumstances this department feels it to be its duty, in accordance with the mandate contained in the act of Congress approved March 4, 1927, to proceed with the issuance of patent to Del Norte County.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

HARE AND LAUGHLIN v. STATE OF NEW MEXICO

Decided January 16, 1931

SCHOOL LAND—ADJOINING FARM ENTRY—ADVERSE CLAIM—RESIDENCE—SETTLEMENT.

Settlement and residence on an original farm by an applicant for an adjoining farm entry, who at the time of filing application was not qualified to make such entry, does not constitute such an adverse claim as will defeat the right of the State to a school section in place under its school land grant. *Carl A. Williams* (52 L. D. 472), distinguished.

EDWARDS, *Assistant Secretary*:

The State of New Mexico has appealed from a decision of the Commissioner of the General Land Office dated June 16, 1930, which, among other things, rejected its claim under the school-land grant to lot 1, Sec. 16, T. 23 S., R. 1 E., N. M. P. M., containing 29.42 acres.

A hearing was had on the contest of Ida M. Stewart Laughlin (adjoining farm homestead applicant, Las Cruces 034016) v. Arthur

Taliaferro (soldier preference homestead applicant, Las Cruces 033279), in which R. F. Hare intervened, claiming under color of title lot 1, said Sec. 16, and Frederick A. Bunch for himself and A. L. Burkholder intervened as lessees of the State of New Mexico.

The register by decision dated August 1, 1929, held that the State of New Mexico was entitled to said lot 1, and that Mrs. Laughlin was entitled to adjoining lot 1 of Sec. 21, said township. On appeal the Commissioner affirmed the decision of the register in so far as the award of lot 1, Sec. 21, was concerned, but reversed the decision as to lot 1, Sec. 16, which he awarded to Hare, and extended to him the right to file proper application under some appropriate land law in the event that he furnished sufficient evidence to show that he had made satisfactory arrangements with Mrs. Laughlin to convey to her after patent, that portion of lot 1, Sec. 16, south of the Deming Road, and that Mrs. Laughlin should pay Hare the *pro rata* share of the expenses in securing patent.

The State of New Mexico has appealed from the Commissioner's decision in so far as it relates to lot 1, said Sec. 16. In the brief filed in support of the State's appeal, after citing and discussing the granting act of June 21, 1898 (30 Stat. 484), and section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 561), counsel reaches the following conclusion:

Since it appears unmistakably from the record that neither Laughlin nor Hare laid claim to Lot 1, Section 16, Township 23 South, Range 1 East, or made settlement thereon, or improvement thereof with a view to entry under the preemption, homestead, or desert-land laws, the nature of their claims and the claim of each of them is such that it can not be said that either of them are within the provisions of the statute which exempt a school section from the operation of the grant to the State of New Mexico for the support of Common Schools.

We submit, therefore, that under the law, the claims of Laughlin and Hare as to the said Lot 1, are insufficient and that the decision of the Commissioner of the General Land Office must be reversed and that it must be held that the said Lot 1 passed to the State under its School Land Grants.

The land involved was shown on township plat approved September 10, 1886, as being embraced in the Mesilla Civil Colony grant, but the subsequent plat, approved December 14, 1925, shows said land to be public land. The survey on which the approved plat was based was begun December 16, 1922, and completed January 9, 1923.

The record shows that Mrs. Laughlin, formerly Ida M. Stewart, filed an original deed dated February 13, 1918, from Wesley Stewart to Ida M. Stewart for two adjoining tracts of land containing 52.838 acres and 43.9 acres respectively. There is also on file an original deed dated December 2, 1920, from the incorporation of Mesilla to Ida M. Stewart for a tract of 109.15 acres of land. Both of said

deeds appear to cover substantially the same tract of land although there is some difference as to area. Tax receipts were filed showing that Mrs. Laughlin paid taxes on 109 acres for the years 1922 to 1926, inclusive. The tract claimed by Mrs. Laughlin embraces, with other lands, a portion of lot 1, said Sec. 21, and a portion of lot 1, said Sec. 16.

The evidence shows that in the early part of the year 1918 Miss Stewart and her brother commenced the construction of a house on the land which he had deeded to her, and that in connection with the building operations they established a camp on land nearby which is now a part of Sec. 16. Miss Stewart probably stayed at the camp to some extent but the testimony indicates that she had not fully abandoned her former home several miles away until later in the year when she established her home on the deeded land. But even if she remained in the camp with substantial continuity for several months during the building of the house on the adjoining land, it would not constitute such a settlement claim as would defeat the right of the State, as hereinafter shown. It does not appear that she settled on Sec. 16 with the intention of making homestead entry. In fact she was not qualified at that time to make homestead entry because she was the owner of more than 160 acres, and continued to hold more than 160 acres of deeded land until September, 1920, when she disposed of one tract which reduced her holdings to less than 160 acres. In the latter part of 1918 she moved into a house on the deeded land. She was married in 1921 and has lived continuously since 1918 on the deeded land. In connection with her deeded land she has cultivated to some extent or used for grazing about $1\frac{3}{4}$ acres of the said tract in Sec. 16 and about 8 or 10 acres in Sec. 21. She claims settlement rights on these tracts by virtue of her residence on the adjoining deeded land and the cultivation, use and fencing of the said lands in Secs. 16 and 21. Under the well-established rule of the department such claim can not be recognized.

In the case of *William C. Field* (1 L.D. 68), it was held that residence upon an original farm does not constitute residence upon an adjoining tract prior to date of entry, and that no credit for residence on the original farm can be credited on the adjoining farm entry prior to the date of entry.

The case of *Hall v. Dearth* (5 L. D. 172), was much like the present case. Hall owned and resided upon a tract of about 100 acres which was a part of a Mexican grant, and had used the land applied for in connection therewith. He made application on June 27, 1883, to enter the adjoining tract, claiming credit for settlement since 1871 under section 3 of the act of May 14, 1880 (21 Stat. 140).

It was held, however, that the latter act had no application to adjoining farm entries; that his residence was upon the land he owned and not upon the adjoining public land; that his contention that although living upon his original farm he, by virtue of cultivation and improvement of the adjoining tract of public land, prior to his application to enter the same, acquired a preference right thereto as a homestead settler, was untenable.

The same rule was restated in the case of *Thatcher v. Bernhard* (10 L. D. 485), wherein it was said that residence on the original farm prior to entry was not residence upon the adjoining tract of public land, but that when entry was made of the adjoining land, the tract entered constituted with the original farm one tract or an entirety, and residence on the original farm after such entry is imputed to and becomes in contemplation of law settlement and residence on the land entered.

In the case of *Patrick Lynch* (7 L. D. 33), it was held that residence on the original tract prior to making adjoining farm entry could be credited as residence upon the tract entered under the provision of the act of May 14, 1880. But that decision was expressly overruled in the case of *John W. Farrill* (13 L. D. 713), and the rule stated in the prior decisions was reaffirmed.

The subject was again considered in the recent case of *Carl A. Williams* (52 L. D. 472), wherein the cases of *Field* and *Farrill*, *supra*, were slightly modified, but only to the extent of holding that credit would be allowed for residence on the original farm from date of application to make adjoining farm entry, instead of allowing credit only from date of entry as stated in the former cases.

In practical effect, the rule stated in the *Williams* case is of no advantage to the applicant for adjoining farm entry in the instant case. She was not qualified to make homestead entry at the date of her application, as she was a married woman and it is not shown that she was the head of a family. In view however of her equities as to the tract in section 21 she will be allowed to enter the same under any appropriate public land law if proper application therefor be made within 30 days from notice hereof.

The claim of Hare is based on his ownership of adjacent land in the private land grant and cultivation and improvement in connection therewith of about four acres in Sec. 16. He claims no actual settlement on Sec. 16 and his claim as against the State is rejected.

The decision appealed from is reversed as to the tract in Sec. 16 and is modified as to the claim of Mrs. Laughlin for the tract in Sec. 21.

Reversed in part and modified in part.

STATE OF WISCONSIN v. CAVENAUGH

Decided January 16, 1931

RAILROAD GRANT—NORTHERN PACIFIC SELECTION—WISCONSIN.

The eastern terminus of the grant of July 2, 1864, to the Northern Pacific Railroad Company was definitely and finally fixed at Ashland, Wisconsin, and consequently the railroad company may select lands in that State in accordance with the terms of the adjustment act of July 1, 1898.

PRIOR DEPARTMENTAL DECISIONS OVERRULED.

Cases of *Northern Pacific Railroad Company* (21 L. D. 412, 23 L. D. 204, adhered to on rehearing, 25 L. D. 501), overruled.

EDWARDS, *Assistant Secretary*:

This is an appeal by the State of Wisconsin from a decision of the Commissioner of the General Land Office dated July 12, 1930, rejecting as to lots 13, 14, 18, 19, and 20, Sec. 23, T. 43 N., R. 6 E., 4th P. M., Wisconsin, its school land indemnity selection list filed July 19, 1929.

The selection list was rejected to the extent stated on the ground of conflict with the prior application of Clifford W. Raw, attorney in fact for Charles Cavanaugh, under the acts of July 1, 1898 (30 Stat. 597, 620), and February 27, 1917 (39 Stat. 946).

The sole question involved is whether rights under the act of July 1, 1898, *supra*, can be located in the State of Wisconsin, the Attorney General for Wisconsin contending that the Northern Pacific Railroad Company never had any grant of lands in the State of Wisconsin, and for that reason no Northern Pacific Railroad grant scrip can have any application to public lands in that State.

The act of Congress approved July 2, 1864 (13 Stat. 365), authorized the Northern Pacific Railroad Company to construct a railroad "beginning at a point on Lake Superior in the State of Minnesota or Wisconsin" westward to "some point on Puget's Sound." Section 3 of the act provides—

That there be, and hereby is, granted to the "Northern Pacific Railroad Company" its successors and assigns, * * * 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 preemption, or other claims or rights, at the time the line of said road is definitely fixed, and 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 preempted, 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: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. * * *

In 1870 the company located its general route from the mouth of the Montreal River in Wisconsin, across Wisconsin and Minnesota to a point on the Red River of the North near Fargo, and transmitted to the department a map showing this location. The map showed the proposed general route to commence at the mouth of the Montreal River, thence a little south of west upon a direct line to a point directly south of and about six miles distant from the south end of Chequamegon Bay; thence a little north of west upon a direct line crossing the State boundary between Wisconsin and Minnesota at or near the point where the St. Louis River becomes such boundary. Pursuant to directions by the department, the Commissioner of the General Land Office instructed the local officers at Bayfield, Wisconsin, to note on their records that all odd-numbered sections of land within 20 miles of the line were withdrawn from sale, homestead or preemption entry. Thereafter large quantities of lands in the even-numbered sections were disposed of at the rate of \$2.50 per acre.

In 1882 a map of definite location of the railroad from a point on the St. Paul and Duluth Railroad eastward to a point in Sec. 15, T. 47 N., R. 2 W., 4th P. M., in Wisconsin was approved by the board of directors and filed in the General Land Office. The line of definite location laid down on this map followed substantially the line of general location upon the prior map, but it turned to the north and touched Superior, and also Ashland, and stopped some ten miles west of the mouth of the Montreal River. Upon receipt of the map of definite location, the Commissioner of the General Land Office prepared diagrams showing the limits of the grant and indemnity belts, and transmitted such diagrams to the district land officers with directions as to the withdrawal of the lands in the odd-numbered sections.

On December 3, 1884, there was filed in the General Land Office a certified copy of a resolution adopted on August 2, 1884, by the board of directors of the Northern Pacific Railroad Company fixing the eastern terminus of the railroad at the city of Ashland, Wisconsin. Thereafter the district land officers were instructed to adjust the grant on the basis of a diagram showing the final eastern terminus of the line at Ashland. The company constructed a continuous line

of railroad from the city of Ashland to Puget Sound, and the whole line was duly accepted by the President of the United States as provided in the act of 1864.

The line of the Northern Pacific Railroad in Wisconsin crossed areas involved in grants made prior to 1864 in aid of the construction of railroads. As a result, the prior grants reduced materially the areas which otherwise would have inured to the Northern Pacific Railroad Company. The records of the General Land Office show that 2,254.39 acres in Wisconsin have been patented to the company as lying within the primary limits of the grant, and that 6,436.75 acres have been selected as indemnity and patented. The selections made by the company in Wisconsin under the act of July 1, 1898, *supra*, which have been approved and patented aggregate 1,906.58 acres.

The Attorney General for Wisconsin contends in the appeal that the departmental decision of November 13, 1895, in *Northern Pacific R. R. Co.* (21 L. D. 412), is controlling. He has apparently overlooked the fact that the Supreme Court of his own State, in *Northern Pacific Ry. Co. v. Doherty* (100 Wis. 39), refused to follow said departmental decision, stating that "as we do not agree with the secretary's premise we can not agree with his conclusion." On appeal, the judgment of the Supreme Court of Wisconsin was affirmed by the Supreme Court of the United States (177 U. S. 421), it being held that the eastern terminus of the Northern Pacific Railroad was at Ashland, Wisconsin, and that the company acquired a right of way over public lands in Wisconsin. To the same effect was the decision in *United States v. Northern Pacific R. R. Co.* (177 U. S. 435).

It is true, as stated in the appeal, that the decision in *Northern Pacific R. R. Co.* (21 L. D. 412) has never been formally overruled by the department, but reference has been made in reported departmental decisions to the fact that the decision had been declared erroneous by the Supreme Court of the United States. See *Eaton et al. v. Northern Pacific Ry. Co.* (33 L. D. 426) and *Northern Pacific Ry. Co.* (44 L. D. 218). Under the circumstances, there was little necessity for formally overruling said decision, but it is hereby now overruled to the extent it conflicts with the views herein expressed.¹

As the grant of land made by the act of 1864 was coextensive with the right of way thereby granted, it follows that the grant extended into the State of Wisconsin.

The decision appealed from is correct and is

Affirmed.

¹ Case of *Northern Pacific Railroad Company* (23 L. D. 204), adhered to on rehearing (25 L. D. 501), in effect also overruled so far as in conflict.—Ed.

CITY OF PHOENIX

Decided January 21, 1931.

WITHDRAWAL—RECREATION LANDS—MINING CLAIM—ABANDONMENT—RELOCATION.

A temporary withdrawal in aid of the grant of June 7, 1924, of lands to the city of Phoenix, Arizona, for park purposes, becomes effective as to mining locations within its area upon their abandonment and cuts off the right of their relocation under the mining laws.

RECREATION LANDS—MINERAL LANDS—RESTORATIONS—OCCUPANCY.

The proviso to the act of June 7, 1924, reserving to the United States the minerals in the lands granted to the city of Phoenix, Arizona, for park purposes, did not have the effect of restoring the lands to the operation of the mining laws either absolutely or with limitations, and occupancy and use of the lands for mining purposes not in accord with rules and regulations of the Secretary of the Interior are without authority of law.

PRACTICE—COMMISSIONER OF THE GENERAL LAND OFFICE—REGISTER—APPEAL.

A decision of an officer of a local land office, in a proceeding in which the United States is made a party, is subject to review *sua sponte* by the Commissioner of the General Land Office, even though no appeal be filed by a party adversely affected by the decision.

MINING CLAIM—RECORDATION—NOTICE—ADVERSE CLAIM—ARIZONA.

A notice of a mining location not filed for record until after an adverse right had intervened is of no validity under the laws of the State of Arizona.

EDWARDS, *Assistant Secretary*:

Arthur A. Fisher and Mary Edith Brooke have filed separate appeals from a decision of the Commissioner of the General Land Office, dated June 17, 1930, in which it was adjudged that the Western Star, Center Quartz, South End, and Del Roy lode locations, claimed by Fisher and certain placer and lode locations claimed by Brooke were invalid.

It is shown that the lodes claimed by Fisher were not located until September 23, 1925, and that part of the Western Star and all of the other three locations cover lands in either SW $\frac{1}{4}$ Sec. 7 or NW $\frac{1}{4}$ Sec. 18, T. 1 S., R. 3 E., G. & S. R. M. The tracts above described are included in temporary Executive withdrawal of April 23, 1924, from settlement, location, sale or entry, or other forms of disposal pending legislation authorizing the city of Phoenix to purchase the lands withdrawn for public park purposes. The contemplated grant of the lands so withdrawn was made by act of June 7, 1924 (43 Stat. 643). The withdrawal and grant were made subject "to valid existing claims" and the grant is upon condition that the city make payment for such land at the rate of \$1.25 per acre within six months from the date of the granting act and contains the proviso, "That there shall be reserved to the United States all oil, coal,

or other mineral deposits found at any time in the land, and the right to prospect for, mine and remove the same."

To this proviso the act of February 8, 1927 (44 Stat. 1081), added the words, "under such rules and regulations as the Secretary of the Interior shall prescribe."

Appellant Fisher testified at the hearing between the city and the mineral claimants and in which the United States intervened and at which he appeared as a party that the locations above mentioned were in 1924 embraced in what was known as the Thomas Boyle claims, but that these claims had been *abandoned*. (Hearings record, p. 38.) If this be true the lands within the prior claims upon such abandonment reverted to the public domain (*South Dakota v. Madill et al.*, 53 L. D. 195, and cases cited), and were, therefore, at the date of Fisher's locations subject to the purchase by the city under its grant. It is not material whether Fisher had actual notice of the grant, he must be charged with notice thereof. He not only could not make any valid location under the mining laws but could not under the terms of the grant initiate any right to prospect for, mine and remove the minerals, for the proviso in the granting act reserving the minerals to the United States did not restore the lands to the operation of the mining laws either absolutely or with limitations. Furthermore, in the absence of the prescription of rules and regulations by the Secretary, occupancy and use of the land for mining purposes are without authority of law. The claims of Fisher are therefore declared void.

There is no merit in his contention to the effect that the city can not claim any land within his locations, because it made no claim to the surface of the land at the hearing or because an opinion was expressed by counsel for the city that the claims appeared to be valid, or because the city did not appeal from the local register's decision holding such claims valid. The city included in its original application of October 6, 1924, by lot number, a description of the land within Fisher's locations and tendered therewith the purchase price for the same. The United States was a party in interest in the proceedings, and the decision of the local officers was therefore subject to review by the Commissioner even though there was no appeal by one of the parties adversely affected by the decision. *Morrison v. McKissick* (5 L. D. 245); *Curtiss v. Simmons* (6 L. D. 359); *Grass v. Northrop* (15 L. D. 400); *Rice v. Simmons* (43 L. D. 343). The Commissioner, *sua sponte*, recognized and declared these claims invalid which he had clear right to do.

According to the documentary and oral evidence offered by appellant Brooke, and as supplemented in her appeal, she asserts ownership of the Hieroglyphics placer located September 23, 1920,

and covering E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 9, T. 1 S., R. 3 E.; the Tuxedo placer, located May 19, 1930, which appears from description to be identical with the Hieroglyphics placer; the Tuxedo Extension lode which according to the recitals in what purports to be an amended notice of location thereof made October 22, 1929, was located October 7, 1919, and the Brooke lode alleged to have been located September 29, 1923, notice of which was not recorded until September 12, 1930. Notices also have been supplied of original location of the Tuxedo lode by Brooke, which gives the date of location as September 26, 1918, and date of recording as November 6, 1918, and amendment thereof January 6, 1928. All of these lodes purport to cover part of the S $\frac{1}{2}$ Sec. 9 T. 1 S., R. 3 E., one of the tracts granted to the city. The only evidence of the original location of the Tuxedo Extension lode prior to the grant is the self-serving recital in the amended location notice thereof, which is insufficient.

The notice of the Brooke location was not filed for record until after the adverse right of the city had intervened. It is therefore of no validity under the law of the State. R. S. 1913, Sec. 4030; *Perley v. Goar* (22 Ariz. 146, 148; 195 Pac. 532).

The evidence relating to the Tuxedo Extension suggests the inference that it is an inclusion and extension of the Tuxedo, though it is far from being explicit or definite on the point, the location notice of the latter is too imperfect to identify the land.

With respect to the placer claims mentioned, Brooke testified that the land contains, "a fine granite quarry of ornamental rock; that it has been and is used for decorative purposes;" that friends of hers and others, "had hauled away at my expense large quantities of rock from this ground;" that she had built cabin foundations with it, and the granite had been used to build a house on the Tarr homestead; that she got no cash for what she allowed to be taken away, but credit thereby for operating and working her quarry. Perkins, a mining engineer for the city, testified that he knew the lands claimed under these locations for 15 years and had examined them with care in 1926 and a number of times since; that he supervised the hauling of granite from the land to build roads for the city and that "there was a total absence of anything of value that could be placered upon it." The evidence fully warrants the conclusion that the Tuxedo or Hieroglyphics placer has no value for its mineral content, and is therefore invalid.

As to the Tuxedo Extension claim, Perkins confirms the claim of the appellant that it covers mineral ground, stating that thereon there is "a well defined mineral zone;" that "the discovery work has been done, and not considering anything else other than that,

I would say it was a valid claim." He, however, testified in substance, that the location covers the Ora claim made by one Crawford with whom he was formerly associated in business, and that there was no other work done thereon except by Crawford until he abandoned the claim in 1925; that a cabin was built, and work has been done to the value of \$500 since 1927, but all of this work was subsequent to 1926; that there was nothing on the ground or in the county records by which the Tuxedo Extension could be identified.

The testimony of claimant Brooke is very indefinite and vague as to what she did to initiate rights by location prior to the grant. She admits she did not sink a discovery shaft on the Tuxedo Extension ground until 1928, or record the original location notice of this claim. The testimony of Perkins to the effect that a large part of the Tuxedo Extension lode was embraced in the Ora claim at the time and for some years after the grant is not refuted. As to the evidence of the failure of Brooke to perform annual assessment work, this is not a matter that can be taken advantage of by the United States or the city as its grantee. It only subjects the claim to relocation by a rival mining claimant; *Wilbur v. Krushnic* (280 U. S. 306, 317); *Corda Gold Mining Co. and Wallace Mathers v. Ernest Bowman*, on petition (52 L. D. 519); *South Dakota v. Madill et al.* (53 L. D. 195); but the evidence fully warrants the finding that no valid location was initiated by Brooke to the ground within the Tuxedo Extension lode prior to the withdrawal mentioned. The claim is therefore of no validity.

In the official survey plat approved February 19, 1924, the Ora claim was erroneously segregated as a valid existing claim. The city therefore applied only for the remainder of the $S\frac{1}{2}$ Sec. 9 in its application. In the decision complained of, the Commissioner held that the city was entitled under its grant to amend its application to include the land within the Ora claim and ask for a cancellation of the present segregation of that claim. This the city subsequently did. It is contended by Brooke that the city is not entitled to purchase such land, presumably upon the theory that as the payment was not made for the same within six months from the date of the act, the right of the city lapsed. The failure of the city to apply specifically for the tract was manifestly due to its erroneous segregation by the General Land Office. The amount tendered the Government originally was more than sufficient to meet the purchase price of this and all other tracts it may now acquire title to. No error is seen in permitting the city to perfect its title to the same.

Another contention is made that asserted rights to this tract were not an issue at the hearing. Although not included in the list of

tracts listed in the instructions authorizing the proceedings, the letter to the register dated April 4, 1929, page 5, states—

The mineral or nonmineral character of each legal subdivision of this area should be established at the hearing, so that when a decision is rendered, the mineral question may be settled and all mineral lands eliminated from the grant and the nonmineral land patented to the city unless it should be in conflict with valid nonmineral claims.

No merit is seen in this contention.

In accordance with the views expressed the Commissioner's decision is

Affirmed.

CITY OF PHOENIX

Motion for rehearing of departmental decision of January 21, 1931 (53 I. D. 245), denied by Assistant Secretary Edwards, April 13, 1931.

OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANT LANDS—EXTENSION OF TIME FOR CUTTING AND REMOVING TIMBER—ACT MAY 19, 1930

INSTRUCTIONS

[Circular No. 1235]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 23, 1931.

REGISTERS, LAKEVIEW AND ROSEBURG, OREGON:

The act of May 19, 1930 (46 Stat. 369), authorizing the Secretary of the Interior to extend the time for cutting and removing timber upon certain revested and reconveyed lands in the State of Oregon, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, empowered, at his discretion, to extend the period within which, under the terms of the patent therefor, the timber may be cut and removed by the purchaser thereof, his heirs or assigns, from revested lands of the Oregon-California Railroad grant lands, and reconveyed lands of the Coos Bay Military Wagon Road land grants, either heretofore or hereafter sold by the United States; and the Secretary of the Interior is further hereby authorized to make such rules and regulations as he may deem proper governing the granting of extensions of time to such purchasers and the length of such extension and the method by which and the terms upon which the same may be granted.

Pursuant to the provisions contained in said quoted act the following instructions are issued to govern the filing of applications for an extension of time and the procedure in regard to disposition of applications thus filed:

1. Applications for an extension of time beyond that specified in the patent heretofore or hereafter issued for timber purchased on land revested in the United States under the act of June 9, 1916 (39 Stat. 218), or reconveyed to the United States under the act of February 26, 1919 (40 Stat. 1179), should be filed with the district cadastral engineer, 619 Post Office Building, Portland, Oregon.

2. Applications may be submitted in longhand if plainly written, but preferably in typewritten form. Any application filed under the above act should describe the land, give the land district and serial number under which the timber patent issued, and briefly and concisely set forth, under oath by the individual applicant or by an official of the company, where the application has been filed by a corporation, the approximate amount of timber remaining on the land, together with a comprehensive statement showing the reason or reasons why the timber involved has not or can not be cut and removed during the period stipulated in the patent.

3. In all cases where the application presented appears to merit the granting of the extension requested the district cadastral engineer shall, as soon as convenient, cause a field examination to be made and thereafter report the facts thus ascertained to the Commissioner of the General Land Office, Washington, D. C., with appropriate recommendations.

4. If for any reason doubt is entertained as to the merit of the application and as to the propriety of granting relief, the district cadastral engineer will, before conducting the field examination, forward the application to the Commissioner of the General Land Office with a request for instructions.

5. The Commissioner of the General Land Office shall, upon receipt of an application which appears meritorious, prepare a letter for the approval of the department, addressed to the district cadastral engineer, containing all material facts and directing that the applicant be allowed 30 days from receipt of notice in which to execute and file a contract and bond, before further favorable action is taken in the same manner as is required under the act of May 17, 1928 (45 Stat. 597, Public No. 417), and departmental regulations, Circular No. 1200 (52 L. D. 683), with reference to the sale of timber on revested and reconveyed lands in the State of Oregon.

6. In response to requests for instructions by the district cadastral engineer, the Commissioner of the General Land Office will either, with the approval of the department, direct field examination and

the submission of a report based thereon, or hold the application for rejection subject to the usual right of appeal to the Secretary of the Interior within 30 days after receipt of notice of such rejection.

7. When the contract and bond mentioned in the preceding section have been submitted in the required form the Commissioner of the General Land Office shall prepare for departmental approval a letter addressed to the district cadastral engineer at Portland, granting such an extension for the cutting and removal of the patented timber as the facts disclosed by the record may warrant.

8. The principal and surety in these bonds will, as the principal and surety in similar bonds submitted with the sale of timber in the first instance under the said act of May 17, 1928 (45 Stat. 597, Public No. 417), be held responsible until the condition in the bond has been fulfilled without reference to the expiration of the extension granted.

9. In cases where the timber is cut and removed before the expiration of the time granted, rights under such extensions may be terminated by the Secretary of the Interior in the same manner as are rights under timber patents issued under the act of June 9, 1916 (39 Stat. 218).

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

THOMAS L. WOODRUFF

Decided February 2, 1931

MINING CLAIM—ASSESSMENT WORK—ABANDONMENT—OFFICERS—ERROR—ESTOPPEL—GOVERNMENT PROCEEDINGS.

Assuming that a mining claimant was dissuaded from filing his mineral application and was induced to abandon work on his locations through the advice of an officer of a local land office that his locations were invalid because of apparent conflict with a prior coal withdrawal, which advice was due to claimant's misdescription of the land claimed, he can not plead that the Government is by such advice estopped from later bringing proceedings charging abandonment.

WILBUR, *Secretary:*

This is an appeal by Thomas L. Woodruff from a decision of the Commissioner of the General Land Office dated June 6, 1930, holding the Steamboat and 36 other oil shale placers, situate in T. 5 S., R. 100 W., 6th P. M., in which he claims an interest, void because he admits the charge theretofore preferred against the claims that the annual assessment work had not been performed on or for the bene-

fit thereof for the year ending July 1, 1929, and had not since been resumed.

Woodruff, however, states in a letter which is taken as an appeal that—

I was not allowed to patent these claims after six years honest and constructive assessment work for the reason stated by your Glenwood Springs Land Office that the claims were filed on land covered by a coal withdrawal which however did not show on their books when the claim locations were made and therefore the claim locations were unpatentable. When I had completed the assessment work and went to apply for patent they advised as did the Land Office in Washington, that further assessment work would be useless. Two years later it was discovered, after a resurvey by the Government surveyors, that these oil shale claims were NOT on land covered by the coal withdrawal, but I was notified that whereas I had not done the assessment work, the claims were to be canceled, not taking into consideration the fact that I had already done sufficient work to bring the claims to patent in 1926.

In a previous communication to the Commissioner, he states that he was ready to go to patent on these claims in 1925, but was advised by the Land Office that they could not accept the application, first because the land was being resurveyed, and second because the land was found to be within the coal withdrawal so that the locations were not legal and the land could not go to patent. In a letter to the register of November 13, 1929, it is admitted that no development work has been done since the year ending July 1, 1926, it being considered foolish to waste further money on assessment work when advised there was no chance for a patent.

It appears from the record that the record holders of the mining title at the date of institution of the proceedings were made parties thereto; that the locations were made on various dates in 1918, and the recorded certificates of location described lands which were then included in an existing coal withdrawal, Colorado No. 2, made September 2, 1910, except lands described in Secs. 19 and 20, the withdrawal being revoked as to these two sections by Executive order of January 26, 1911. No part of the remaining lands were restored to entry until Executive order of August 11, 1928, a date subsequent to the passage of the leasing act of February 25, 1920. Original approved plat of survey of this township and range was filed in the local office December 10, 1885, but entries and filings therein were suspended by letter "E" of December 7, 1922, because the lands were not resurveyed. On July 19, 1926, they were suspended from settlement, location, sale or entry or other disposition pending a resurvey. It appears pursuant to authority in current appropriation acts to survey and resurvey lands valuable for oil shale in this and other townships, a resurvey has been executed of T. 5 S., R. 100 W., in the field but not as yet accepted. Reports submitted by the chief

of field division agree with appellant's contention, that descriptions in the coal withdrawal interpreted in terms of the resurvey, except for some small fractions of three claims in question, do not cover the appellant's claims as actually located on the ground.

An extended statement is made in [unpublished] departmental decision of March 7, 1930, in the case of E. K. Whitehead (A. 14291) as to the occasion for the resurvey of Ts. 5 S., Rs. 99 and 100 W., the causes of the errors of mining and other claimants in describing by legal subdivision the lands they had located, the effect of the resurvey as an establishment of the lines and corners of the original survey, and as to the area that was included in the coal withdrawal. The conclusion there expressed that tracts should not be held to be within the coal withdrawal because of any assumption that the position of T. 5 S., R. 99 W. was $2\frac{7}{8}$ miles further east than is now shown by resurvey is equally applicable to these claims in question. The Commissioner was therefore right, upon being informed of the location of these claims with respect to the resurvey, in modifying in his order of April 11, 1930, his previous decision of May 13, 1929, holding certain of the claims void for conflict with the withdrawal and challenging the validity of the claims for defaults in maintenance rather than as being void *ab initio*.

The department adheres to its view that the United States may challenge the validity of an oil shale placer claim, where default occurred in the performance of assessment work and has not been cured by a resumption of work (*Federal Shale Oil Co.*, 53 I. D. 213). The appellant sets forth no sufficient ground in fact or law that would relieve him from the obligation to maintain his claims. No data is given whereby any application for patent for these claims can be identified by recourse to the records of the General Land Office. In fact it is not definitely alleged that such application was presented and rejected or refused reception for the causes alleged or any cause. If appellant merely consulted the officers of the land office, and was told he could not obtain title because of the invalidity of the claims, and thereby was dissuaded from presenting his application and concluded it was useless to further maintain the claims, this was not a matter of decision but advice which although it may have been erroneous does not conclude the Government. *Ard v. Brandon* (156 U. S. 537, 543).

But it can not be determined from what appellant avers that the advice as alleged to have been given would have been erroneous. If appellant disclosed that he intended to apply for patent for the lands as described in his notices of location, being on their face in conflict with the withdrawal, the advice that they were void was correct, and had there not been the withdrawal for resurvey, which

of itself was sufficient to reject the application (*Wiegert v. Northern Pacific Railway Co.*, 48 L. D. 48), a rejection because of the coal withdrawal would have been justified. See Albert C. Gillette, Salt Lake City 034606, decided October 3, 1927, unreported. It would make no difference whether the withdrawal was noted or not on the tract books when the location was made. A withdrawal takes effect, unless otherwise specified, on the date it is issued, though not noted on the public records. *Anna L. Schram* (51 L. D. 303) and cases cited. The local officers or any officers of the Government were not bound to know that the claims were situated elsewhere than as described. The error in description was that of claimant or his predecessors in interest. As in the *Whitehead* case, *supra*, it is apparent that the error in description arose from suppositions by the locators' surveyor as to the relative positions of the township and range in question with surveyed townships in T. 6 S. and using corners in the latter as starting points. As is stated in that case, had the parties sought to locate particular sections in T. 5 S., R. 100 W. by using monuments in T. 5 S., R. 97 W., safer and more proper points of control, as was done in making the independent resurvey of the township, and had made a proper survey therefrom, the claims in question would not have been considered as invading the sections described in the location notices but would have been considered as being within approximately the subdivisions that they are now shown to occupy by the plat of resurvey. No merit is perceived in the reasons assigned for abandoning work upon the claims. The Commissioner's decision will therefore be

Affirmed.

J. G. HOFMANN

Decided February 5, 1931

REPAYMENT—HOMESTEAD ENTRY—SWAMP LAND—ERROR—RELINQUISHMENT—
WAIVER.

A homestead entry allowed for land within a pending swamp land selection is an entry erroneously allowed within the contemplation of the repayment act of June 16, 1880, and a relinquishment of the entry filed because of the conflict constitutes merely a waiver of the claim for the purpose of securing a return of the fees improperly applied.

PRIOR DEPARTMENTAL INSTRUCTIONS SUPERSEDED.

Circular of December 13, 1886 (5 L. D. 279), no longer followed.

EDWARDS, *Assistant Secretary*:

This is an appeal by J. G. Hofmann from decision of October 18, 1930, by the General Land Office rejecting his application for repayment of the fee and commissions (\$12.10) paid in connection with

his homestead entry, and also for certain items of alleged expenses incident thereto amounting to \$500.

The entry was allowed on May 20, 1929, for lots 14 and 15, Sec. 30, T. 41 S., R. 39 E., T. M., Florida, containing 81.37 acres.

It appears that the State of Florida on September 5, 1923, filed swamp-land selection embracing the said tracts and other lands, and that selection was pending at the time Hofmann's entry was allowed. Notice of the entry was served upon the State and thereupon the State applied for a hearing to contest with Hofmann the question whether the land was swamp in character. Upon notice of the State contest, Hofmann applied for return of his fee and commissions which he had paid in connection therewith, and for incidental expenses. He was advised that he should file a relinquishment of his entry, as required by law, in order to secure repayment. He did so, and the entry was canceled. But his application for repayment was rejected as to the fee and commissions on the ground that his entry was not erroneously allowed, and as to the claim for expenses on the ground that the same was not paid to the Government.

As regards the item in the claim for expenses, the decision was clearly correct but the department finds that the entry was erroneously allowed because of conflict with the prior adverse claim of the State, and that the relinquishment was merely a waiver of claim to the land in order to secure the return of the money improperly applied to an entry prematurely and erroneously allowed. The relinquishment was a legal prerequisite expressly demanded by statute in order to secure return of money paid on an entry erroneously allowed. To say that relinquishment in such case operated to prevent repayment would be tantamount to saying that the law designed both life and death in the same remedy.

It is observed that reference is made to the old circular of December 13, 1886 (5 L. D. 279), which permitted entries to be made in conflict with a pending swamp-land selection, but that circular expressly provided that such allowance would be conditional, namely, "subject to the swamp land claim."

In the instant case, the certificate of allowance by the register does not show such condition. The certificate reads as follows:

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

Therefore it does not appear that the circular was complied with, even if it were found that the provisions of that circular were still in full force and effect. But the procedure directed by that ancient

regulation has long since been superseded or modified by innumerable orders and decisions. That regulation was referred to in the case of *Mary E. Coffin* (32 L. D. 124), which involved an application for land embraced in a pending swamp-land selection. It was said—

* * * As against a later claimant the State's application while pending segregates the land from other location, entry, or disposal. "In the administration of the swamp land grant, lands formally claimed thereunder must of necessity, during the pendency of such claim, be reserved from any other disposition." *St. Louis, Iron Mountain and Southern Railway Company* (11 L. D., 157, 160); *Chicago, Milwaukee and St. Paul Railway Company* (15 L. D., 121, 123). It is not compatible with good administration to permit the filings of applications for entry or selection to be held unacted upon until land segregated by former pending applications may be restored to the public domain.

A more recent circular, dated July 14, 1899 (29 L. D. 29), reads in part as follows:

* * * it is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

In the case of *Hall v. State of Oregon* (32 L. D. 565), the circular just referred to was cited as authority in refusing to allow an application in conflict with a prior pending State indemnity school selection. The following is quoted from that decision:

* * * 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. Indeed, in many instances contests have been permitted of such proffered selections and preferred right of entry accorded to the successful contestants.

The rule contained in the said circular of July 14, 1899, was considered by the Supreme Court in the case of *Holt v. Murphy* (207 U. S. 407, 415), where it was said—

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

The old circular of December 13, 1886 relating to entries in conflict with swamp-land selections was similar to the practice provided by the circular of September 6, 1887 (6 L. D. 131) in respect to applications in conflict with railroad selections, which latter permitted such applications to be received subject to a hearing on the conflicting claims. But in the case of *Santa Fe Pacific Railroad Co.* (33 L. D. 161, 162), it was held as follows:

A pending selection list is therefore given the same force in segregation of the land as an actual entry, and lands so conditioned are within the rule fixed by circular of July 14, 1899 (29 L. D., 29), which supersedes the circular of September 6, 1887, so far as in conflict therewith.

If, as thus held, the circular of September 6, 1887, was superseded by the circular of July 14, 1889, above quoted, necessarily the circular of December 13, 1886, was likewise superseded. However, there appears to have been much confusion on the subject. By order of April 4, 1903 (32 L. D. 88), it was said that the circular of December 13, 1886, was abrogated so far as concerned the State of Minnesota, by the decision reported in 32 L. D. 65. In the case of *Lampi v. Minnesota* (37 L. D. 385), it was held that the said circular, in so far as it allowed entry over a swamp-land selection, did not apply to those States which relied upon the survey returns as showing whether lands were swampy.

The State of Florida elected to make its selections by its own agents rather than to be governed by the field notes of survey, but after it has made such selection, it is contrary to general practice and good administration to allow an entry in conflict therewith.

This review of the subject fully demonstrates the erroneous allowance of the entry in question. More comprehensive instructions will be promulgated¹ with a view to clarification of the practice and for expeditious settlement of the swamp-land claims of the various States.

The application for return of the fee and commissions in this case is allowed under the provisions of the act of June 16, 1880 (21 Stat. 287), and the application for recompense on account of other expenditures is rejected.

The decision appealed from is modified accordingly.

Modified.

IRRIGATION DISTRICTS—PENALTIES

Opinion, February 5, 1931

RECLAMATION—IRRIGATION DISTRICTS—PENALTIES—POWER PROJECT—ERROR—OFFICERS.

Where the administrative officers of the Government fail to apply the net profits derived from the operation of a project power plant annually to the operation and maintenance costs of the project taken over by an irrigation district as required by subsection I of section 4 of the act of December 5, 1924, and such profits together with the amount paid by the irrigation district would have liquidated the debt of the district, no penalty can be charged against the district.

¹ See departmental instructions of April 6, 1931, promulgated by the General Land Office April 20, 1931, as Circular No. 1246. See 53 I. D. 377.—Ed.

First Assistant Secretary Dixon to the Commissioner of the Bureau of Reclamation:

Receipt is acknowledged of a memorandum dated January 24, 1931, from the Acting Commissioner of the Bureau of Reclamation to the Secretary, attaching a letter dated January 13, 1931, from the secretary of the Pathfinder Irrigation District, North Platte project, relative to penalties charged against the district during the year 1930. The distribution of power revenues on the North Platte project is controlled by the contracts with the irrigation districts. The contract with the Pathfinder Irrigation District is dated July 31, 1926, and contains in Article 32 of the same, provisions practically identical with subsection I of section 4 of the act of December 5, 1924 (43 Stat. 672).

In the distribution of power revenues on the North Platte project there were some accumulated net profits at the time the irrigation system was taken over by the Pathfinder Irrigation District, and since that date there has been a further accumulation of net power revenues, all of which you have apparently distributed.

The act of 1924 required the accumulated net revenues of the power system to be applied to a reduction of the total indebtedness of the district to the United States on the date that the district took over the operation and maintenance of its portion of the project. The application of net revenues must subsequently be made annually upon the indebtedness due each year from the district to the United States. The fact that your office did not distribute the revenues until the opinion [not published] of the Solicitor on October 17, 1930, does not relieve you from the necessity of distributing the revenues as required by the statute. The letter from the irrigation district, above referred to, appears to agree with the distribution of power revenues up to the year 1930 and no dispute is raised except for penalties that accrued in that year upon past due indebtedness of the district to the United States.

If the United States has in its hands funds belonging to the district that would, if properly applied, liquidate the indebtedness on which the penalty is claimed to have accrued the penalty is wrongly charged against the district.

The cases involving the application of credits are usually those arising in banking transactions. In the case of *Studley v. Boylston Bank* (229 U. S. 523, 528), it is stated—

The banker's lien on deposits, the right of retention and set-off of mutual debts are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised

by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, to avoid a circuitry of action, may interpose his mutual claim by way of defense and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaims can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A.

In 2 Comp. Gen. 506, there was under consideration by the Comptroller General the collection of interest on money due from an employee under the retirement act. He said: "Under the retirement act it is the duty of the administrative offices to make proper deductions from salary payments throughout the year." Failure to make proper deductions is an error of the administrative office and the duty of correcting any such error is upon that office. The error in not making the deduction * * * was the error of the administrative office for which the employee was not responsible. In this case the Government department had failed to deduct from the employee's salary the amount required by statute and permitted this condition to continue for some time, when the employee was instructed to pay into the Treasury the amount that should have been deducted from his salary, with four per cent interest. The Comptroller General held that the employee was not required to pay interest.

From these decisions and others which might be cited it is my conclusion that if the United States had in its hands money that is required to be applied upon the indebtedness of a contractor it can not charge interest or penalty upon the indebtedness in so far as the retained funds would liquidate the indebtedness from the contractor to the United States. Under the act of December 5, 1924, *supra*, the administrative officers were required to apply the net profits annually, and if the application of such net profits together with the amount paid by the irrigation district would have liquidated the debt of the district, no penalty can be charged against the district.

ATLANTIC AND PACIFIC RAILROAD COMPANY

Instructions, February 10, 1931

RAILROAD GRANT—INDEMNITY.

For purposes of adjustment the grant to the Atlantic and Pacific Railroad Company became by operation of law separated into two distinct grants, one as the eastern division, the other as the western division, and indemnity for losses in the former division can not be satisfied by selections within the limits opposite the constructed portion in the latter division.

EDWARDS, *Assistant Secretary*:

Under date of November 14, 1928, the Commissioner of the General Land Office submitted a report on the status of the grant to the Atlantic and Pacific Railroad Company as shown by the records of that office as of December 31, 1923, with request for instructions as to the proper method for adjustment of same. In that connection, it was stated that the history of the grant is such as to indicate that it had become separated into two units by operation of law and should be adjusted as two grants, one as the eastern or Missouri division and the other as the western division.

By the act of July 27, 1866 (14 Stat. 292), the Atlantic and Pacific Railroad Company was incorporated and authorized to construct a continuous line of railroad from Springfield, Missouri, westward to the Pacific Ocean. For the purpose of aiding such construction, the company was granted all sections of land designated by odd numbers, not mineral, to the amount of 20 sections per mile on each side of the line of the road through the Territories and 10 such sections per mile on each side of the road in any state, with the right to select indemnity lands within a further limit of 10 miles in cases where the odd sections in place were granted, sold, reserved, or otherwise disposed of at the time of the definite location of the line of the road. In case any of the odd sections in the place limits were mineral, other than iron or coal, indemnity therefor could be selected within 20 miles of the line of the road.

Section 3 of the act contained the following proviso:

That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act.

Under authority of the above provision, the Atlantic and Pacific Railroad Company by deed dated October 26, 1870, acquired the railroad, franchise, and property of the South Pacific Railroad Company under the grant made by the act of June 10, 1852 (10 Stat. 8), and adopted that line from Springfield, Missouri, to the western border of the State. Fifty miles of the acquired road west of Springfield, Missouri, had been constructed prior to that time, and it was afterwards completed to the western border of the State of Missouri, 39 miles, and to Vinita in the Indian Territory, a further distance of 36 miles, making a total distance of 125 miles, when construction ceased in the year 1871. The grant in Missouri became known as the Missouri or eastern division.

All of the rights of the company in this division were mortgaged, which was foreclosed by decree of court and sold on November 2, 1876, and became the property of the St. Louis and San Francisco Railway Company. The deficiency in this division of the grant amounts to 120,272.84 acres, as shown by the record as of December 31, 1923.

No attempt has ever been made by anyone to satisfy the losses incurred on this portion of the grant by selecting lands within the indemnity limits of the western division, and no such right is now formally or definitely claimed, but in oral argument before the department on the question it was indicated that the Santa Fe Pacific Railway Company claims the franchise under the grant to the Atlantic and Pacific Railroad Company, including the right to select lands within the indemnity limits of the western division to satisfy the said deficiency in the eastern or Missouri division. On the other hand, the St. Louis and San Francisco Railway Company and the New Mexico and Arizona Land Company have joined in representations to the effect that through certain transfers the latter company now holds all the rights of selection within the indemnity limits of the western division that were originally conferred upon the Atlantic and Pacific Railroad Company by reason of the construction of the western division, and it is further asserted that the Santa Fe Pacific Railway Company never had any interest in the lands of the Atlantic and Pacific Railroad Company in the eastern or Missouri division.

This claim of the New Mexico and Arizona Land Company is not altogether pertinent to the question under consideration, namely whether indemnity for losses in the eastern division may be satisfied by selections within the indemnity limits opposite the constructed portion of the western division. The ownership of the right of selection for losses occurring in the western division is not now involved in the question submitted for decision.

In respect to the eastern division, it is believed that all rights of the Atlantic and Pacific Railroad Company in or appertaining thereto were fully and finally transferred and closed out by the foreclosure sale above mentioned, and passed to the St. Louis and San Francisco Railway Company.

Under the terms of the act of 1866, *supra*, the whole line should have been completed by July 4, 1878. The eastern division from Springfield, Missouri, to Vinita, Indian Territory, a distance of approximately 125 miles was completed in the year 1871, after which there was no further construction until the year 1880 when construction was commenced on the western division. Thereafter, there were constructed 167 miles in the Territory of New Mexico and 383 miles

in Arizona. There were also constructed 50 miles additional in the Indian Territory, but no land grant was earned upon any portion of the line in the Indian Territory.

The grant was forfeited by the act of July 6, 1886 (24 Stat. 123), both as to the primary and indemnity lands opposite all of the unconstructed portions of the line on that date. The western division was mortgaged and sold under foreclosure and came into the ownership of the Santa Fe Pacific Railway Company in 1897.

As above stated, the eastern division embracing the grant in Missouri was sold under mortgage foreclosure proceedings in 1876 at a time when there had been no construction on the western division. The rights of the Atlantic and Pacific Railroad Company in that portion of the grant passed to the St. Louis and San Francisco Railway Company and the rights of the latter were limited by the act of April 20, 1871 (17 Stat. 19), which reads as follows:

That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seven, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: *Provided*, That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

Therefore, the St. Louis and San Francisco Railway Company could not have acquired any interest in the western division under that purchase. At the time of the foreclosure, the Atlantic and Pacific Railroad Company was in default as to the condition contained in section 8 of the act of July 27, 1866, requiring construction of not less than 50 miles of road per year. Construction had entirely ceased for several years. Congress did not by the act of 1871 declare a forfeiture of the grant so as to prevent further construction but it did limit the right of the purchaser to the lands coterminous with the constructed portion of the road at the time of foreclosure. The eastern division thus became a distinct and separate unit for adjustment.

In speaking of the effect of the act of April 20, 1871, the Supreme Court in the case of *Atlantic and Pacific Railroad Company v. Minus* (165 U. S. 413) used the following expressions (p. 429):

* * * There is nothing in the act evincing an intention on the part of Congress to waive any of the conditions of the act of 1866, except so far as such conditions had already been broken. Congress doubtless anticipated that the mortgage might be foreclosed, and desiring to provide against the possible contingency that the mortgagees might claim the right to sell the entire land grant upon the foreclosure, declared that it should operate only upon that part of the grant appertaining to the completed portion. * * * The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken. It cannot be supposed that Congress intended to postpone indefinitely, or until the mortgagees chose to foreclose, any remedy it might have against the mortgagor for a breach of its covenants. The plain meaning of the proviso is to permit any foreclosure of the mortgage to operate only upon such lands as are opposite and appurtenant to that part of the road which should be constructed at the time of the foreclosure, but not to extend for a day the time within which the road should be completed. The act also had a purpose in its assurance to mortgagees that no forfeiture would be insisted upon for conditions already broken, and that they might safely advance their money, if no breach should thereafter occur. Except to this extent there was no intention by this act to alter, amend or repeal the act of 1866.

Attention is also called to the act of March 3, 1897 (29 Stat. 622), section 1 of which reads in part as follows:

That whenever any mortgage made by the Atlantic and Pacific Railroad Company under and by virtue of Acts of Congress is foreclosed in any court of the United States, or of any State or Territory thereof, and any sale of the road, equipment, lands, franchises, privileges, and other rights and property covered by said mortgage is made under a decree or decrees of such courts, the purchaser at any such sale or sales, and their associates or assigns, shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants, and franchises, including the franchise to be a corporation, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure.

In June, 1897, the Santa Fe Pacific Railway Company under foreclosure proceedings obtained all of the interest of the grant owned by the Atlantic and Pacific Railroad Company but the mortgage did not cover any interest in the eastern division as that had long since passed to the St. Louis and San Francisco Railway Company under prior foreclosure sale of that division.

It appears that all parties concerned have acted upon the theory that the two portions of the grant were subject to separate and independent adjustment. In 21 L. D. 162 it is shown that the St. Louis

and San Francisco Railway Company urged that the eastern division had been adjusted by departmental decision of February 6, 1889 (8 L. D. 165). That decision dealt only with the eastern division, which was treated separately from the western division but the department held that the eastern division had not been at that time finally adjusted and closed.

In 6 L. D. 84 and 12 L. D. 116, it is shown that the Atlantic and Pacific Railroad Company disclaimed interest in the eastern division of the grant.

It thus appears that neither of the different companies claiming the respective portions of the grant has heretofore put forward any claim for lands in the western division to supply the unsatisfied loss in the eastern division.

The Forest Service has filed a brief in this matter urging that the two portions of the grant should be adjusted separately, and also contending that an excess of acreage was allowed on selections in Missouri, because, as contended, the Atlantic and Pacific Railroad Company should not have been permitted to take lands opposite that portion of the road which it bought and did not itself construct.

The department finds no sufficient reason to reverse its former ruling on the latter point as set forth in 8 L. D. 165, which was concurred in by the Attorney General in his opinion of January 8, 1891, to the effect that the Atlantic and Pacific Railroad Company was entitled to its grant on that portion of the road as reduced by the acreage received by its predecessor under the prior grant of 1852. Furthermore, that objection becomes unimportant if the unsatisfied loss in the eastern division may not be used as basis for a claim in the western division.

Upon review of the case, the department concurs in the view expressed by the Commissioner of the General Land Office that the said two portions of the grant should be adjusted separately, and it is so ruled, subject to the usual privilege of the parties in interest to file motions for rehearing.

SANTA FE PACIFIC RAILROAD COMPANY (ON REHEARING)

Decided February 10, 1931

MINERAL LANDS—STOCK-RAISING HOMESTEAD—RAILROAD LAND.

The allowance of a stock-raising homestead entry on land previously classified as mineral in character does not amount to an adjudication that the land is now nonmineral.

RAILROAD LAND—MINERAL LANDS—SELECTION—STOCK-RAISING HOMESTEAD—PRACTICE—RES JUDICATA.

Where a railroad selection for lands in place was rejected on default of the selector on an unrefuted charge that the lands were mineral in character

at the time that the selection list was filed and a stock-raising homestead entry was allowed to intervene, a readjudication of the question as to the character of the land can not be had while the entry remains intact.

RAILROAD LAND—SELECTION—STOCK-RAISING HOMESTEAD—NOTICE—CONTEST.

Service of notice by a railroad company upon an entryman of intention to enter an appeal to the rejection of the company's selection list does not constitute a contest against the entry.

PRIOR DEPARTMENTAL DECISION MODIFIED.

Case of *Oregon and California Railroad Company v. Puckett* (39 L. D. 169), modified.

EDWARDS, Assistant Secretary:

By decision of November 22, 1930, the department affirmed the action of the Commissioner of the General Land Office rejecting the primary list filed on May 17, 1930, by the Santa Fe Pacific Railroad Company for the E. $\frac{1}{2}$ Sec. 9, T. 15, N., R. 1 E., G & S. R. M., Arizona. The company has filed motion for rehearing.

It appears that the said land is within the primary limits of the grant to the Atlantic and Pacific Railroad Company by the act of July 27, 1866 (14 Stat. 292), and its successor in interest, the Santa Fe Pacific Railroad Company, under the act of March 3, 1897 (29 Stat. 622), and the grant attached with the filing of the map of definite location of the railroad on March 12, 1872, provided the land was not adversely claimed on that date and was not valuable for mineral other than coal and iron.

On March 17, 1916, the company filed its list, Phoenix 029863, including the tract here in dispute. The Geological Survey reported the land to be valuable for its mineral deposits, and adverse proceedings were instituted against the selection on the charge that the land was mineral in character, containing valuable deposits of gold, silver and copper. Notice was duly served on the company but no answer was made and on such default the selection was canceled on July 30, 1920, as to said land.

On November 26, 1929, Lelia J. Ross made homestead entry for the E $\frac{1}{2}$ Sec. 9, and other lands, under the stock-raising homestead act of December 29, 1916. (39 Stat. 862).

On May 17, 1930, the company filed the list now under consideration which the register rejected because of conflict with the said homestead entry of Ross. The company appealed and attempted to make personal service of notice thereof on the entrywoman but was unable to find her. Notice was sent to her record address by registered mail and that was returned unclaimed. Inspection of the homestead entry papers shows that the entrywoman on May 28, 1930, executed an application for extension of time for the establishment of residence upon her homestead entry. At that time she was in California. The application was rejected by letter of the General Land Office dated August 4, 1930.

It further appears that the company on September 4, 1930, mailed a registered letter to the entrywoman at her record post office address, notifying her of the appeal of the company from the action of the General Land Office in affirming the action of the register rejecting the company's selection. It is not shown whether she received that notice, but in any event she has not made any response, and it is not shown whether or not she has established residence.

The actions above recited do not constitute a contest by the company against the homestead entry, and the department is not in position to cancel the entry on the basis of the present record.

It seems that the present claim of the company is predicated on the theory that allowance of the homestead entry was tantamount to a finding that the land is nonmineral in character. It is stated that the entrywoman is asserting a nonmineral claim, and that her position is the same as that contended for by the company, namely, that the land is nonmineral in character, and it is further contended that if it is in fact nonmineral in character, it passed to the company under its grant, and that the department has no authority to otherwise dispose of it.

But the company is in error in respect to the basis of the homestead entry. An entry of this kind may be made covering mineral land, but the law expressly provides that all mineral deposits shall be reserved to the United States. Such entries are sometimes characterized as surface entries. It will, therefore, be observed that the position of the entrywoman is not the same as that of the company. If the land is valuable for mineral, other than coal or iron, that fact alone excepted it from the grant, but did not prevent the homestead entry. But the contention of the company is that the land is in fact nonmineral, and that it should be patented to the company notwithstanding the former adjudication against the company on default, even though it is now embraced in an intervening adverse claim. Assuming it to be in fact not valuable for its mineral deposits, it is urged that the homestead entry should be canceled and the land awarded to the company under the doctrine announced in the case of *Oregon and California R. R. Co. v. Puckett* (39 L. D. 169), wherein it was held (syllabus)—

An adjudication by the land department that a tract of land within a railroad grant is mineral in character is not effective to except it from the grant in the face of a subsequent adjudication, as result of a hearing, that the tract is not and never was mineral in character; and having passed to the company under the grant, the land department is without authority to make other disposition thereof.

The present attitude of the department is opposed to the doctrine of that decision in so far as it held that the principle of *res judicata* could not be applied as against the railroad company and in favor of an intervening claimant. In that case, however, the intervening

claimant had not actually made entry, and furthermore there had been a hearing and an adjudication that the land was nonmineral. These features tend to distinguish that case from this. Furthermore, as applied to this case, we think the doctrine in that case was considerably weakened in a later decision near the same date in the case of *Central Pacific R. R. Co. v. De Rego* (39 L. D. 288), where it was held (syllabus)—

An adjudication by the land department, in a proceeding in which that question is in issue, that lands within the primary limits of a railroad grant were at the date of the grant mineral in character, so long as it stands unimpeached, excepts them from the operation of the grant; and no rights attach thereto under the grant upon a subsequent adjudication by that department, in another proceeding, that the lands in question are at that time nonmineral.

It is true that a distinction between these cited cases exists in the fact that in the case first cited it was found that the second hearing impeached the verity of the first hearing, while in the other case it was found that the second hearing did not impeach or impair the result of the first hearing, or in other words, the land could have been mineral at the time of the first hearing and nonmineral at the date of the second hearing. That possibility, of course, applies in the instant case. At least, the former adjudication gave the land the status of mineral land so far as the railroad claim is concerned and that adjudication would have to be impeached and set aside before the claim could be recognized, even in the absence of an adverse claim. In the language of the case last above cited (p. 290)—

* * * That adjudication is not in any degree impeached or impaired by anything subsequently transpiring, and stands to-day as the last determination by the land department of the character of these lands at the time the grant to the company under the act became effective.

Moreover, it is not believed that the company's claim should be recognized in the face of the intervening adverse claim, even if it were now shown that the land is and always has been nonmineral in character. It is considered that the correct rule was applied in the analogous case of *Northern Pacific Ry. Co.* (44 L. D. 73) which held (syllabus)—

Where settlement and entry were made of lands classified as mineral under the act of February 26, 1895, and included in the so-called "Garfield Agreement," prior to notation upon the records of the local office of the direction of March 1, 1911, that further entries of such lands would not be permitted, and the lands so settled upon and entered were subsequently classified as nonmineral under the act of June 23, 1910, the rights of such entrymen are superior to the claim of the Northern Pacific Railway Company under its grant; but upon relinquishment of any such entry, the land inures to the company.

In the instant case the company has requested that a hearing be ordered as a basis for readjudication of the question whether the land is mineral in character, but under present circumstances that request

must be denied. A valid claim has intervened, and so long as it stands the company must be held to the result of the former adjudication rejecting its claim.

The motion is accordingly

Denied.

STATE OF NEW MEXICO (ON REHEARING)

Decided February 10, 1931

SCHOOL LAND—INDEMNITY—ADVERSE CLAIM—ERROR—RES JUDICATA—ESTOPPEL.

The doctrine of *res judicata*, or estoppel by judgment, is clearly applicable where a State was erroneously permitted to assign as base for an indemnity selection a school section in place and thereafter remained silent for fifteen years and permitted adverse rights to intervene before questioning the validity of the transaction.

EDWARDS, *Assistant Secretary*:

By decision of August 18, 1930, the department affirmed the action of the Commissioner of the General Land Office wherein it was held that the State of New Mexico had divested itself of the W. ½ Sec. 2, T. 15 S., R. 36 E., by making indemnity selection for other land in lieu thereof. A motion for rehearing has been filed by the State.

In 1915 the State applied for other land as indemnity for alleged loss of the land here in question because of prior Territorial selection. Notwithstanding the fact that the prior selection by the Territory had been canceled in 1914 the subsequent State indemnity selection assigning this land as base was approved and certified to the State. Thus this land became public land and has been recognized as such. An oil and gas prospecting permit was issued covering this land but it was later canceled upon expiration.

On October 28, 1929, Charles B. Barker filed application for the land under the enlarged homestead act and his application was allowed on April 22, 1930.

The argument in support of the motion is the same in substance as that presented on appeal, and which was given due consideration in connection with the former decision. The contention is that the land inured to the State under the terms of the enabling act of June 20, 1910 (36 Stat. 557, 561); that the allowance of selection of other land in lieu thereof was an error, and that such error does not operate to divest the State of its title to the land in dispute because neither the State nor the Federal officers had legal authority to effect such exchange. Certain decisions are cited in support of the principle that acts of public officers beyond the scope of their authority are null and void, but that line of decisions is not applicable to the case in hand.

In this case the officers were acting within the scope of their authority in making the exchange, but a mistake was made as to the status of the land used as base. In a multitude of transactions such mistakes will occasionally occur, but the legal title passed upon consummation of the exchange even though there might be equitable ground for reformation or revocation of the transaction in the absence of adverse intervening claims.

Certainly the State could not recover the base land while holding the tract selected in lieu thereof, even if there were no adverse claim to the base. The idea that the whole transaction was a nullity is untenable. The State voluntarily asked for the exchange. It received the land applied for in lieu of the base which was relinquished to the Government, and for about 15 years the exchange was regarded as a closed transaction. In the meantime adverse rights have intervened.

The doctrine of *res judicata*, or estoppel by judgment, clearly applies, as well as the further principle that the original cause of action passes and is merged *in rem judicatam*.

The United States is not now in position to offer the base tract to the State, and the latter has not shown that it is in position to return the tract selected, nor has it offered to do so.

Where a tract has stood of record as public land open to entry for 15 years, and a claimant relying upon the record has made entry thereof, certainly a former claimant of that land who has stood by and failed to take steps to correct his error in relinquishment, is in no position to interpose a belated objection to the detriment of the innocent adverse claimant.

The motion is accordingly

Denied.

WITHDRAWAL OF LANDS CONTAINING HOT OR MEDICINAL SPRINGS—CIRCULAR NO. 1231, AMENDED

INSTRUCTIONS

[Circular No. 1236]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 11, 1931.

REGISTERS, UNITED STATES LAND OFFICES;

CHIEFS OF FIELD DIVISIONS:

By Executive order of July 7, 1930 (No. 5389), every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a hot spring or a

spring, the waters of which possess curative properties, and all land within one-quarter of a mile of every such spring located on unsurveyed public land, exclusive of Alaska, were withdrawn from settlement, location, sale, or entry, and reserved for lease under the provisions of the act of March 3, 1925 (43 Stat. 1133), subject to valid existing rights.

The regulations issued in pursuance of said Executive order contained in Circular No. 1231, approved August 16, 1930 (53 I. D. 173), were amended by departmental order of February 3, 1931, by substituting the following paragraph for paragraph 3 of the original regulations:

An applicant to enter or select lands situated outside of a national forest in any State must show that no hot spring or other spring having waters possessing curative properties exists, if it be a fact, upon any legal subdivision of land sought to be appropriated, if surveyed, and if unsurveyed, that no portion of the land applied for is within an area of one-quarter of a mile from such spring.

You will make proper notations of this amendment in order that it may be considered in connection with Circular No. 1231 and with applications filed.

THOS. C. HAVELL, *Acting Commissioner.*

CHARLES A. SON ET AL.

Decided February 17, 1931

RAILROAD RIGHTS OF WAY—OIL AND GAS LANDS—LEASE—SECRETARY OF THE INTERIOR—RULES AND REGULATIONS.

The act of May 21, 1930, authorizes the Secretary of the Interior to lease deposits of oil and gas in and under lands embraced in railroad or other rights of way whenever he shall deem it to be consistent with the public interest and to adopt rules and regulations governing the exercise of the discretion and authority conferred upon him by the act which shall constitute a part of any application or lease thereunder.

RAILROAD RIGHTS OF WAY—OIL AND GAS LANDS—LEASE—ROYALTY—DISCRETIONARY AUTHORITY OF THE SECRETARY OF THE INTERIOR.

The leasing of oil and gas deposits in and under lands embraced in railroad or other rights of way for the prevention of the drainage of those deposits by the operation of wells on adjoining lands with the consequent loss of royalty to which the Government is entitled is an exercise of the discretionary authority conferred upon the Secretary of the Interior by the act of May 21, 1930.

RAILROAD RIGHT OF WAY—OIL AND GAS LANDS—LEASE.

An oil and gas lessee of a tract of public land crossed by a railroad or other right of way granted prior to the execution of the lease acquires no rights to the mineral deposits in or under the lands embraced in the right of way.

WILBUR, *Secretary*:

Charles A. Son and Charles S. Crail and the Wellington Oil Company, Ltd., have appealed from an order by the Commissioner of the General Land Office dated December 9, 1930, requiring interested parties to make bids under the act of May 21, 1930 (46 Stat. 373).

The Sunset Railway Company filed application on July 22, 1930, under the said act of May 21, 1930, for an oil and gas lease on its right of way under the act of March 3, 1875 (18 Stat. 482), on the NE $\frac{1}{4}$ Sec. 8, T. 11 N., R. 23 W., S. B. M., California. Pursuant to regulations (Circular No. 1224, approved July 3, 1930; 53 I. D. 137), under the said act of May 21, 1930, the Commissioner called upon the railway company and the parties interested in oil and gas leases on said NE $\frac{1}{4}$ to submit offers or bids. The original oil and gas lease of said NE $\frac{1}{4}$ was issued to Charles A. Son and Charles S. Crail, who have assigned the SW $\frac{1}{4}$ NE $\frac{1}{4}$ to the Wellington Oil Company, Ltd., and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ to the Doyle Petroleum Corporation.

The grounds of appeal of the Wellington Company are stated as follows:

1. That the development of the said right of way is not necessary to offset or prevent drainage, or threatened drainage, of the oil and gas deposits from the right of way and consequent loss of royalty to the Government through operations on adjoining or nearby lands.

2. That the leasing of said right of way is contrary to and opposed to the best interests of the United States Government in that it creates competitive drilling on land now covered by the above-numbered lease, and is contrary to the announced policy of conservation being advocated by the Secretary of the Interior to the oil operators in the State of California, and in particular in that section where the said land is located, to-wit; Maricopa Flats Field, in the county of Kern, State of California.

3. That the said action of the Commissioner of the Land Department is violative of the constitutional rights of this appellant, in that it seeks to take from the said appellant rights granted to it by contract antedating the passage of the act under which it is proposed to grant the said lease.

It is stated that the Wellington Company has been in possession of the property for several years and has drilled thereon four wells, of which three are now producing; that said wells are ample to produce all the oil and gas contained under the entire 40 acres; that additional drilling on the right of way would be detrimental to the appellant company and to the Government, and would be wasteful and in conflict with the department's oil conservation policy; that the lease which has been issued gives to the appellant company as assignee all the oil and gas under the 40 acres; that the right of way across the property carried with it only and solely the use of the surface rights "for the said railway right of way;" that the lease was accepted, exploration was thereon made, and moneys were ex-

pended by the lessees and the assignee, relying upon the contract which granted to them all of the oil and gas under the 40 acres; and that the said act of May 21, 1930, could not, under the Constitution of the United States, deprive said lessees and the appellant company of the rights of contract granted them by the United States Government.

Son and Crail contend in their appeal that the railway company has no interest in the oil or minerals under the right of way, because no exception of the right of way is made in the lease; that the act of May 21, 1930, was not meant to apply and does not apply to rights of way where the Government owns the adjoining lands on both sides thereof; that said act can have no retroactive effect on lands under rights of way which have already been leased by the Government for the extraction of oil and gas; that the order of the Commissioner does not recite that "the Secretary of the Interior has determined that development of the right of way is necessary to offset or prevent drainage or threatened drainage of the oil and gas deposits from the right of way and consequent loss of royalty to the Government through operations on adjoining or nearby lands," as required by paragraph 1 of the regulations; that the interested parties should have been notified and given opportunity to be heard; and that there is here a real controversy between the Government and the lessees which can be determined only by a resort to the courts of appropriate jurisdiction.

The right of way involved was granted in 1901. The oil and gas lease was granted November 7, 1929. A statement is found in the record that mineral rights in the quarter section have been privately claimed since 1908, but there is no allegation that any right or claim to minerals antedated the approval of the right of way.

The grounds of appeal of the Wellington Company will first be considered, and each ground will be taken up separately.

1. The said act of May 21, 1930, authorizes the Secretary of the Interior to lease deposits of oil and gas in and under lands embraced in railroad or other rights of way, "whenever he shall deem it to be consistent with the public interest." It also authorizes and directs the Secretary "to adopt rules and regulations governing the exercise of the discretion and authority conferred by this act, which rules and regulations shall constitute a part of any application or lease hereunder."

The first section of the regulations of July 3, 1930, under said act, reads as follows:

Leases will be issued only for rights of way through the geologic structure of producing oil or gas fields.

No lease will be authorized until the Secretary of the Interior has determined that development of the right of way is necessary to offset or prevent drainage

or threatened drainage of the oil and gas deposits from the right of way and consequent loss of royalty to the Government through operations on adjoining or nearby lands.

As drainage through wells on lands leased by the United States at a royalty of not less than 12½ per cent does not cause loss to the Government, leases will not be issued for rights of way through such leased lands.

Any lease will be limited in area to such part or parts of the right of way as are affected by drainage or threatened drainage.

The appellant company pays a royalty of 5 per cent and it virtually admits that it contemplates draining all oil and gas from the right of way across its subdivision. The Director of the Geological Survey reported on November 19, 1930, that the right of way was affected by drainage through producing oil wells on adjacent land, and on December 2, 1930, the Secretary of the Interior approved a recommendation by the Commissioner, concurred in by the Geological Survey, that the Sunset Railway Company and the lessees of adjoining lands be given opportunity "to submit bids or offers for the oil and gas deposits in the railroad right of way in the said land according to Sec. 3 of the act of May 21, 1930, and the regulations thereunder." It is clear that the Government is suffering loss of royalty to which it holds that it is lawfully entitled and that this had been determined before the Commissioner's order was issued.

2. With the said act of May 21, 1930, in effect it is not apparent why the appellant company, or any other lessee, should be permitted to drain oil from the right of way and pay merely a royalty of 5 per cent when the Government is entitled to more and can obtain a royalty of 12½ per cent or more. The appellant company has said nothing of suspending production on its lease. Each lease under the said act of May 21, 1930, will contain the following condition (par. (b), section 2, lease form, circular No. 1224):

The lessee agrees within 30 days from delivery of executed lease to proceed with reasonable diligence to install on the leased ground a standard or other efficient drilling outfit and equipment, and to commence drilling, and to drill and produce only such wells as are necessary to offset drainage from the leasehold through wells on adjoining lands unless and until authorized in writing by the Secretary of the Interior to drill and produce wells in number not greater than the number of 40-acre tracts or lots crossed by the right of way.

It can not be said that any competitive drilling is threatened or contemplated. The drilling of necessary offset wells is required of every Government lessee when the draining of oil or gas from the leasehold through wells on adjoining lands, even if these be leased from the Government, causes loss of royalty to the Government.

The appellant company may offer to pay a compensatory royalty for the extraction of oil and gas in or under the right of way through

wells on its own land, and if it obtains such agreement it can limit production from its lease and thereby limit for the present the amount payable in compensatory royalty.

3. While the lease granted describes the whole of the NE $\frac{1}{4}$ said Sec. 8, the railroad right of way was granted and was of record long before any mineral rights in the land were asserted. The oil and gas lease and the portion thereof assigned to the appellant company were subject to the right of way. The land embraced in the right of way and the mineral deposits beneath the land do not in any way belong to the oil and gas lessees. In the case of *Rio Grande Western Railway Company v. Stringham* (239 U. S. 44), the Supreme Court of the United States held that the right of way granted by the act of March 3, 1875, *supra*, was a limited fee. The court, speaking through Mr. Justice Van Devanter, said (p. 47)—

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

In this connection see the case of *Windsor Reservoir and Canal Company v. Miller* (51 L. D. 27 and 305), and the cases therein cited. No right of any kind legally belonging to the appellants will be affected by leasing the right of way to the railway company.

The lessees of adjoining lands have been notified and given opportunity to make offers or bids as provided in the act of 1930. They had no voice in determination of the question whether the land in the right of way should be offered in accordance with said act. The department does not find that there is any question for litigation in the courts.

The Commissioner's ruling is

Affirmed.

SANFORD H. WALLIS

Instructions, February 19, 1931

STOCK-RAISING HOMESTEAD—ADDITIONAL—RESIDENCE—IMPROVEMENTS.

Section 4 of the stock-raising homestead act differs from section 5 of that act in that under the former section the general provisions of the homestead law as to residence either on the original or on the additional entry must be fulfilled while under the latter section the requirements as to improvements only must be met.

STOCK-RAISING HOMESTEAD—ADDITIONAL—COMMUTATION—RESIDENCE.

To perfect title to an additional entry made under section 4 of the stock-raising homestead act based on a commuted original entry the entryman must show compliance with the law as to residence for a period of three

years either on the perfected original entry, if ownership thereof be continued during that time, or partly on the original and partly on the additional entry.

Acting Assistant Commissioner Parrott of the General Land Office to the Register, Phoenix, Arizona, Approved by Assistant Secretary Edwards:

October 18, 1928, Sanford H. Wallis made original homestead entry, Phoenix 063965, under section 2289, Revised Statutes, for SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 33, T. 12 S., R. 12 E., G. & S. R. M., containing 40 acres. On October 21, 1929, he made homestead entry, Phoenix 064022, as an additional under section 4 of the stock-raising law for S $\frac{1}{2}$, S $\frac{1}{2}$ N $\frac{1}{2}$, Lots 1, 2, 4, Sec. 23, T. 11 S., R. 10 E., G. & S. R. M., Arizona, containing 601.76 acres.

The claimant submitted commutation proof on the original entry August 25, 1930. Pursuant to the request of the chief of field division the issuance of cash certificate was withheld to await field investigation and report. Accordingly, the proof record with an application for a reduction in the area of cultivation was transmitted to this office. A favorable report with respect to the proof was made by the chief of field division January 12, 1931, with recommendation that the case be clear-listed.

The record shows satisfactory compliance with the law for commutation proof as to residence. It is made to appear that due to the arid character of the land only a small area of the entry, about 70 by 70 feet, which was used for a garden, was cultivable. As the facts disclosed appear to merit favorable action, the area of cultivation is hereby reduced to that shown by the record. The proof has been found satisfactory in other respects and warrants issuance of cash certificate upon payment of all sums due, and in the absence of other objection.

It was developed by the examination in the field in this case that Wallis and a number of other homestead claimants were under the impression, due to advice which it is stated they received from attorneys and from clerks in your office, that a person can make entry under section 2289, Revised Statutes, for 40 acres or other area permitted by this section, and although commutation proof is submitted on such original entry with only 14 months residence, an additional entry based thereon under section 4 of the stock-raising law may be thereafter perfected without further residence at any time after the required stock raising improvements are made.

It is probable that the claimant herein would not have submitted commutation proof had he been advised that further residence would be necessary in order to submit satisfactory proof on his additional entry.

Section 4 of the stock-raising homestead act provides—

That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this Act, such amount of lands designated for entry under the provisions of this Act, within a radius of twenty miles from said existing entry, as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries. * * *

Section 7 of the stock-raising homestead act provides—

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

Under the regulations of the department as set forth in paragraph 8(b), Circular No. 523 (51 L. D. 1, 6), it is required that—

On submission of proof on the additional entry claimant must show residence on one of the tracts to the extent ordinarily required, but will be entitled to credit for residence on the original tract before or after the date of the additional entry; * * *.

Section 4 of the stock-raising law contemplates full compliance with the general provisions of the homestead law as to residence, either on the original or additional land. This section differs in its requirements as to residence from section 5 of the stock-raising law. The latter section provides that after an original entry has been perfected additional entry may be made if the claimant owns and resides upon the original perfected entry at the time the additional entry is initiated, and that such additional entry may be perfected by meeting the requirements as to improvements only. In a case of this kind it is immaterial whether the original entry was perfected under the three or five year homestead law or commuted.

To permit a claimant to perfect title to an additional entry under section 4 of the stock-raising law after commutation proof on the original entry with only 14 months residence would be a clear evasion of the law. You will therefore in all cases reject, subject to appeal, the final proof submitted on such an additional entry, based on a commuted original entry, unless, among other things, three years compliance with the law as to residence is shown on the perfected original entry if ownership thereof be continued during that time, or partly on the original and partly on the additional claim.

Advise the chief of field division of this holding and give same as much publicity as possible throughout your district and also advise Wallis, that if, in view of this holding, he should desire to withdraw his commutation proof he is at liberty to do so. If no withdrawal is filed or other action taken within thirty days from receipt of notice you will issue cash certificate as above instructed.

Attention is directed to paragraph 27 (b) section 3 at bottom of page 11, Circular No. 541.

**RIGHTS OF WAY OVER PUBLIC LANDS AND RESERVATIONS FOR
CANALS, DITCHES, AND RESERVOIRS AND USE OF RIGHTS OF
WAY FOR VARIOUS PURPOSES**

REGULATIONS

[Circular No. 1237]¹

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 21, 1931.**

CANALS, DITCHES, AND RESERVOIRS

1. *General statement.*—Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat. 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, or reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals. If the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the department having jurisdiction. A map and field notes of the portion within any reservation, except in the case of a national forest, must be submitted in addition to the duplicates required herein. All maps and field notes must conform to the provisions of this circular.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal,

¹ This is a revision of the regulations of June 6, 1908 (36 L. D. 567), with the amended regulations which have been approved in the interim substituted for those they have superseded.—Ed.

if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation in the construction of any canal, ditch, or reservoir injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

2. *Material on adjacent lands.*—The word “adjacent,” as used in section 18 of the act, in connection with the right to take material for construction from the public lands, must be construed according to the conditions of each case (28 L. D. 439). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D. 566). These decisions were rendered under the railroad right-of-way act, and are applied to this act since the words are the same in both.

3. *Other uses*—(a) *Public purposes, etc., subsidiary to main purpose of irrigation.*—Section 2 of the act approved May 11, 1898 (30 Stat. 404), entitled “An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes,” authorizes the use of rights of way granted under the act of 1891 for purposes subsidiary to the main purpose of irrigation. The language of said section is as follows:

SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled “An act to repeal timber-culture laws, and for other purposes,” approved March third, eighteen hundred and ninety-one,

may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

(b) *Drainage*.—By an act approved March 4, 1917 (39 Stat. 1197), section 18 of the said act of March 3, 1891, was amended so as to provide for drainage as well as irrigation, and section 2 of the said act of May 11, 1898, was amended so as to make the other uses authorized by the granting act of March 3, 1891, "subsidiary to the main purpose of irrigation or drainage."

(c)² *Ditch riders' stations*.—An act entitled: "An act to amend acts to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved March 1, 1921 (41 Stat. 1194), reads:

That in addition to the rights of way granted by sections 18, 19, 20, and 21 of the act of Congress entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891 (Twenty-sixth Statutes, p. 1095), as amended by the act of Congress entitled "An act to amend the irrigation act of March 3, 1891 (Twenty-sixth Statutes, p. 1095, sec. 18), and to amend section 2 of the act of May 11, 1898 (Thirtieth Statutes, p. 404)," approved March 4, 1917 (Thirty-ninth Statutes, p. 1197), and, subject to the conditions and restrictions therein contained, the Secretary of the Interior is authorized to grant permits or easements for not to exceed five acres of ground adjoining the right of way at each of the locations, to be determined by the Secretary of the Interior, to be used for the erection thereon of dwellings or other buildings or corrals for the convenience of those engaged in the care and management of the works provided for by said acts: *Provided*, That this act shall not apply to lands within national forests.

Applicants for rights of way under this amendment will be governed by the regulations set forth in this circular, in so far as applicable, appropriate additions being made to the forms on the maps therein prescribed so as to include this amendment.

(d)³ *Additional right of way*.—An act to amend section 18 of the irrigation act of March 3, 1891, as amended by the acts of March 4, 1917, and March 1, 1921, *supra*, approved May 28, 1926 (44 Stat. 668), reads:

Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purposes of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the ap-

² See Circular No. 757, approved May 16, 1921 (48 L. D. 113).—Ed.

³ See Circular No. 1076, approved July 8, 1926 (51 L. D. 485).—Ed.

plicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation of the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

It will be noted that this act authorizes right of way, if needs be, additional to the 50 feet granted by the act of March 3, 1891 (26 Stat. 1095). To obtain such additional right of way, explanatory showing must accompany the application. This should consist of an affidavit by the applicant's engineer or surveyor setting forth succinctly the extent of the additional right of way required and the necessity therefor. The additional right of way should also be shown graphically by lateral limit lines on the map filed in connection with the application. If additional right of way is wanted only for portions or sections of the reservoirs, canals, ditches, or laterals, the termini thereof should be fixed by engineer's survey stations in addition to the lateral limit lines.

4. *Control of water.*—While these acts grant rights of way over the public lands necessary to the maintenance and use of ditches, canals, and reservoirs, the control of the flow and use of the water is, so far as these acts are concerned, vested in the States or Territories, the jurisdiction of the Department of the Interior being limited to the approval of maps carrying the right of way over the public lands. If the right of way applied for under these acts in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes, the maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which such right of way is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed.

5. *Nature of grant.*—The right granted is not in the nature of a grant of lands, but is a base or qualified fee, on an implied condition of reverter in the event the grantee ceases to retain or use the land for any of the purposes authorized by the granting act. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdivision entered,

there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this department. Section 21 of the act of March 3, 1891, provides that the grant of a right of way for a canal, ditch, or reservoir does not necessarily carry with it a right to use of land 50 feet on each side, but only such land may be used as is necessary for construction, maintenance, and care of the canal, ditch, or reservoir. The width is not specified.

6. *Right of way through national forests.*—Whenever a right of way is through a national forest, the applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of such national forest. No construction will be allowed in a national forest until an application for right of way has been regularly filed and approved by the Secretary of the Interior, or unless permission for such construction work has been specifically given.

7. *Right of way through proposed national forest.*—If the right of way is through land within a proposed national forest, the applicant must file the following stipulations under seal:

(a) That the proposed right of way is not so located as to interfere with the proper occupation and use of the reservation by the Government.

(b) That the applicant will cut no timber from the reserve outside the right of way, and will remove no timber from the land within the right of way except such as is rendered necessary for the proper use and enjoyment of the privilege for which application is made.

(c) That he will remove from the reservation, or destroy, under such safeguards as may be deemed necessary by the General Land Office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be required by the General Land Office to protect the forest from fire.

(d) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business.

(e) That should any portion of said right of way be included in a national forest, the applicant will build new roads, trails, and crossings, as required by the Forest Service, in case any roads or trails are destroyed or intercepted by construction work or flooding upon said right of way.

The applicant will also be required to give bond to be approved by the Commissioner of the General Land Office, stipulating that the United States will be compensated "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat. 279), will be accepted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

8. *Right of way partly on unsurveyed land.*—Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see sec. 18.)

9. *Application by corporation.*—An incorporated company desiring to obtain the benefits of the law must file the papers and maps specified below with the register of the land district in which the canal, ditch, or reservoir is to be located. These papers and maps will be forwarded to the General Land Office, and after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval:

(a)⁴ A copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the secretary of the State or Territory where organized; also an uncertified copy of the articles of incorporation.

(b) A copy of the State or Territorial law under which the company was organized (if it was organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory, under seal, that the same was the law at the date of incorporation. (See par. *k* of this section.)

(c) If the State or Territorial law directs that the articles of incorporation or other papers connected with the organization be filed with any State or Territorial officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(d) When a company is operating in a State or Territory other than that in which it is incorporated, it must submit the certificate of the proper officer of the State or Territory that it has complied

⁴ See instructions of July 10, 1912 (41 L. D. 101), promulgated as part of Circular No. 194, November 16, 1912, unpublished.—Ed.

with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

(e) The official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory in which it is incorporated, and that the copy of the articles filed is true and correct. (See Form 1, p. 304.)

(f)⁵ A true list, in duplicate, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs.

(g) A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. If the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. If the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of the map where the notice describes the location sufficiently to identify it with the canal or reservoir for which the right-of-way application is made. If the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

(h) A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See par. *k* of this section.)

(i) A separate statement as follows: The amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average flow in cubic feet per second for each month during the period for which records are available. In cases of reservoirs of 5,000 acre-feet capacity or more, or of ditches of 100 cubic feet per second capacity or more, the amount of water, in acre-feet, available for storage or diversion, and the amount of water

⁵ See instructions of July 10, 1912 (41 L. D. 101), promulgated as part of Circular No. 194, November 16, 1912, unpublished.—Ed.

which it is proposed to divert annually from the stream or streams affected, with the period during which the water is to be diverted. The length, cross-section, grade, and capacity of the ditches to be constructed and the characteristics of each ditch as affecting the flow of water. The surveyor or engineer of the applicant must certify to the above, and must certify that all available records (specifying them), official and otherwise, have been consulted. If there is no well-defined flow which can be measured, or if there is no record of the flow, the area of the watershed, average annual rainfall, and estimated run-off at the point of diversion or damming must be given.

(j) Maps, field notes, and other papers, as hereinafter required.

(k) If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to the General Land Office by the Governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of paragraphs *b* and *h* of this section, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded.

(l)⁶ A separate statement, describing as near as may reasonably be done, by legal subdivisions, if practicable, the land to be irrigated by the proposed project; the approximate acreage and general condition and character of the lands; their ownership generally, and whether public or private; such negotiations or arrangements as have been had between the applicant and the owners or occupants of the lands.

10. *Application by individuals.*—Individuals or associations of individuals making applications for right of way are required to file the information called for in paragraphs *g*, *h* or *k*, *i*, *j*, and *l* of the preceding section. Associations of individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association.

11. *Field notes.*—Field notes of the surveys must be filed in duplicate, separate from the map, and in such form that they may be folded for filing. Complete field notes should not be placed on the map, but the following data should be shown thereon: (*a*) The station numbers where deflections or changes of numbering occur; (*b*) station numbers with distances to corners at points where the lines of the public surveys are crossed, and (*c*) the lines of reference of initial and terminal points, with their courses and distances. Type-written field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should

⁶Added by instructions of October 8, 1912, unpublished, promulgated as a part of Circular No. 194, November 16, 1912, unpublished.—Ed.

contain, in addition to the ordinary records of surveys, the data called for in this and in the following sections. They should state which line of the canal was run—whether middle or a specified side line. The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments. The field notes should show whether the lines were run on the true or the magnetic bearings, and if run on magnetic bearings the declination of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal circle should be noted. The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

12. *Maps.*—The maps filed must be drawn on tracing linen in duplicate, and must be strictly conformable to the field notes of the survey. They must be filed in the land office for the district in which the right of way is located; but if the right of way is located in more than one district, duplicate maps and field notes need be filed in but one district and single sets in the others. Other canals, ditches, laterals, or reservoirs with which connections are made must be shown, but distinguished from those for which right of way is desired by ink of a different color.

The scale of the map should be 2,000 feet to the inch in the case of canals or ditches and 1,000 feet to the inch in the case of reservoirs. The scale may, however, be 1,000 feet to the inch in the case of canals or ditches and 500 feet to the inch in the case of reservoirs when such a scale is absolutely necessary to properly show the proposed works.

All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown. The section, township, and range must be clearly marked on the map.

The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width the limits of the deviations must be clearly defined on the map. The field notes should record the changes in such a manner as to admit the exact location on the ground. In the case of a pipe line the diameter of the pipe should be stated. The map must show the source of water supply.

In applications for right of way for a reservoir the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered to a depth of 1 foot by the water that the

reservoir will hold; 1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

13. *Initial and terminal points.*—The terminal of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of course and distance to the nearest existing corner outside the reservoir by a line that does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4, p. 305, post) should each show these connections.

14. *Connections on unsurveyed land.*—When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant, and the single bearing and distance from the terminal point to the corner must be computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4, p. 305, post). The notes and all data for the computation of the traverse must be given in the field notes.

15. *Connections with monuments on unsurveyed land.*—When an established corner of the public survey is more than 6 miles distant this connection will be made with a natural object or a permanent monument which can be readily found and recognized and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark and must give the course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4, p. 305, post) must state the connections. These monuments are of great importance.

16. *Forms for canal, etc., on unsurveyed land.*—When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately described in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See secs. 13, 14, and 15.)

17. *Forms for reservoir on unsurveyed land.*—When a reservoir lies partly on unsurveyed land its initial point must be noted, as required for the termini of ditches in section 13. The reference line must not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on the surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4, p. 305, post.

18. *Rights of way wholly on unsurveyed land.*—Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the land is located, for general information. The date of filing will be noted thereon; but the maps will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time specified by the act granting the right of way. If these maps are in all respects regular when filed, they will receive the Secretary's approval. In filing such maps the initial and terminal points will be fixed as indicated in sections 14 and 15.

19. *Connections with public survey corners.*—Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use. The map of the canal, ditch, or reservoir must show these distances, and the field notes must give the points of intersection and the distances. When corners are destroyed by the canal or reservoir, proceed as directed in sections 20 and 21.

20. *Witness monuments for destroyed public survey corners.*—Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at said corner. These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by the General Land Office, and must be at such distance from the works as to be safe from interference during the construction and operation of the same. If two or more consecutive corners on the same line are destroyed, the monuments shall be set as required in the Manual for the nearest corner on that line to be covered.

21. *Method of establishing witness monuments.*—The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, a temporary mark being set on the random line at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it will be measured and the true course calculated. The proper correction of

the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, and must be certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by the General Land Office.

When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments must be governed by the special features of each case and left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

22. *Affidavit and certificate required.*—The engineer's affidavit and applicant's certificate must both designate by termini (as in secs. 13 to 18, inclusive) and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on a map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4, p. 305, post) the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation." (See Forms 3 and 4, p. 305, post.) No changes or additions are allowable in the substance of these forms, except when the facts differ from those assumed therein.

23. *Notation on maps and records.*—When maps are filed, the register will note on each the name of the land office and the date of filing over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See sec. 5.) If no unpatented land is involved in the application, the local offices will reject it, allowing the usual right of appeal.

Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note the approval in ink, on the tract books, opposite each tract marked as required above and report to the General Land Office that notations have been made and the applicant notified of approval.

24. *Evidence of construction.*—When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6, p. 306, post) must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required, unless there are deviations from the right of way previously approved, either before or after construction, when there must be filed new maps and field notes in full, as herein provided bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior. If the canal or reservoir has been constructed on the location originally approved, and is to be used until the canal or reservoir on the amended location is ready for use, the relinquishment may be made to take effect upon the completion of the canal or reservoir on the amended location.

25. *Right of way on segregated reservoir sites.*—The act approved February 26, 1897 (29 Stat. 599), entitled "An act to provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat. 505, 526), and August 30, 1890 (26 Stat. 371, 391). The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir site to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

When an application is made under this act a reference to it should be added to Forms 4 and 6, pp. 305, 306, post. In other respects

the application should be prepared according to the preceding regulations.

RESERVOIRS FOR WATERING STOCK

26. *General provisions.*—The act approved January 13, 1897 (29 Stat. 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided,* That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, livestock company, or corporation, desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall prescribe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

27. *No lands sold.*—Although the title indicates that lands are to be sold for reservoir sites, this act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from sale after the approval of the map showing the location of the reservoir. Homestead entries are allowed for lands embraced in reservoir declaratory statements, prior to the completion of the reservoir and the approval of the map, subject, however, to cancellation if the reservoir is completed within the time specified by the act.

28. *Declaratory statement.*—Any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or

transporting livestock, desiring to obtain the benefits of the act must file a declaratory statement in the United States land office in the district in which the land is located.

29. *Application by corporation.*—When the applicant is a corporation there should be filed a copy of its articles of incorporation and proofs of its organization, as required in section 8, paragraphs *a, b, c, d, e, f,* and *h,* of these regulations. If these papers are filed with the first declaratory statement made by the company, a reference thereto by its number will be sufficient in any subsequent application by the company.

The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (p. 307), and must contain the following:

(*a*) The post-office address of the applicant; the name of the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions (40-acre tracts or lots) of the land sought to be reserved which under no circumstances must exceed 160 acres; certificate that the land is not occupied or otherwise claimed; certificate that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; statement of the business of the applicant, which statement shall include full and minute information concerning the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, the number and kinds of such stock, the place where they are being bred or grazed, whether within an inclosure or upon uninclosed lands, and also the points from which and to which they are being driven or transported; description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir and statement of its amount; certificate that no part of the land sought to be reserved is or will be fenced, that all the land will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

(*b*) The location of the reservoir described by the smallest legal subdivisions (40-acre tracts or lots), its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within 2 miles of the land sought to be reserved; and if so, where.

(*c*) The numbers, locations, and areas of all other reservoir sites filed upon by the applicant, especially designating those in the county in which the proposed reservoir is located.

30. *Action by the Land Department on declaratory statements, and size, location, and number of reservoir sites.*—When such declara-

tory statement is filed, the date of filing will be noted thereon over the signature of the officer receiving it, and the statements will be numbered according to order of June 1, 1908. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir declaratory statement, No. —," adding the date of the act. For the filing of such reservoir declaratory statement the local officers will be authorized to charge the usual fee. (Sec. 2238, U. S. Rev. Stat.) The local officers will forward the declaratory statement with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied.

(a)† No reservation will be made for a reservoir of less than 250,000 gallons capacity, and for a reservoir of less than 500,000 gallons capacity not more than 40 acres can be reserved. For a reservoir of 1,000,000 gallons capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallons and less than 1,500,000 gallons capacity not more than 120 acres can be reserved. For a reservoir of 1,500,000 gallons capacity or more 160 acres may be reserved. In the case where the water is furnished the livestock by artificial means, such as by windmill, pump, tanks, troughs, etc., the regulation requiring a minimum capacity of 250,000 gallons may be waived, upon the claimant's submitting a satisfactory showing that by such artificial means he will be able to furnish sufficient water and provide proper troughs, etc., to properly accommodate all cattle likely to water at the place in question.

(b) Not more than 160 acres shall be reserved for this purpose in any section.

(c) Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

(d) A distance of one-half mile must be left between any two groups of tracts which aggregate more than 160 acres.

(e) The local officers will reject any reservoir declaratory statement not in conformity with these rules.

(f) Lands so reserved shall not be fenced, but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise inclosed, or if they are not kept open to the free use of any person desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to appear, will be canceled and all rights thereunder be declared at an end.

† See Circular No. 416, approved June 18, 1915 (44 L. D. 127).—Ed.

(g) Notwithstanding the action of the local officers in accepting any such declaratory statement, the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it appears that the declaratory statement is not filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

31. *Construction.*—The reservoir must be completed and constructed within two years after the filing of the declaratory statement; otherwise the declaratory statement will be subject to cancellation.

32. *Map and field notes of constructed reservoir.*—After the construction and completion of the reservoir the applicant shall have the same accurately surveyed and mapped, in accordance with the instructions of sections 11 to 23, inclusive, so far as they are applicable. The map and field notes, which are not to be prepared in duplicate, must be filed in the proper local office. The map must bear Forms 10 and 11. (p. 309), and the field notes must be sworn to by the surveyor.

33. *Notations by local land officers.*—When the map, field notes, and other papers have been filed in the local office, the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. Local officers will then promptly forward the maps and papers to the General Land Office.

34. *Approval.*—The map and papers will be examined in the General Land Office to determine whether they comply with the law and the regulations, and whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the Secretary of the Interior, and upon approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act. Upon the receipt of notice of such reservation from the General Land Office the local officers will make the proper notations on their records and report the making thereof promptly to the General Land Office.

35. *Annual proof of maintenance.*—In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Form 12 (p. 310) will be used for this affidavit. Upon failure to file such affidavit steps will be taken looking to the revocation of the reservation of the lands.

36.⁸ *Reservoir on unsurveyed land.*—(a) In any case where the proposed reservoir is to be located upon unsurveyed public land, the declaratory statement may be filed, the land being therein described by metes and bounds and, as well, by the description which it is believed it will bear when officially surveyed. Proof of construction must be submitted at the end of the same period of time and in the same manner as is prescribed and required in cases where the lands have been previously surveyed. Such proof should embrace the field notes and a plat of a survey such as is required in cases of reservoirs on surveyed lands, with such modifications as are necessary (par. 32), the initial point of such survey being fixed by means of a traverse line run to the nearest existing corner of a public-land survey, not more than six miles distant from such point; if there be no such corner within that limit of distance, then the reference should be to some well-known or easily identifiable natural monument or, such monument being absent, to a fixed, permanent, and readily recognizable artificial monument.

(b) Any reservation made pursuant to this statute secures only a license to use and occupy the reserved land with and for a reservoir, and this license may endure permanently or may be of transient duration. No estate in the land is granted. For this reason it is administratively undesirable that private surveys made pursuant to the statute and these regulations shall be preserved and established by subsequent public-land surveys and approved plats thereof. When, therefore, the public-land surveys have been extended over land covered by a reservoir declaratory statement affecting unsurveyed lands, the declarant shall adjust his survey to the lines of the official survey, showing the location of the reservoir with respect to said lines by means of properly established tie lines. Any subsequent reservation which may be ordered will be of those subdivisions thus shown to be occupied by or necessary for the proper use of the reservoir.

(c) An annual affidavit of maintenance must be submitted the same as though the reservoir had been constructed on surveyed lands. Nothing in these regulations contained shall preclude the General Land Office or the department from requiring additional information in any case where that information is deemed proper or necessary.

37.⁹ The act of Congress approved March 3, 1923 (42 Stat. 1437), amends section 1 of the act of January 13, 1897 (29 Stat. 484), "An act providing for the location and purchase of public lands for reservoir sites" by inserting at the end thereof, the following new sentence:

⁸ See Circular No. 638, approved April 8, 1919 (47 L. D. 117).—Ed.

⁹ See Circular No. 893, approved May 3, 1923 (49 L. D. 577).—Ed.

The Secretary of the Interior, in his discretion, under such rules, regulations, and conditions as he may prescribe, upon application by such person, company, or corporation, may grant permission to fence such reservoirs in order to protect livestock, to conserve water and to preserve its quality and conditions: *Provided*, That such reservoir shall be open to the free use of any person desiring to water animals of any kind; but any fence erected under the authority hereof shall be immediately removed on the order of the Secretary.

This act applies only to stock-watering reservoirs which have been or may hereafter be constructed, and due proof of construction filed in the General Land Office.

Any person, company, or corporation, desiring to secure the benefits of this act should file in the local land office an application, under oath, duly corroborated by at least two disinterested witnesses, setting forth such facts as would show that it is necessary to fence such reservoir in order to protect the livestock, to conserve water, and to preserve its quality and condition. There should be filed with such application, and as a part thereof, a plat showing the land embraced in the reservoir as near as may be, the location of the proposed fence with respect to such reservoir, together with all gates or other openings and roadways leading to the same. In no instance will an application be considered unless said plat shows the location of at least two gates. Said gates shall be so constructed and maintained that they may be, at all times, readily opened and closed by any person desiring to water animals of any kind and such gates shall be so placed as to be readily accessible from the road or roads nearest the reservoir, which roads shall be the ones usually traveled and, where there are no such roads whereby to govern the location of such gates, they shall be so situated as to make the reservoir readily available from the adjacent public or other range; and that there shall be posted on the gates, and elsewhere if necessary, a notice stating that the reservoir is for stock-watering purposes, located on public lands, and that the same is opened to the free use of any person desiring to water animals of any kind.

Upon the filing of such an application, it should be considered by the local office as an additional paper in the case and transmitted to the General Land Office by special letter under the serial number of the reservoir declaratory statement for such action as may be deemed proper.

TELEGRAPH AND TELEPHONE LINES, ELECTRICAL PLANTS, CANALS, AND RESERVOIRS

38. *General statement.*—The act of February 15, 1901 (31 Stat. 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, he, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forests, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks in California, for every purpose contemplated by acts of January 21, 1895 (28 Stat. 635), May 14, 1896 (29 Stat. 120), and section 1 of the act of May 11, 1898 (30 Stat. 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid remaining unmodified and not being in any manner extended.*

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the acts referred to, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is

evident that, for purposes of administration, the later act should control in so far as it pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder, except for the generation and distribution of electrical power which are governed by separate regulations. Where, however, it is sought to acquire a right of way for the main purpose of irrigation as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts. (See pp. 277 to 289, inclusive.)

Application for permission to use the desired right of way through the public lands and parks designated in the act must be filed and permission must be granted, as herein provided, before any rights can be claimed thereunder.

Attention is called to the act of March 3, 1921 (41 Stat. 1353), as affecting the scope of the act of February 15, 1901, *supra*. *Inter alia*, this act provides:

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as now constituted of any national park or national monument, shall be granted or made without specific authority of Congress, etc.

39.¹⁰ *Nature of grant.*—It is to be specially noted that this act does not make a grant in the nature of an easement but authorizes a mere permit in the nature of a license, which permit may be revoked by the Secretary, or his successor, at any time in his discretion. Further, it gives no right whatever to take from public lands, reservations, or parks adjacent to the right of way any materials, earth, or stone, for construction or other purposes.

40. *Applications for right of way through national forests.*—By section 1 of the act of February 1, 1905 (33 Stat. 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts

¹⁰ This is section 38 of the regulations of June 6, 1908 (36 L. D. 567), as amended by Circular No. 108, approved May 7, 1912 (41 L. D. 13). This section was further amended, however, by Circular No. 1003, approved May 18, 1925 (51 L. D. 147), which added the following sentence and which is still in force:

The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be considered to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.—Ed.

supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

Under this provision it has been determined that the Department of Agriculture is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a national forest, provided this occupation or use is temporary, and will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued.

Therefore, when it is desired to obtain permission to use a right of way over public lands wholly within a national forest, an application should be prepared in accordance with the instructions issued by the Department of Agriculture, and the same filed with the officer in charge of such national forest.

In case the application involves rights and privileges upon public lands partly within and partly without a national forest, separate applications must be prepared, and the one affecting lands within the national forest filed with the forest officer and the other filed in the local land office.

41. *Applications for right of way through land outside of national forests.*—Where permission to use a right of way over lands wholly outside of national forests is desired, the application must be prepared and filed in accordance with sections 5 to 23, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

An affidavit by the applicant that he is a citizen of the United States must accompany the application. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit by one of them. If he is not a native-born citizen he must file the usual proofs of naturalization. The applicant must also set forth in the affidavit the purposes for which the right of way is to be used, and must show that he in good faith intends to utilize the same for such purposes.

42. *Buildings to be platted on map in main drawing and in separate drawing.*—When application is made for right of way for electrical or water plants, the location and extent of ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith must be clearly designated on the map and described in the field notes and forms (7 and 8, pp. 306, 307) by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a sepa-

rate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such proposed structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all the others are connected therewith by course and distance shown on the map. The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each one is necessary for a proper use of the right of way for the purposes contemplated in the act.

43. *Unsurveyed lands.*—Permission may be given under this act (February 15, 1901) for rights of way upon unsurveyed lands, maps to be prepared in accordance with the requirements of this circular.

44.¹¹ *National Parks.*—Whenever a right of way is through any of the national parks designated in the act, the applicant must show to the satisfaction of the department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein. The applicant must also file the stipulations and bond required by section 7, but, in case of a telephone line, substitute the following: "That upon completion of the telephone lines they shall be subject to the free use of the park officers for all purposes incident to the administration of the park," for stipulation (e) under said section 7.

Whenever right of way within a park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the park. If the application and the showing made in support thereof is satisfactory, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the department.

45. *Indian reservations.*—Applications for right of way under this act, all of which is located upon land within an Indian reservation, and applications for right of way affecting lands within and without Indian reservations must be filed in the local land office for forwarding to the Commissioner of the General Land Office. Before such applications are transmitted to the department they will be submitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for such action and recommendation as that officer may deem proper in so far as the same pertains to such Indian reservation. Applicants will be required to furnish, in triplicate, so much

¹¹ See Circular No. 108, approved May 7, 1912 (31 L. D. 13).—Ed.

of the map and field notes as relate to that portion of the right of way within an Indian reservation; and if the application is subsequently granted, one copy of such portion of the map and field notes as pertains to such reservation will be placed on file in the Indian Office. In this connection attention is directed to the provisions of section 3 of the act of March 3, 1901 (31 Stat. 1058, 1083), which authorizes the granting of permanent rights of way, in the nature of easements, for telegraph and telephone purposes only, through Indian reservations and other Indian lands, upon payment of proper compensation for the benefit of the Indians interested therein. The provisions of the act of March 3, 1901, and the nature and character of the rights authorized to be secured thereunder differ materially from the provisions of the act on which these regulations are based and the rights authorized to be conferred thereunder. Applicants, therefore, desiring to secure permanent rights of way through Indian reservations or other Indian lands for telegraph and telephone purposes will be required to submit their applications therefor under the act of March 3, 1901, *supra*, in accordance with the then current regulations issued thereunder. (For existing regulations under said act, see regulations approved May 22, 1908.)

46. *Notations and procedure.*—Upon the filing of an application under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map, over his written signature, the date of filing. If it appears that no portion of the public lands or parks designated in the act would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If vacant public land or lands in any park so designated are affected by the proposed right of way, the register will so certify on the map and duplicate over his signature, and will promptly transmit the same to the General Land Office with report that the required notations have been made.

When permission to use the right of way applied for is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way and will note in pencil, opposite each tract of public land affected, that such permission has been given, the date thereof, and a reference to the act.

TRAMROADS

47. *Rights of ways for tramroads.*—The Secretary of the Interior is authorized to permit the use of rights of way for tramroads through the public lands of the United States, not within the limits of any park, national forest, or military or Indian reservation under

the provisions of the act of Congress of January 21, 1895 (28 Stat. 635), as amended by section 1 of the act of May 11, 1898 (30 Stat. 404). The act of January 21, 1895, entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation, for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

This act was amended by section 1 of the act of May 11, 1898, *supra*, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses."

Applications for permission to use rights of way for tramroads should be prepared and filed in accordance with the regulations hereinbefore prescribed relative to presentation of applications for rights of way under the act of February 15, 1901, and the then current regulations issued under the general railroad right-of-way act of March 3, 1875 (for existing regulations under the latter act see 32 L. D. 481),¹² the prescribed forms in such regulations being so modified as to specify and relate to the acts under which the application is made. It is to be specially noted that the acts relating to tramroads do not authorize the granting of permission to use rights of way for such purpose within the limits of any park, national forest, or military or Indian reservation, and it is to be further noted that permission to use rights of way for tramroads over public lands, when granted,

¹² For latest published instructions relating to railroad rights of way under the act of March 3, 1875 (18 Stat. 482), see instructions of May 21, 1909 (37 L. D. 787).—Ed.

only confers a right in the nature of a license and is subject to all the conditions and limitations hereinbefore stated in section 44 of these regulations.

RIGHT OF WAY THROUGH NATIONAL FORESTS FOR DAMS, RESERVOIRS, WATER PLANTS, DITCHES, FLUMES, PIPES, TUNNELS, AND CANALS FOR MUNICIPAL OR MINING PURPOSES

48. *General statement.*—Section 4 of the act of Congress approved February 1, 1905 (33 Stat. 628), reads as follows:

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores during the period of the beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

This act grants rights of way through national forests to citizens and corporations of the United States for the objects therein specified, during the period of their beneficial use, under rules and regulations to be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are situated.

All applications for the right of way for the purposes set forth in said act must be submitted in accordance herewith.

No construction will be allowed in national forests until an application for right of way has been regularly filed in accordance with these regulations and has been approved by the Secretary of the Interior or unless permission has been specifically given.

49. *Nature of grant.*—The right granted is not in the nature of a grant of lands, but is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the act, during the period of the beneficial use. When the use ceases the right terminates, and thereupon proper steps will be taken to revoke the grant.

No right, whatever, is given to take any material, earth, or stone for construction or other purposes, nor is any right given to use any land outside of what is actually necessary for the construction and maintenance of the works.

50. *Preparation of applications.*—Applications for right of way under this act should be made in the form of a map and field notes, in duplicate, and must be filed in the local land office for the district in which the land traversed by the right of way is situated; if the land is in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. The maps,

field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with sections 8 to 22, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

An affidavit by the applicant that he is a citizen of the United States must accompany the application. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit of one of them. A copy of their articles of association must also be furnished, or if there be none, the fact must be stated over the signature of each member of the association.

If the applicant is not a native-born citizen, he must file the usual proof of naturalization. The applicant must set forth in the affidavit the purposes for which the right of way is desired.

51. *Water-plant structures.*—When application is made for right of way for water plants, the location and extent of ground proposed to be occupied by buildings, or other structures necessary to be used in connection therewith must be clearly designated on the map and described in the field notes and forms (7 and 8, pp. 306, 307) by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all others are connected therewith by course and distance shown on the map.

The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each is necessary to a proper enjoyment of the right of way granted by the act.

52. *Stipulation and bond.*—The applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of the national forest.

53. *Notation by register.*—Upon the filing of an application under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map over his written signature the name of the land office and the date of filing.

If it appears that no portion of the public lands in a national forest would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If unpatented lands are affected by the proposed right of way, the register will so

certify on the map and duplicate, over his signature, and will promptly transmit the same to the General Land Office, with report that the required notations have been made.

Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the right of way as laid down on the map. They will also note the approval in ink on the tract books, opposite each legal subdivision affected, with a reference to the act mentioned on the map.

54.¹³ *Right of way through unsurveyed land.*—Maps showing reservoirs, canals, water plants, etc., wholly upon unsurveyed lands, will be received and acted upon in the manner hereinbefore prescribed for surveyed lands.

THOS. C. HAVELL,
Acting Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF RIGHT OF WAY
FOR CANALS, DITCHES, AND RESERVOIRS

FORM 1

I, _____, secretary (or president) of the _____ Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction, according to the existing laws of the State (or Territory) of _____, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 19____.

[Seal of company.]

_____ of the _____ Company.

FORM 2

I, _____, do certify that I am the president of the _____ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

In witness whereof I have hereunto set my name and the corporate seal of the company this _____ day of _____, in the year 19____.

[Seal of company.]

_____ President of the _____ Company.

¹³ See instructions of May 24, 1916 (45 L. D. 91), promulgated as Circular No. 479, June 10, 1916, unpublished.—Ed.

STATE OF _____,

FORM 3

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the _____ Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir for which right of way is asked, as required by section 21, being a total length of canals, ditches, and laterals of _____ miles, and a total area of reservoirs of _____ acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commenced on the _____ day of _____ 19____, and ending on the _____ day of _____, 19____ [and that the survey of the said (canal, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir)]¹⁴ and that such survey is accurately represented upon this map and by the accompanying field notes. [And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.]¹⁴

Sworn and subscribed to before me this _____ day of _____, 19____.

[SEAL.]

Notary Public.

FORM 4

I, _____, do hereby certify that I am president of the _____ Company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field notes, was adopted by the company, by resolution of its board of directors, on the _____ day of _____, 19____, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows—(describe as in Form 3)—[and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map]¹⁴; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of¹⁵ (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right of way herein described is desired for the main purpose of irrigation.¹⁶

Attest:

President of the _____ Company.

[Seal of the company.]

Secretary.¹⁴ The clause in brackets to be omitted in applications for telephone and telegraph lines.¹⁵ Here insert the description of the act of Congress under which the application is made when filed under some other act than those of 1891 and 1898.¹⁶ Or, where filed under other acts than those of 1891 and 1898, state the purposes for which right of way is applied for.

FORM 5

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the _____ Company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in section 21) a total length of constructed (canals, ditches, and laterals) of _____ miles, and a total area of constructed reservoirs of _____ acres; that construction was commenced on the _____ day of _____, 19____, and completed on the _____ day of _____, 19____; that the constructed (canals, ditches, laterals, and reservoirs) as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the _____ day of _____, 19____.

(Sworn and subscribed to before me this _____ day of _____, 19____.

[SEAL.]

Notary Public.

FORM 6

I, _____, do certify that I am the president of the _____ company; that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the _____ day of _____, 19____; and that the company has in all things complied with the requirements of the act of Congress¹⁷ (March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States).

President of the _____ Company.

[Seal of company.]

Attest:

Secretary.

FORM 7

[Under act February 15, 1901]

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed by) the _____ company, under whose supervision the survey was made of the grounds selected by the company for structures for electrical purposes under the act of Congress approved February 15, 1901, said grounds (here describe as required by sections 41 and 50); that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent

¹⁷ Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891.

required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat. 790).

_____,
Chief Engineer.

Subscribed and sworn to before me this _____ day of _____, 19__.

[SEAL.]

_____,
Notary Public.

FORM 8

[Under act of February 15, 1901]

I, _____, do hereby certify that I am the president of the _____ company; that the survey of the structures represented on the accompanying drawing was made under authority and by direction of the company, and under the supervision of _____, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying drawing actually represents the structures required (here describe as required by sections 41 and 50) for electrical purposes, under the act of Congress approved February 15, 1901; and that the company, by resolution of its board of directors, passed on the _____ day of _____, 19__, directed the proper officers to present the said drawing for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat. 790).

President of the _____ Company.

[Seal of the company.]

Attest:

Secretary.

FORM 9

Reservoir declaratory statement

[Under act of January 13, 1897 (29 Stat. 484)].

RES. D. S.

LAND OFFICE AT _____,

_____, 19__.

I, _____, of _____, do hereby certify that I am president of the _____ company, and on behalf of said company, and under its authority, do hereby apply for the reservation of land in _____ County, State of _____, for the construction and use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat. 484). The location of said reservoir and of the land necessary for its use, is as follows: _____ of section _____ in township _____, of range _____ M., containing _____ acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of

The land owned or claimed by the applicant within the vicinity of the said reservoir (within 3 miles) is as follows: ———.

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock, and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

The water of said reservoir will cover an area of ——— acres in ——— of section ——— in township ———, of range ——— of said lands; the capacity of the reservoir will be ——— gallons, and the dam will be ——— feet high. The source of the water for said reservoir is _____

and there are no streams or springs within 2 miles of the land to be reserved except as follows: ———.

The applicant has filed no other declaratory statements under this act except as follows:

- No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
 - No. _____, _____ land office, area to be reserved _____ acres.
- Total, _____ acres, of which Nos. _____ are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[SEAL OF COMPANY.] _____

Attest:

Secretary.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

Sworn to and subscribed before me this _____ day of _____, in the year 19—.

[SEAL.]

Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

LAND OFFICE AT _____,
_____, _____, 19—.

I, _____, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the pro-

visions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

Fees, \$ _____ paid.

Register.

NOTE.—The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting livestock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899 (28 L. D. 552).

FORM 10

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the person who was employed to make the survey of a reservoir covering an area of _____ acres, the initial point of the survey being _____ (here describe as required by section 21); said reservoir having been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian, as proposed by reservoir declaratory statement No. _____, which was filed in the local land office at _____, under the provisions of the act of January 13, 1897 (29 Stat. 484); that the said survey was made on the _____ day of _____, 19____; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of _____ gallons, and at the time of said survey contained _____ gallons of water.

Sworn and subscribed to before me this _____ day of _____, 19____.

[SEAL.]

Notary Public.

FORM 11

I, _____, do hereby certify that I am the president of the _____ company which filed (or that I am the person who filed) reservoir declaratory statement No. _____ in the local land office at _____; that the reservoir proposed has been constructed upon the _____ quarter of the _____ quarter of section _____, township _____, range _____, _____ principal meridian, covering an area of _____ acres, the initial point of the survey being _____ (described as in Form 10); that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purposes, and in the manner prescribed by the said act of January 13, 1897 (29 Stat. 484), the provisions of which have been and will be complied with in all respects.

[Seal of company.]

President of Company.

Attest:

Secretary.

FORM 12

STATE OF _____,
County of _____, ss:

_____, being duly sworn, deposes and says that he is the president of the _____ company which filed (or that he is the person who filed) reservoir declaratory statement No. _____, in the local land office at _____; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that water has been kept therein to the extent of not less than _____ gallons during the entire calendar year of 19—; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years, and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat. 484).

President of _____ Company.

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

RIGHTS OF WAY FOR PIPE LINES FOR TRANSPORTATION OF OIL AND GAS

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 21, 1931.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

It is provided in section 28 of the mineral leasing law, approved February 25, 1920 (41 Stat. 437), in part as follows:

That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe line purposes for the transportation of oil or natural gas * * * under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers. * * *

The following regulation is hereby established and promulgated under said law as to any right of way applications hereafter considered:

In approving such rights of way granted, it shall be specifically stated that such pipe lines shall be constructed, operated, and maintained as common carriers, and in addition that the use of any such pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and/or Federal laws, including laws prohibiting waste.

RAY LYMAN WILBUR, *Secretary.*

HENRY G. HAMM

Instructions, February 24, 1931

ENLARGED HOMESTEAD—OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION—WAIVER OF COMPENSATION.

A mineral reservation and a waiver of the right to compensation which an applicant to make entry under the enlarged homestead act was required to consent to because of conflict with an oil and gas prospecting permit will be rescinded where the permit is canceled and the land classified as nonoil and nongas prior to the allowance of the homestead application.

Assistant Secretary Edwards to the Commissioner of the General Land Office:

You have informally requested instructions on the application (Santa Fe 061110) of Henry G. Hamm to make entry under the enlarged homestead act for $W\frac{1}{2}$ Sec. 15, T. 4 N., R. 16 E., N. M. M., New Mexico.

The application was filed February 27, 1930, and was in conflict as to $E\frac{1}{2}$ $W\frac{1}{2}$ and $W\frac{1}{2}$ $NW\frac{1}{4}$ Sec. 15 with outstanding permits to prospect for oil and gas.

The prospecting permits have been canceled, and under date of December 19, 1930, the Director of the Geological Survey advised you that available evidence indicates that the tract applied for by Hamm has no prospective value for oil or gas and is properly subject to classification as nonoil and nongas land at the present time.

Because of the conflict with the prospecting permits, Hamm was required to consent to the amendment of his application to make it, as to $E\frac{1}{2}$ $W\frac{1}{2}$ and $W\frac{1}{2}$ $NW\frac{1}{4}$, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509), as to oil and gas, and to file a waiver of right to claim compensation from the permittees.

Hamm's application being now ready for allowance, you request instructions as to whether the applicant's consent to reserve the oil and gas to the United States should be canceled.

Inasmuch as the permits have been canceled and the land has been classified as nonoil and nongas, the notation on the face of the application, reading as follows:

Oil and gas reserved to U. S. Act 7-17-14. Right to compensation waived (Sec. 29, Act Feb. 25, 1920).

should be canceled, and the register advised that the consent to the reservation of the oil and gas and the waiver of right to claim compensation has been rejected.

ARLINGTON C. HARVEY

Decided March 5, 1931

MINING CLAIM—AMENDMENT—EVIDENCE.

An allegation that the object of an amended certificate of a mining location was merely to correct defects in the original certificate is not determinative of its character but whether the certificate is a mere amendment or one taking in new or abandoned ground is a question depending upon the facts as they existed at the time it was made.

MINING CLAIM—COOWNERS—PATENT PROCEEDINGS—APPLICATION.

A coowner who is not made a party to an application for a patent to a mining claim is not required to adverse or protest the application and the fact that he does not object is not sufficient warrant for ignoring the existence of his outstanding title.

EDWARDS, *Assistant Secretary*:

On April 1, 1927, Arlington C. Harvey made application, Greenwood Springs 030712, now Denver 038546, for patent to certain oil shale locations in Garfield County, Colorado, among which were Junior Nos. 1 to 3, inclusive, Virginia Nos. 1 to 7, inclusive. The abstract of title shows that these locations were made on various dates in July, 1917, by M. B. Coryell, P. C. Coryell, jr., Alberta Townsend, Theresa Schuessler, M. B. Walker, Walter Walker, H. R. Townsend and W. H. Clark; that by several deeds executed in September, October, and December, 1917, P. C. Coryell, jr., acquired all the right, title and interests of the other locators in the locations above specified, that thereafter on April 16, 1918, amended certificates of location were filed in the names of the above-named original locators for all the locations above named; that by deed dated February 5, 1919, there was conveyed to P. C. Coryell, jr., by the remaining locators except Clark all their interest in the claims mentioned. The applicant deraigns title from P. C. Coryell, jr. No deed appears in the abstract conveying the interests of Clark executed subsequent to the amendment of the locations in which he was joined. By letter of December 8, 1930, the Commissioner of the General Land Office held Clark's interest in the claims outstanding and that thereby a cloud rested on applicant's title and unless the cloud was removed to his satisfaction, Clark's interest would be recognized in the final adjudication of the entry. From this action applicant appeals.

It is alleged in support of the appeal that the amended certificates were filed simply to give a clearer and more accurate description as a matter of record to the lands included in the original locations; that they (the amended certificates) did not change the lands within the stakes on the ground; that the record shows that at that time P. C. Coryell, jr., was in fact sole owner of the claims and through ignorance made the mistake of using all the original locators' names

in the amended certificates when he could have used but his own name; that Clark throughout the years has stood by and permitted the expenditure of thousands of dollars on the claims without objection or protest. It is therefore contended that the amended certificates should not affect the title; that no new right was created thereby in anyone, and thereafter there was no title in Clark that he could convey, nor is there such interest in him now; that if, in fact, Clark has a vested interest, he could enforce a trust against applicant as patentee.

It is a settled rule that full ownership must be shown in the applicant for patent. *Repeater and Other Lode Claims*. (35 L. D. 54); *Badger Gold Mining and Milling Co. v. Stockton Gold and Copper Mining Co.* (139 Fed. 838, 841). The abstract of title does not disclose whether the objects of the amendment were recited in the amended certificates. But if such objects were alleged in the certificate to be but corrections of defects and imperfections in the original certificates such recitals are not determinative of its character. Whether a given certificate is a mere amendment or one taking in new or abandoned ground is a question depending upon the facts as they exist at the time it is made. *Cheesman v. Shreeve* (40 Fed. 787, 789); *Slothower v. Hunter* (88 Pac. 36, 38); *Bergquist v. West Virginia-Wyoming Copper Co.* (106 Pac. 673, 678). It is not therefore patent from the record of title that the amendment was one made by P. C. Coryell, jr., intended merely to cure obvious defects and imperfections in the original certificate notwithstanding appellant's allegations to the contrary. Incompatible with such allegations are the facts that subsequent to the amendments, P. C. Coryell obtained deeds from each of the parties named in the amended certificates, except Clark, and, moreover, appellant filed an affidavit executed by said Coryell July 24, 1930, wherein he states in substance that the negotiations with his colocators to purchase their respective interests was in the year 1919; that each, including Clark, was paid \$500 for his respective interest; that a separate deed was executed and delivered by Clark for his respective interest to affiant's agents, but through some mischance it was not recorded and could not then be found. Such averments are inconsistent with the averments now made that the use of the original colocators named in the amendments was a mistake and they were without interest in the locations.

Nor is the fact that Clark has not objected to or protested the application sufficient warrant for ignoring the existence of his outstanding title. It is well settled that coowners are not required to adverse the application because not made parties to the proceedings. Paragraph 53, Mining Regulations (49 L. D. 72); Section 728,

Lindley on Mines (2d Ed.), and cases there cited. Nor is there shown such an emphatic and well-recognized repudiation of Clark's title brought to his notice as would suggest that he claims no interest in the locations by failing to protest. Ordinarily a coowner, although he may, is not required to adverse or protest, but if wrongfully excluded from the patent application he may have a trust declared at any time in his favor after the issuance of patent. Lindley on Mines, Section 646. The existence of this remedy in an excluded coowner, however, affords no basis for granting a patent where apparently an interest in the claim is outstanding in some one not a party to the application. No error is seen in the Commissioner's decision. It will, therefore, be and is hereby

Affirmed.

ARLINGTON C. HARVEY

Motion for rehearing of departmental decision of March 5, 1931 (53 I. D. 312), denied by Assistant Secretary Edwards, April 18, 1931.

**MEASURE OF DAMAGES IN COAL TRESPASS CASES—CIRCULAR
NO. 953, AMENDED**

INSTRUCTIONS

[Circular No. 1239]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 6, 1931.

CHIEFS OF FIELD DIVISIONS:

Since the issuance of Circular No. 953¹ of July 19, 1924, developments have arisen which make it necessary to amend the regulations contained therein, in order to adequately protect the Government's interests. You will, therefore, hereafter observe the following instructions and apply the measures of damage prescribed below in coal trespass cases:

The mining of coal, either under a pending application for license, lease or permit, or without such pending application, is in trespass. However, where a permittee applies for a lease the mining of coal by him prior to the issuance of the lease does not constitute a trespass nor does the mining of coal by the surface owner for his own domestic use constitute a trespass.

¹ Circular No. 953 (unpublished) was based upon departmental instructions of May 23, 1924 (50 L. D. 501), and was supplemented by Circular No. 1135 (52 L. D. 216.)—Ed.

Settlement for all coal mined in trespass will be required in accordance with the following measures of damage:

1. *Innocent trespass*.—The value of coal in place, before severance. *United States v. Homestake Mining Company* (117 Fed. 481). In no event should less than twenty-five cents per ton be demanded in settlement of a trespass.

2. *Willful trespass*.—Full value of property at time of conversion, without deduction for the labor bestowed or expense incurred in removing and preparing it for market. *United States v. Ute Coal and Coke Company* (158 Fed. 20).

Where coal is being mined in trespass without a pending application, steps should be taken to put immediate stop to such mining and to collect damages for the coal.

Where coal is being mined in trespass but under a pending application for license, lease or permit, the trespasser should be advised that he is mining in trespass and at his own risk.

If, however, it is found that the mining operations are being conducted in violation of the coal mining regulations of the department, or the applicant fails to submit payment for the coal in accordance with the proper measure of damage, the chief of field division having jurisdiction in the matter will take such action as may be necessary to put a stop to such mining operations.

C. C. MOORE, *Commissioner*.

I concur:

W. C. MENDENHALL,

Acting Director, Geological Survey.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

VOTING STATUS OF GOVERNMENT EMPLOYEES WITHIN MOUNT RAINIER NATIONAL PARK

Opinion, March 13, 1931

NATIONAL PARKS—MOUNT RAINIER NATIONAL PARK—JURISDICTION.

An act of the legislature of the State of Washington ceding exclusive jurisdiction to the United States over the Mount Rainier National Park reserving, however, to the State certain rights had the effect of ceding the political jurisdiction of the State only to the limited extent stated in the act.

NATIONAL PARKS—MOUNT RAINIER NATIONAL PARK—VOTING STATUS OF FEDERAL EMPLOYEES.

The fact that the State of Washington, in ceding jurisdiction to the United States over the Mount Rainier National Park, reserved the right to serve criminal and civil process thereon and to tax the persons and property of park residents did not have the effect of extending the election laws of

the State to include persons residing within the park, but a prior qualified voter in the State did not lose his right to vote at the place of his legal residence by reason of his entering the service of the United States on the reservation.

VOTING QUALIFICATIONS—STATE LAWS.

The privilege of voting and the qualifications of voters are primarily determined by State laws, and however unwise or unjust they may seem, those laws are controlling if not in conflict with the limited provisions of the Federal Constitution on that subject.

FINNEY, *Solicitor*:

The Superintendent of Mount Rainier National Park requested information as to the voting status of Government employees and other citizens residing in the park, and the question has been referred to me for consideration and a legal opinion on the subject. In order that the basis for discussion may be fully in view, the statement of the case by the superintendent is set forth herein. He states—

We understand, of course, that in ceding jurisdiction over Mount Rainier National Park the State of Washington reserved the right to serve criminal or civil process within the limits of the park in suits or prosecutions for rights acquired, obligations incurred, or crimes committed in the State but outside of the park, and the right of the State to tax persons and corporations, their franchises and property on the lands included in the park. It would seem that if the State and county may tax the property of park residents that such taxed residents should have the right to vote.

At each election local election officials make a different ruling. At some elections residents of the park have been permitted to vote for all national, State, county, and local officials, at other elections we have been denied the right to vote for local school officials and matters. At the general election in 1928 one of the inspectors declared that park residents could vote only for national and state officials and he proceeded to scratch the names of district and county officials from the ballots, which he passed out to some of our park residents. However, our park people refused to accept scratched ballots and insisted on using unmarked ballots which were accepted and counted.

Until a few years ago no question was raised concerning the voting status of park residents and our employees voted in all elections and even held office as school directors in the district outside the park. In 1924 at the school election a park resident defeated a candidate residing outside the park for school director. The defeated candidate took up the question of the right of park residents to vote in school election and the Attorney General of the State ruled that the residents of the park do not have the right to vote in local school district elections. The matter of school taxes was then taken up by park residents and the Attorney General ruled that we can not be taxed for local road and school improvements. Since then such taxes have not been paid by park residents although the county treasurer regularly includes such taxes with the State and county taxes.

At the election in November, 1930, all residents, numbering 32 individuals, of the park were refused the right to vote for the national congressional candidates and all State and county officials. I was personally denied the vote and on protesting I was shown a letter from the Pierce County Superintendent of Elections in which it was stated that no residents of the Rainier National

Park may vote at the November, 1930, elections. The letter further stated that this ruling was based on an interpretation of the laws by the Pierce county Prosecuting Attorney. Following this denial of the right to vote I took up the matter with the Attorney General of Washington who replied that under the laws of the State he was prohibited from rendering an opinion to other than State, county, and municipal officials, but he suggested that I take up the matter with the Prosecuting Attorney of Pierce County, whose duty it is to render opinions on such matters. I wrote the Pierce County Prosecutor but he did not answer my letter, presumably because he had already given an opinion in the case to the Supervisor of Elections.

Up until a few years ago the number of permanent residents of the park was so small that local and State officials were not concerned in whether or not such residents of the park exercised their rights as citizens. But since the number has grown to above thirty their votes are considered of importance.

It is my opinion that under our constitutional rights we cannot be legally denied a vote in State and county elections if the State and county tax us.

The subject is naturally divided into two parts: (1) The political status of the area embraced in the park. (2) The effect of the election laws of the State of Washington in relation to that area.

By legislative act of March 16, 1901 (section 7122, Pierce's Code, 1929), the State ceded jurisdiction in the following language:

Exclusive jurisdiction shall be, and the same is hereby ceded to the United States over and within all the territory that is now or may hereafter be included in that tract of land in the State of Washington, set aside for the purposes of a National Park, and known as the Rainier National Park; saving, however, to the said State, the right to serve civil or criminal process within the limits of the aforesaid park, in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said States, but outside of said park; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said park, Provided, however, This jurisdiction shall not vest until the United States through the proper officer, notifies the Governor of this State that they assume police or military jurisdiction over said park.

By Congressional Act of June 30, 1916 (39 Stat. 243, section 95, title 16, U. S. Code), it was declared that the United States assumed "sole and exclusive" jurisdiction over the territory embraced within the Mount Rainier National Park, saving, however, to the State of Washington the powers reserved by it in its act of cession.

The manner in which the Government of the United States acquired so-called exclusive jurisdiction over this area and the extent of that jurisdiction are believed to be essentially similar to the conditions considered by the court in the case of *Fort Leavenworth Railroad Company v. Lowe* (114 U. S. 525). In that case the court referred to section 8, Article I of the United States Constitution which provides that Congress shall have power to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the legislature of the State in which the same shall be, for

the erection of forts, magazines, arsenals, dock yards, and other needful buildings. It was said that Fort Leavenworth Military Reservation did not have a status under that provision of the Constitution because the land was not purchased by consent of the State but had been reserved out of lands owned by the United States before the State of Kansas was admitted into the Union; that when the State was admitted its general political jurisdiction extended over the lands embraced in the reservation subject to exercise, however, only in subordination to the instrumentalities of the general government; that the later act of the legislature of the State ceding exclusive jurisdiction to the United States reserving, however, to the State the right to serve civil and criminal process therein and to tax corporate property therein, had the effect of ceding the political jurisdiction of the State only to the limited extent stated in that act.

The court gave extended consideration to the question whether the legislature of a State has power to cede her jurisdiction and legislative power over any portion of her territory, and while it was held that the State, whether represented by her legislature or by a convention specially called for that purpose, was incompetent to cede her political jurisdiction to a foreign country, without the concurrence of the general government, yet no objection was seen to cession of such jurisdiction to the United States in promotion of the instrumentalities of the general Government. It was held that the reserved right of the State to tax corporate property within the reservation was not incompatible with the use of the reservation by the United States and the tax was recognized as legal.

In the case of *Arlington Hotel Company v. Fant* (278 U. S. 439), Chief Justice Taft referred to that case as the leading case on the subject, and in regard to the contention made in the *Leavenworth case* that the State of Kansas could not legally retain the power of taxation of corporate property on the reservation in its act of cession, he summarized the ruling of the court in that case on the point of divided jurisdiction as follows (p. 451):

In answering this claim the Court pointed out that the United States without the consent of a State might purchase or condemn for its own use State land for a national purpose, and that without any consent or cession by the State, such jurisdiction would attach as was needed to enable the United States to use it for the purpose for which it had been purchased. The Court held that in such a case when the purpose ceased, the jurisdiction of the federal government ceased. But the Court further held that when a formal cession was made by the State to the United States, after the original purchase of the ownership of the land had been made, the State and the Government of the United States could frame the cession and acceptance of governmental jurisdiction, so as to divide the jurisdiction between the two as the two parties might determine, provided only they saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction. The Court there-

fore held that a saving clause in the language of the cession requiring that the railroad should pay taxes was not invalid but was in accord with the power of both parties and might be enforced. This decided the point in the case.

In the recent case of *United States v. Unzeruta* (281 U. S. 138, 142), the rules were succinctly stated by Chief Justice Hughes in the following language:

When the United States acquires title to lands which are purchased by the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings," (Const. Art. 1, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this Court said in *Fort Leavenworth Railroad Company v. Lowe*, 114 U. S. 525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State as would impair their effective use for the purposes for which the property was acquired. When, in such cases, a State cedes jurisdiction to the United States, the State may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. *Fort Leavenworth Railroad Company v. Lowe, supra*; *Chicago, Rock Island & Pacific Railway Company v. McGlinn*, 114 U. S. 542; *Benson v. United States*, 146 U. S. 325, 330; *Palmer v. Barrett*, 162 U. S. 399, 403; *Arlington Hotel Company v. Fant*, 278 U. S. 439, 451. The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction.

See also *Surplus Trading Company v. Cook* (281 U. S. 647).

In considering the extent of the respective jurisdictions of the State and of the United States over the Mount Rainier National Park, no reason is seen to question or depart from the limits thereof as defined in the act of cession by the State and the acceptance thereof by the act of Congress. Therefore, the right of the State to tax as therein provided must be recognized.

It is clear that Congress assumed full jurisdiction except as thus specially limited. It is familiar doctrine in the practical operation of our dual system of Government that the States may exercise jurisdiction in respect to many matters of concern to persons within their borders, even though the subject matter be within the jurisdiction of the United States, until Congress shall by appropriate legislation enter the field. It was upon that principle that the Solicitor for this department in an opinion [unpublished] dated November 26, 1927, held that there was no substantial legal objection to the practice which obtains in cooperating with State authorities in respect to holding inquests and issuing death certificates where deaths occur in national parks. That opinion finds support in the case of *Allegheny Company v. McClung* (53 Pa. 483). But I fail to find in the decided cases clear authority for any broad application of that doctrine in respect to reservations over which the United States has jurisdiction.

It is realized that where State jurisdiction is wholly excluded there will be an unfortunate hiatus where vital matters will be entirely devoid of applicable laws, because the Federal Government has not set up complete machinery for administrative control or adjudication of the myriad *minutiae* of local government. It has provided generally that all of the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park, and others having similar status, and that if any offense be committed therein, which offense is not prohibited or the punishment for which is not provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State at the time of the offense may provide for a like offense in the State. See act of June 30, 1916, *supra*, and Chapter 11, Title 18, U. S. Code.

This covers the field for criminal cases but does not provide for the adjudication of property or civil rights nor for regulatory control of such matters as marriage and divorce, the recordation of legal documents, vital statistics, etc.

In respect to property rights, the law is left in static form under the doctrine applied in the case of *Arlington Hotel Company v. Fant*, *supra*, a civil action, wherein it was held that the law of the State of Arkansas as it existed at the date of the cession of jurisdiction to the United States over the Hot Springs Reservation was the law governing the liability of hotelkeepers for the loss of the property of their guests, and not the later and more liberal law which had been enacted by the State after the cession of the State's jurisdiction. It was held that such former law of the State remained the law of the place over which jurisdiction was ceded, it not having been otherwise provided by Act of Congress.

There have been a number of decisions on the question of the right of inhabitants of such reservations to vote at elections held under State authority. An important opinion on this subject was rendered by the judges of the Supreme Court of Massachusetts in 1841 (1 Metc. 580), wherein it was held (syllabus)—

Persons who reside on lands purchased by or ceded to the United States for navy yards, forts and arsenals, and where there is no other reservation of jurisdiction to the State than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated—nor are they liable to be assessed for their polls and estates to state, county, and town taxes, in such towns—nor do they gain a settlement in such towns, for themselves or their children, by residence for any length of time on such lands—nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns.

To the same effect was the decision in the case of *Sinks v. Reese* (19 Ohio St. 306). That decision was favorably noticed by the Supreme Court of the United States in the *Fort Leavenworth* case above referred to wherein the court said—

In *Sinks v. Reese*, 19 Ohio St. 306, the question came before the Supreme Court of Ohio, as to the effect of a proviso in the act of that State, ceding to the United States its jurisdiction over lands within her limits for the purposes of a National Asylum for Disabled Volunteer Soldiers, which was, that nothing in the act should be construed to prevent the officers, employees and inmates of the asylum, who were qualified voters of the State, from exercising the right of suffrage at all township, county, and State elections in the township in which the National Asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the Legislature of the State, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote, within the meaning of the Constitution, which conferred the elective franchise upon its residents alone.

It will be observed that the act of cession in that case undertook to save to inhabitants of the reservation the right to vote, but that provision was held to be invalid because consent to the purchase had been given in the manner provided by the Constitution, and, therefore, the United States acquired exclusive jurisdiction and the State jurisdiction was completely ousted.

The same conditions obtained in respect to the Soldiers' Home at Johnson City, Tennessee, and the question of the right of the inhabitants of that home to vote in Tennessee was involved in the case of *State v. Willett* (97 S. W. 299). The *Sinks* case was cited and followed.

The following statement is quoted from 20 Corpus Juris, p. 74:

Since land which has been ceded by the state to the United States for the use of some department of the general government, without any reservation of jurisdiction except the right to serve civil and criminal process thereon, ceases to be a part of the state, such land cannot become a voting residence in the state in which it is situated, until it is ceded to the state by congress. But the mere fact that a person is in the service of the United States on a government reservation will not deprive him of his right to vote in the place where he has a legal residence.

The right to vote can not be regarded as a constitutional right in a national sense except in a very limited degree as regards immunity from State discrimination on account of sex, race, color, or previous condition of servitude as provided in the 15th and 19th Amendments to the Constitution, and in respect to the qualifications of electors of members of the House of Representatives of the United States, con-

cerning whom it was provided in the original Constitution that they shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The qualifications of voters are fixed by State laws, and however unwise or unjust they may seem, they are controlling if free from conflict with the Federal Constitution as regards the very limited provisions on the subject in that instrument.

Among the qualifications for voting required by Article 6 of the Constitution of the State of Washington, it is necessary that persons be citizens of the United States; that they shall have lived in the State one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; that for the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence or lost it by reason of his absence while in the civil or military service of the State or of the United States. The State law also makes provision enabling absentees to vote by mail when unavoidably absent from home and more than 25 miles from the precinct where they are qualified to vote.

Under these provisions, if any of the Government employees in the park were qualified voters of the State in precincts outside of that area, they have not lost the right to vote in such precincts by reason of absence in the Government service. But if they were not prior qualified voters in the State, they have not acquired the right to vote merely by residing in the park. It is probable that none of the employees of the Government have lost their voting privileges at their former homes by reason of absence in the Government service. It may also be that other persons merely sojourning in the park or temporarily engaged in business or private employment there, have not lost their elective franchise at their former homes, but that would depend in great measure upon whether they intended to abandon their former citizenship in other states as well as upon the provisions of the election laws of the particular States where they formerly resided.

The important general rule to be kept in mind is that the voting privilege is determined by State laws primarily and with very few exceptions. Although this Nation gained its independence in the American Revolution by force of arms in defense of the principle that taxation without representation is tyranny, yet that doctrine was not preserved in the Federal Constitution. The payment of taxes is not a paramount test of the right to vote. Numerous instances are found where States make the payment of a tax one of the qualifications, but it is familiar to all that property, where the State has jurisdiction to impose a tax, may be taxed without regard to its representation at the polls.

It may be observed that in the cession of jurisdiction over the Rocky Mountain National Park in Colorado, the right to vote was expressly saved to the persons residing therein. See act of March 2, 1929 (45 Stat. 1536).

In the present case, the State of Washington and the United States agreed upon terms of cession of jurisdiction whereby the State reserved its taxing power but made no provision in respect to voting privileges of the inhabitants of the park. The present attitude of the State appears to be within its powers. Doubtless the compact could be amended by mutual agreement of the State and the Federal Government in a manner similar to that in respect to Rocky Mountain National Park, but so long as the cession stands in its present form the inhabitants are subject to its terms.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

COMMENCEMENT OF PAYMENT OF SUPPLEMENTAL CONSTRUCTION CHARGES BY STATE IRRIGATION DISTRICTS IN MONTANA

Opinion, March 17, 1931

RECLAMATION—CONSTRUCTION CHARGES—TRANSFER OF PAYMENT—STATUTES.

The act of April 23, 1930, which amended section 43 of the act of May 25, 1926, was not a relief act, but rather an act which authorized moneys paid voluntarily by a debtor into the reclamation fund for construction charges on the unproductive portion of a farm unit declared to be in the suspended class to be credited to the unpaid balance of the construction charge on the productive area of the unit.

RECLAMATION—IRRIGATION PROJECT—STATE IRRIGATION DISTRICTS—CONSTRUCTION CHARGES—PAYMENT—CONTRACTS.

A contract entered into between the United States and a project irrigation district, organized under the laws of the State of Montana, whereunder it is agreed by the district that it will collect and pay to the United States the construction charges due the latter, does not intend that there shall be a moratorium between the termination of the payment by any individual landowner on the primary charge and the beginning of payment on the secondary charge, where the completion of payments of the primary charge on the various units occurs in different years.

FINNEY, *Solicitor*:

The Huntley Project Irrigation District, organized under the laws of the State of Montana, is a quasi-municipal corporation including within its limits all of the irrigable area of the Huntley Federal reclamation project. Under a contract dated January 2, 1927, between the United States and the district, it is agreed that the district will operate and maintain the project irrigation system and will collect

for the United States the construction charges due the latter in repayment of the investment made by the United States pursuant to the act of June 17, 1902 (32 Stat. 388).

On February 13, 1931, the Secretary of the Interior made an announcement of the amount and terms of payment of the supplemental construction charges due under the contract. This announcement is provided for in the agreement between the parties. As written the announcement provides that each landowner shall begin payment of the supplemental construction charge in the year following the date of the completion of the payment of the primary construction charge.

It is the claim of the district that payment of the primary construction charge will not be completed until 1947 and that none of the secondary construction charge is due and payable until 1948. Therefore, the district has protested against the provisions of the announcement of February 13, 1931.

The Huntley project lies on the south side of the Yellowstone River about 20 miles east of Billings, Montana, and comprises three divisions of approximately 32,000 acres. The Pryor division contains 28,000 acres, and the Eastern and the Fly Creek divisions contain 4,000 acres. In what is said hereafter reference will be made only to conditions existing in the Pryor division. The lands in the Pryor division of the Huntley project were opened to entry under public notice in 1907 and each entryman was required to make a water-right application for his land providing for payment of the construction charges of the project, fixed at \$30 per acre, in ten equal annual installments. Subsequently, by the act of August 13, 1914 (38 Stat. 686), known as the extension act, the terms of payment were extended 20 years. By the act of May 25, 1926 (44 Stat. 636), authority was given to the Secretary of the Interior to extend the time of payments for a term not exceeding 40 years. This was by reason of departmental decision determined to be a period of 40 years from the time of the issuance of the public notice. The contract with the irrigation district was negotiated during the year 1926, and due to the fact that a considerable period had elapsed from the time of opening the project and that entries had been made during succeeding years, it was known to the men who drafted the contract that the amount due from each tract of land was different from that of other tracts. This necessitated a computation from the books in the hands of the United States of the amount due from each landowner.

By the terms of the contract the water-right applications and the books kept by the Government became the means for determining the amount due from each tract of land and the contract therefore provided that the Secretary should determine the amount due and

announce the date of payment. By section 5 of the contract there is a designation of the classes of land in the district relative to their being application land, nonapplication land, and nonconsenting application land. It is only necessary to consider in this opinion the condition relative to consenting application land.

Article 16 of the contract states that the Secretary will determine and announce to the district *for each tract* of consenting application land in the Pryor division the unaccrued primary construction charge and that the total of such charges for all of the tracts will be referred to as the primary construction charge. This is the charge that the district agreed to pay in semiannual amounts. It represents the total found by adding the amounts due from each individual consenting application landowner.

Article 17 of the contract provides that the Secretary will determine and announce to the district *for each tract* of consenting application land in the Pryor division the number of equal semiannual installments after June 30, 1932, in which the owner of such tract may complete the payment of the primary construction charge thereon, it being understood that the Secretary will, in each case, allow the longest possible period permissible under the adjustment act. This period, under the law and the regulation of the department, would be 40 years from the time that the landowner's water-right application was made.

By Article 18 it is provided that the district will, in 1932 and each year thereafter until the primary construction charge is paid, levy assessments and pay the construction charge to be collected from all tracts of land on the basis fixed in Article 17.

It must be concluded from a study of the contract provisions that the amount to be paid by the irrigation district was the total of the amount owed by each tract of land at the time the contract was executed.

Article 22 of the contract deals with the payment of supplemental construction charges. It states that—

Within a reasonable time after this contract goes into effect and before the expiration of the period within which the primary construction charge is *payable in full on behalf of any tract of consenting application land*, the Secretary will determine and announce * * * the amount of the supplemental construction charge * * * payable on behalf of *each tract* of consenting application land. [Italics supplied.]

The Secretary is to determine the due dates of the installments for *each such tract*, the first being due for any tract on December 31 of the year in which the final installment of the primary construction charge was payable for each tract.

It is evident from the statements in the contract that each consenting application landowner might have a different annual payment and that the time of completion of payment might be different. It can not be doubted from the statement in Article 22 of the contract that the first payment on the supplemental construction charge should be made on December 31 of the year in which the final installment of the primary construction charge was payable. In other words, there was no intention of permitting a moratorium in payment between the termination of the payment by any individual landowner on the primary construction charge and the beginning of payment on the secondary construction charge.

With this situation in view we must now approach the question of the effect of the act of April 23, 1930 (46 Stat. 249), which provides as follows:

SEC. 43. The payment of all construction charges against said areas temporarily unproductive shall remain suspended until the Secretary of the Interior shall declare them to be possessed of sufficient productive power properly to be placed in a paying class, whereupon payment of construction charges against such areas shall be resumed or shall begin, as the case may be. *Any payments made on such areas shall be credited to the unpaid balance of the construction charge on the productive area of each unit. Such credit shall be applied on and after the passage and approval of this Act, which shall not be construed to require revision of accounts heretofore adjusted under the provisions of this section as originally enacted.* While said lands so classified as temporarily unproductive and the construction charges against them are suspended, water for irrigation purposes may be furnished upon payment of the usual operation and maintenance charges, or such other charges as may be fixed by the Secretary of the Interior the advance payment of which may be required, in the discretion of the Secretary. Should said lands temporarily classed as unproductive, or any of them, in the future be found by the Secretary of the Interior to be permanently unproductive, the charges against them shall be charged off as a permanent loss to the reclamation fund and they shall thereupon be treated in the same manner as other permanently unproductive lands as provided in this Act except that no refund shall be made of the construction charges paid on such unproductive areas and applied as a credit on productive areas as herein authorized. [Italics supplied.]

The italicized portion is the amendment to old section 43 of the act of May 25, 1926, *supra*. This act does not apply to all of the farms in the Pryor division of the Huntley project. It applies only to those lands where a portion of the entry has been declared to be in the suspended class on which payments of construction charge had been made. The sum of money paid upon the charges formerly falling due on suspended land must, under the amended act, be applied as a credit on the construction charges of the Class 1 to 4 lands in the unit. The application of these credits has, in some instances, resulted in the payment of all of the primary construction charges on the Class 1 to 4 lands in the unit, and the land-

owner claims that he should not be required to begin payment of the supplemental construction charge on December 31 of the year that he completed payment of the primary charge.

In order to determine the meaning of a contract it is desirable to place one's self in the position of the parties who made the contract. It is evident that none of them had in view the act of April 23, 1930, *supra*, because it was not in existence. This act is not a relief act, as asserted by the irrigation district. It took money that had been voluntarily paid by a debtor into the reclamation fund for construction charges on a specified area and applied it to a payment of construction charges on another area comprised in the same farm unit. It was a statutory provision sought by the landowners and not the administrative officers of the United States.

There is an apparent conflict in the statements of Articles 17 and 22 of the contract. Section 17 provides, among other things, that: "It being understood that the Secretary will allow the longest possible period under the adjustment act." This has reference to the primary construction charge. Article 22, which deals with the supplemental construction charge, provides, among other things: "The Secretary is to determine the due dates of the installments for each such tract, the first being due for any tract on December 31 of the year in which the final installment of the primary construction charge was payable." In determining the meaning of the language used in the contract it must be remembered that the division of the charges into primary and supplemental was an administrative act. Article 17 of the contract states that the Secretary will determine the due date, but Article 22 fixes a continuity of payments over which the Secretary of the Interior has no control. The contract between the parties determines this continuity of payments and can not be disregarded.

It is my opinion that there is no foundation in the contract or the application of the act of April 23, 1930, *supra*, for deferment in the beginning of payment of supplemental construction charge which would amount to a moratorium granting to the consenting application landowner any term of years between the time of completion of the primary construction charge and the beginning of payment of the supplemental construction charge.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

**DIVISION OF WATERS OF AHTANUM CREEK, WASHINGTON,
BETWEEN YAKIMA INDIANS AND WHITE LANDOWNERS**

Opinion, March 18, 1931

WATER RIGHTS—RECLAMATION—INDIAN LANDS—WATERMASTER.

A provision in a contract for the division of the waters of Ahtanum Creek entered into between the United States on behalf of the Indians on the Yakima Indian Reservation and the white landowners outside of the reservation for the appointment of a watermaster on or before June 15 each year, contemplated that the apportionment of the waters was to be made only during the irrigation season, and not then until the watermaster had been appointed, but that his appointment could be made before that date, if desirable.

WATER RIGHTS—RECLAMATION—INDIAN LANDS—EQUITABLE RIGHTS—SECRETARY OF THE INTERIOR.

The department will not attempt to abrogate a contract entered into more than twenty years ago between the United States on behalf of the Indians on the Yakima Indian Reservation and the white landowners outside of the reservation under which more than fifty per cent of the waters of Ahtanum Creek were apportioned to the latter during the irrigation season each year where the division was based upon beneficial use at the time the agreement was made and valuable rights have been acquired in reliance upon the terms of the contract, notwithstanding that the Secretary of the Interior may not have had authority at the time to bind the Indians by such agreement.

COURT DECISION CITED AND DISTINGUISHED.

Case of *Winters v. United States* (207 U. S. 564), distinguished.

FINNEY, Solicitor.

You [Secretary of the Interior] have submitted to me for opinion certain questions propounded by the Commissioner of Indian Affairs relative to the water rights on Ahtanum Creek a stream forming the northerly boundary of the Yakima Indian Reservation in the State of Washington. The questions submitted are as follows:

1. Whether certain old Indian rights to the use of water from the south fork of Ahtanum Creek were taken into consideration when the agreement of 1908 was made.
2. Whether the division of the water on the basis of 75-25 in the agreement of 1908 was without limitation as to time of use throughout the season or was confined to the period of low water usually beginning about the middle of June.
3. Whether the parties representing the Government had authority to bind and limit the use of water upon the Yakima Indian Reservation along the lines set forth in the agreement of 1908.

The first question was considered in the [unreported] Solicitor's opinion of May 24, 1930 (M. 25937), wherein it was stated in the last sentence of the opinion that "The diversion of water for about 60 acres in the vicinity of the south fork of Ahtanum Creek seems

to require no affirmative action as the condition now prevailing has existed for sixty years."

All of the questions submitted resolve about a contract made May 9, 1908, between the United States, acting in behalf of the Indians on the Yakima Indian Reservation, and W. W. Glidden, *et al.*, representing the white landowners living on the northerly side of Ahtanum Creek and irrigating their lands by diversions from such creek. The validity of the contract depends to some extent upon the interpretation to be placed upon the treaty made with the Yakima Indians on June 9, 1855, which treaty was ratified by Congress March 8, 1859 (12 Stat. 951). It is claimed by some that the waters of Ahtanum Creek should be divided equally between the reservation lands on the south side of the creek and the white men's lands on the north side of the creek because this stream is the boundary line of the reservation and, therefore, following the ruling in the case of *Winters v. United States* (207 U. S. 564), one-half of the water belongs to the Indians and the other half to the whites.

In Article 2 of the treaty above referred to the Indians ceded, relinquished and conveyed to the United States a tract of land which was explicitly described, reserving from the tract the land included within the following boundaries, which is the present Yakima Indian Reservation:

Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakima, eight miles below the mouth of the Satass River; and thence up the Yakima River to the place of beginning.

Further reference will be made to this provision of the treaty in connection with the discussion of the third question propounded.

In the contract of May 8, 1908, the parties agree by Article 1 to a division of the waters of Ahtanum Creek and its tributaries on the basis of 25 per cent of the natural flow of the creek to the Indian lands and 75 per cent of the natural flow of the stream to the white lands. In Article 3 it is agreed that the waters flowing in the creek shall be measured at a point locally known as the Narrows which is on the creek below the confluence of the north fork and the south fork of Ahtanum Creek. It is provided that to the amount thus ascertained at the point of measurement shall be added the amounts of water diverted from said Ahtanum Creek including its north and south forks above the point of measurement, the total thus obtained

to be divided in the percentages set forth in Article 1. It is evident that the division of water at the point of measurement was intended to take into consideration the total flow of the stream at the point of measurement including the diversions above that point.

It was not intended by my opinion of May 24, 1930 [unreported], to decide what should be done about the appropriations on the south fork of the creek, but to say that they need not be considered in determining the other questions decided.

Turning our attention now to the answer of the second question, which involves also an interpretation of the contract of May 9, 1908, the contract seems to contemplate the measurement of the water during a time when a division must be made between the various appropriators on the stream. It is certain that it did not attempt to divide the waters or provide for their measurement and division outside of the irrigation season. There is no intimation that the parties contemplated the storage of water or use of water from storage and the distribution of the same to the lands of either party to the agreement. The term low water flow is intended to describe the period when it becomes necessary to measure and divide the waters between the appropriators. From the beginning of the irrigation season up to the time that the waters must be divided, there is sufficient water in the stream to supply all lands and permit water to go to waste below the diversions. At that time of year the contracting parties were not interested in a division of the waters. Therefore, they provided for the appointment of a water commissioner and the beginning of the division of the waters by him when the flow of the stream fell to a point where it was impracticable for all of the appropriators to secure all of the water they could divert, or that was required for their lands. The date when the division of water became necessary is variable with each year. The contract fixed the time for the appointment of the ditchmaster "on or before the 15th of June of each and every year." As stated in my previous opinion, this could not be construed to mean June 15 of each year because the parties used the words *on or before* which, properly construed, makes it possible to appoint the ditchmaster before June 15, if desirable. It is evident that the parties did not intend by the contract to provide for a division of the waters until the ditchmaster was appointed but when his appointment was made he was supposed to begin the division of the water between the parties to the contract. This may appear as an amendment of the opinion rendered by me May 24, 1930, wherein it was stated that the division "is without limitation as to the season of the year." This referred only to the time of the appointment of the watermaster. It is my conclusion that the contract plainly shows that the parties

were considering the waters in the stream during the irrigation season and they believed that there was no necessity for a division of the water during the early part of the irrigation season but that at some time during the summer the stream would fall to a point where there would be a shortage for some of the water users, at which time a watermaster would be appointed by agreement of the parties. By the appointment they agreed upon the man who should make the division of the water and also the time when a division was necessary.

In question No. 3 we are presented with greater difficulties as it involves the treaty rights of the Indians and also the right of the Secretary of the Interior to make a contract for and on behalf of the Indians which would limit their rights to the diversion of the waters of Ahtanum Creek which is the northerly boundary of the reservation. From the portion of the treaty previously quoted, it is shown that the boundary is fixed as commencing *on* the Yakima River, thence proceeding westerly along said Ahtanum River to the forks. These words give little information as to whether the boundary line was the thread of the stream or whether it would be on the north or the south bank of the stream. The land on the north bank of Ahtanum Creek and west of the Yakima River was surveyed July 14, 1864. This survey was by meander lines along the north bank of the creek. The survey of lands on the south bank of the stream lying west of the Yakima River, which is on the present Indian Reservation, was made February 7, 1893. This line was also meandered. There was no attempt to establish a line in the bed of the stream. It might be asserted that the meander line on the south bank was all that represented the boundary of the Indian reservation because that would be land within the limits of the area described in section 2 of the treaty of 1855. The Supreme Court of the United States in the case of *Oklahoma v. Texas* (256 U. S. 70, 90), would not give such a narrow interpretation to the words used. Further, the Supreme Court decisions lead to the conclusion that where a stream marks the boundary between sovereignties, the thread of the stream is the line which represents the division of authority.

The records in the Indian Office indicate that a dispute arose in 1907 relative to the division and use of waters from Ahtanum Creek and that arrangements were made that year looking to the institution of a suit to determine the rights of the parties. After negotiations had been carried on for some time the contract of May 9, 1908, was evolved which divided the waters as above explained. At that time the case of *Winters v. United States*, *supra*, was pending in the courts and after the decision was rendered by the Supreme Court

of the United States it was contended that the Secretary of the Interior had by such contract deprived the Indians on the reservation of some of their rights by entering into the agreement of May 9, 1908.

In the case of *Winters v. United States* the conditions are in my opinion different than those presented by the conditions existing at the time the treaty was made in 1855 with the Yakima Indians. In the *Winters case* the Court was considering a treaty made May 1, 1888 (25 Stat. 113). It described the boundary of the reservation as (p. 124)—

beginning at a point in the middle of the main channel of Milk River opposite the mouth of Snake Creek; thence due south to a point * * * thence due east * * * thence following the southern crest of said mountains * * * thence in a northerly direction to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk River in the middle of the main channel thereof, to the place of beginning.

The decision of the Circuit Court of Appeals in *Winters v. United States* is found in 143 Fed. 740, and this is referred to because it gives an extended history of the situation. The court said (p. 745)—

Now we have the basis from which to determine whether or not the Indians were, by the terms of the treaty, given any right on the reserve which they accepted to the flowing waters of Milk River from which to irrigate their lands so as to enable them to cultivate the soil on the lands of the government set apart to them for the purposes mentioned in the treaty. * * *

* * * Why was the northern boundary of the reservation located "in the middle of Milk River" unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation as well as for other purposes?

At the time the treaty was made in 1888 irrigation had been practiced in Montana, where this reservation was located, for twenty or thirty years. At the time the treaty was made with the Yakima Indians in 1855 irrigation was practically unknown in the United States except for some areas irrigated by the Mormons in Utah beginning in 1847 and for some irrigation in California. There was evidently no intention of the parties to the treaty of 1855 to consider the question of the use or division of title to the waters of Ahtanum Creek.

Assuming that the treaty did not decide the rights to the waters of Ahtanum Creek but that the people living along the stream might appropriate and use the waters, we find that a dispute arose and in 1907 it was agreed that the water should be divided on the basis of 25 per cent to the lands on the south side of the stream and 75 per cent to the lands on the north side of the stream when it became necessary to divide the waters. It is asserted in the record in the Indian Office that this division was based upon the determination that

at that time 4500 acres were irrigated by whites on the north side of the stream and 1500 acres on the south side of the stream. In other words, it was a division of the waters based upon beneficial use at the time the agreement was made. With these facts in view, does the Secretary of the Interior have authority to make a contract which would limit the use of water to the Indian lands on the reservation? Water used for irrigation purposes is an appurtenance to the land on which it is used. In this respect it can be considered real estate and the rules of law regarding real property should be applied in determining the rights of the parties. To dispose of some of the water in the boundary stream of the reservation by sale or otherwise involves the right of the Secretary of the Interior to dispose of the property of the Indians of a reservation.

By the act of Congress approved July 9, 1832 (4 Stat. 564), there is a provision for the appointment of a Commissioner of Indian Affairs who shall have the direction and management of all Indian affairs and of all matters arising out of Indian relations, and by section 5 of the act approved March 3, 1849 (9 Stat. 395), it is provided that the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department in relation to all of the acts of the Commissioner of Indian Affairs.

The authority of the Secretary of the Interior attempted to be exercised in this instance has reference to a treaty between the United States and an Indian tribe, and there is considerable doubt in my mind whether he has authority to divest the tribe of any of the rights in real property held by the Indians. It has been held by me in two opinions that the contract of May 9, 1908, should not be abrogated by the United States because it has been in force for more than twenty years and valuable rights have been acquired by acting upon the terms of the agreement. This is evidenced by the decree by Judge Nicholson in the Superior Court of the State of Washington in and for Yakima County May 7, 1925, wherein he adjudicated and determined the water rights of the landowners on the north bank of Ahtanum Creek and settled the priority rights of such landowners. The rights of the Indians and of the whites have been established and grown for over twenty years on the basis of the agreement of May 9, 1908, and it is my opinion that the rights should not be disturbed by an abrogation of the agreement on the theory that the Secretary of the Interior did not have authority to make the agreement for the Indians.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

**WYOMING IRRIGATION DISTRICT ELECTION LAWS RELATING TO
CONTRACTS WITH UNITED STATES**

Opinion, March 21, 1931

IRRIGATION DISTRICTS—CONSTRUCTION CHARGES—STATE ELECTION LAWS—WYOMING.

Section 963 of the Wyoming Compiled Statutes of 1920 is to be construed in conjunction with sections 993 and 994 of those statutes and, when so construed, the requirement in the former section that, before an irrigation district shall contract with the United States for the construction, operation and maintenance of an irrigation system for the benefit of the district, an election shall be held at which a majority of the qualified electors present and voting shall have voted in favor of such contract, is fulfilled where the voting is by proxy upon the basis of the quantity of acreage held by each elector as authorized by the latter mentioned sections.

FINNEY, Solicitor:

You [Secretary of the Interior] have submitted to me for opinion questions propounded by the Commissioner of the Bureau of Reclamation relative to the election held by the voters of the Midvale Irrigation District to authorize the execution of a contract between the United States and the district, providing for payment of the construction charges representing the moneys expended by the United States in the construction, operation and maintenance of the irrigation system constructed for the benefit of district lands.

Section 963, Wyoming Compiled Statutes, 1920, as amended by section 2 of Wyoming Session Laws, 1925, reads in part as follows:

Provided, however, that the commissioners of the district shall not contract with the United States for the construction, operation and maintenance of the necessary works for the delivery and distribution of water to district lands, or for the drainage of district lands, under the provisions of the Federal Reclamation Act and any act or acts amendatory thereof or supplementary thereto, or the rules and regulations established thereunder, or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands, or for a water supply or drainage incident to irrigation under any act of Congress providing for or permitting such contract, or for acceptance by the district of appointment or authorization as fiscal agent of the United States to make collections of moneys for or on behalf of the United States in connection with any Federal Reclamation project *until there has been an election duly held at which a majority of the qualified electors present and voting has voted in favor of any such contract.* [Italics supplied.]

The last twenty-seven words of the quotation have been italicised, to direct attention to the part of the law now in question.

There is attached to the papers a certified copy of the notice of election on the contract and also copies of the proceedings leading up to and including the decree of confirmation entered by the District Court of Fremont County, Wyoming.

The election was held pursuant to sections 993 and 994 of the Wyoming Compiled Statutes, 1920, which authorized proxy voting by irrigation districts, and fixed the number of votes that each elector could cast as one vote for each acre of land. You require a decision whether the proxy voting is authorized under section 963, *supra*.

The statute seems to imply that a majority of the qualified electors must vote in favor of the contract before it can be executed. It might be inferred from a reading of this section of the statute that proxy voting was prohibited, and that the only vote which was authorized was a per capita or head vote. By referring to the Session Laws of Wyoming, 1920, at page 20, will be found sections 58 to 63, inclusive, which were carried into the language set out in sections 992 and 993 of the Compiled Statutes of 1920. Sections 60 to 63, inclusive, set forth the method of holding elections by irrigation districts. The facts do not apply exclusively to the election of commissioners; they refer to the conduct of all irrigation district elections.

The heading of section 60 is "Conduct of Elections", and this section provides as follows:

The commissioners of the district shall fix the hour and place, within the boundaries of the district of each election, and preside at the same. It shall be the duty of the commissioners at least twenty days prior to the date of an election, to mail to each person or corporation entitled to vote thereat, at his or its last known place of residence or business, a notice stating the time, place and purpose of such election.

Section 61 provides for one vote for each acre of land owned, and section 63 provides for proxy voting.

It is my conclusion that the notice of election was properly worded in so far as it referred to representation by proxy, and that the election as held was authorized by the law. In fact it is believed that it was compulsory with the commissioners of the district to permit proxy voting. Under such circumstances a majority of the votes is shown to have been cast in favor of the execution of the contract.

Turning our attention now to the action of the court in confirming the proceeding leading up to the execution of the contract, it can be asserted that the holding of the election for authorization of the contract was only one of the things required to be done by the commissioners and landowners. The election was not a jurisdictional requirement. If the court obtained jurisdiction of the parties in the confirmatory proceedings, its action in confirming and finding valid the election would be no more subject to attack in a future action than the finding of the court that the contract was properly signed by the commissioners.

The confirmatory proceedings become final if not appealed from within 30 days after the entry of the decree (Chapter 74, Session Laws of Wyoming, 1929).

It is my opinion that the election held by the district to authorize the execution of the contract between the United States and the Midvale Irrigation District was properly noticed and held; and further, that the confirmatory decree, at the end of 30 days, precluded a successful attack upon the decree.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

THE PARK BINGHAM MINING COMPANY

Decided March 23, 1931

MINING CLAIM—PATENT PROCEEDINGS—POSSESSION—ABANDONMENT.

The fact that a claimant excluded a portion of his mining claim from his application for patent is not conclusive of an abandonment of his possessory right to the excluded portion to another claimant or to the United States.

MINING CLAIM—PATENT PROCEEDINGS—NOTICE.

A published notice by an applicant for patent of a mining claim which excluded a claim by name, in legal contemplation, excluded the entire claim as surveyed, not merely the patented portion thereof, and such notice is not sufficient to apprise the owner of the patented claim that the exclusion was restricted to the patented area.

DIXON, *First Assistant Secretary:*

August 28, 1929, The Park Bingham Mining Company made application, Salt Lake City 048643, for patent to the Betty Walker Lode. Proof of publication was submitted. Following the metes and bounds description of the claim, the published notice of the application for patent reads as follows:

Said lode mining claim is located in the NW $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 2, T. 4 S., R. 3 W., S. L. M., and contains a net area of 3.194 acres, the area in conflict with the following claims having been excluded, viz: Lot 269—St. James lode; Lot 350—Northern Star lode; Sur. 3443—Silver Butte lode; and Sur. 5434—Cincinnati and Legislator lodes, said Betty Walker lode location mining claim being of record in the office of the County Recorder of said mining district at Salt Lake City in Salt Lake County, Utah. The nearest known location being the aforesaid excluded claims, and Lot 262—Prince of Wales; and Lot 263—Florence and Sur. 4809—Grand View lodes.

It appears that the boundaries of the Betty Walker claim are identical with boundaries of Florence lode, Lot 263, for which entry was heretofore made and canceled; that the Florence lode as deline-

ated on the official plat thereof was expressly excluded from the patent to the Legislator and Cincinnati claims, Survey 5434; that the portions of the last named claims, excluded from the application for patent thereto cover the major portion of the 3,194 acres for which patent is sought under this application. It thus appears that the patented portions of the Legislator and Cincinnati claims do not conflict with but adjoin the Betty Walker claim, but the unpatented portions of those claims are meant to be included in this application.

The Commissioner of the General Land Office in his decision of January 24, 1931, observed that—

It is obvious that that portion of the Florence not covered by the Silver Butte, St. James and Northern Star lodes should be allotted to the Betty Walker lode, this not being included in the patent for the Cincinnati and Legislator.

He required republication and directed that—

The exclusions, therefore, should be as follows: Survey 3443, Silver Butte lode; Lot 269, St. James lode; Lot 350, Northern Star lode; and Survey 5434, Cincinnati and Legislator lodes, *exclusive of conflicts with Lot 263, the Florence lode.* (Italics supplied.)

Claimant appeals. His contentions in substance are that the Florence lode was not excluded; that—

where an applicant excludes claims by name, which have been patented, and there is an unpatented area in said patented claims boundaries, the proper construction would be that the only exclusion intended to be made and which the notice conveyed to the public or anyone interested as made, would be the patented and applied for portion of said claims;

that under the situation now, the Cincinnati and Legislator only exist as to the patented area.

These contentions can not prevail. Express exclusion of a certain conflict area of land is not in itself such an abandonment or waiver of the applicant's right thereto, as to preclude his filing a supplemental application for such tract. *Fow v. Mutual Mining and Milling Co.* (31 L. D. 59), or a waiver of his possessory right to the remainder, *Black Queen Lode v. Excelsior No. 1 Lode* (22 L. D. 343); *Branagan v. Dulaney* (2 L. D. 744), even in the absence of adverse claim thereto. *Miller v. Hamley* (31 Colo. 495; 74 Pac. 980, 982). The abandonment by the claimants of the Legislator and Cincinnati claims in their applications of the area within the Florence claim is not conclusive of an abandonment of their possessory right thereto to the claimants of the Florence or to the United States. The exclusion in the present application of the Legislator and Cincinnati claims by name, in legal contemplation, was an exclusion of such entire claims as surveyed and not merely the patented por-

tion thereof, and there is not enough in the published notice to charge claimants of such patented claims with notice that the exclusion was restricted to the patented portion.

Republication of the notice will therefore have to be made, and not until it appears that there is no challenge of their claim within the statutory period, can it be said that claimants are entitled to patent for said area.

The clause suggested by the Commissioner to be inserted in the notice, i. e., "Survey 5434, Cincinnati and Legislator lodes, exclusive of conflicts with Lot 263, the Florence lode," described no land inside but the patented land outside the Betty Walker claim. The applicant is seeking patent for those portions of the Legislator and Cincinnati conflicting with the Betty Walker, and those claims should not be named among the exclusions.

As modified, the Commissioner's decision is

Affirmed.

**POTASH PROSPECTING PERMITS AND LEASES—PARAGRAPH 19,
CIRCULAR NO. 1120, AMENDED**

REGULATIONS

[Circular No. 1242]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 25, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

On March 23, 1931, the Acting Secretary of the Interior amended Circular No. 1120 of April 20, 1927 (52 L. D. 84), concerning potash mining leases and prospecting permits, under the act of February 7, 1927 (44 Stat. 1057).

Section 19 of Circular No. 1120 is amended as follows:

19. *Limitation on holdings.*—The act provides that the general provisions of the act of February 25, 1920, shall be applicable. The Secretary of the Interior is given authority to prescribe necessary and proper rules and regulations, and in view of the provisions of amended section 27 of the latter act on holdings of permits and leases of the minerals enumerated therein no person, association, or corporation will be granted either directly or indirectly or by approval of assignments, permits or/and leases for more than 2,560 acres or which will when added to the area already held exceed in the aggregate 2,560 acres in the same potassium prospecting or leasing field, except in cases where, because of the character of the deposits, the capital necessary for their proper development, or other conditions, a larger area is found necessary for economic mining operations and to secure the best development thereof, and the interests of the United States will be subserved thereby.

C. C. MOORE, *Commissioner.*

A. OTIS BIRCH AND M. ESTELLE C. BIRCH

Decided March 27, 1931

RAILROAD RIGHT OF WAY—OIL AND GAS LANDS—MINING CLAIM.

A mining claim embracing a tract of land including a right of way previously granted under the act of March 3, 1875, carries neither title to the land included in the right of way nor any interest in or to any mineral deposits beneath the surface thereof.

DIXON, *Acting Secretary*:

A. Otis Birch and M. Estelle C. Birch have appealed from an order by the Commissioner of the General Land Office dated December 9, 1930, allowing interested parties to submit bids under the act of May 21, 1930 (46 Stat. 373).

The Sunset Railway Company filed application on July 22, 1930, under the said act of May 21, 1930, for oil and gas leases on its right of way, under the act of March 3, 1875 (18 Stat. 482), on the NE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 8, T. 11 N., R. 23 W., S.B.M., California. This right of way also extends over the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 7, said township, and although the railway company did not include said land in its application, the Director of the Geological Survey reported in November, 1930, that the right of way in the SE $\frac{1}{4}$ said Sec. 7 was affected by drainage through producing wells on adjacent lands. On December 2, 1930, the Secretary of the Interior approved a recommendation by the Commissioner that the owners of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ said Sec. 7 and the Sunset Railway Company be given opportunity "to submit bids or offers for the oil and gas deposits in the railroad right of way in the said land according to section 3 of the act of May 21, 1930, and the regulations thereunder."

The appeal herein was filed January 17, 1931. The appellants alleged ownership in fee of the land and requested 60 days from January 20, 1931, within which to submit an abstract of title and memorandum of authorities in opposition to the Commissioner's order. Although more than the 60 days requested have passed no abstract of title or memorandum or other showing has been filed.

It is shown that the right of way involved was granted in 1901 and that the placer mining claim for the SE $\frac{1}{4}$ said Sec. 7 which was made the basis for patent was located in 1908.

The appellants have no title to the land included in the right of way nor have they any right, title, or interest in or to any mineral deposits beneath said land. In the case of *Rio Grande Western Railway Company v. Stringham* (239 U. S. 44), the Supreme Court of the United States, in dealing with a right of way under the said act of March 3, 1875, said (p. 47)—

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition

of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

In this connection see the case of *Windsor Reservoir and Canal Company v. Miller* (51 L. D. 27 and 305), and the cases therein cited. See also *Charles A. Son et al.* (53 L. D. 270).

The Commissioner's ruling is

Affirmed.

A. OTIS BIRCH AND M. ESTELLE C. BIRCH (ON REHEARING)

Decided June 13, 1931

RAILROAD RIGHT OF WAY—MINERAL LANDS—SEGREGATION—PATENT.

Upon the grant of a right of way under the act of March 3, 1875, the land ceases to be public land and any attempted appropriation thereof under the mineral or other public-land laws is void and patent issued pursuant to such appropriation is inoperative to the same extent as if the land in the right of way had been expressly eliminated by description.

RAILROAD RIGHT OF WAY—MINERAL LANDS.

The fact that the grantee of a railroad right of way is restricted to the use of the lands for railroad purposes only and is not invested with any right to mine and remove the minerals for any other purpose does not render the land subject to location under the mining laws.

MINING CLAIM—OIL AND GAS LANDS—PATENT—RAILROAD RIGHT OF WAY—ABANDONMENT—REVERTER.

A patent to a placer claim traversed by a right of way previously granted under the act of March 3, 1875, carries with it no possibility of a future estate in the land within the right of way in the event of its abandonment, but the land thereupon reverts to the United States.

RAILROAD RIGHT OF WAY—FORFEITURE—ABANDONMENT—MINERAL LANDS—MINING CLAIM.

The act of March 8, 1922, provides that upon extinguishment by forfeiture or abandonment of rights of way the title holder of the lands traversed or occupied by the right of way shall be vested with the right of way strip, unless it be embraced in a public highway or municipality, subject, however, to a reservation of the minerals in favor of the United States.

RAILROAD RIGHT OF WAY—MINERAL LANDS—LEASE.

The act of May 21, 1930, is an act of the grantor, enlarging the rights of a railroad right of way grantee as to the uses and purposes to which the right of way may be devoted by permitting the exercise of mining rights in deposits in which no others than the parties to the lease have any right, title, or interest.

EDWARDS, Assistant Secretary:

A. Otis Birch and M. Estelle C. Birch have filed a motion for rehearing of departmental decision dated March 27, 1931 (53 L. D. 339), wherein was affirmed the action of the Commissioner of the General Land Office inviting competitive bidding between

the Sunset Railway Company as owners of a railroad right of way extending over the SE $\frac{1}{4}$ Sec. 7, T. 11 N., R. 23 W., S. B. M., and the movents as owners of the adjacent land in said subdivision, relative to the percentage of royalty they will agree to pay for the extraction of oil and gas under that part of the right of way within the tract above described.

The invitation is extended pursuant to the provisions of the act of May 21, 1930 (46 Stat. 373), which empowers the Secretary, after consideration of such bids, to award either a lease to the holder of the right of way for the extraction of oil and gas thereunder or to enter into an agreement with the adjoining owner or lessee as to the amount of compensating royalty to be paid for the extraction of oil and gas from the right of way through wells on the adjacent land.

The movents contend that by virtue of their title to the above-mentioned SE $\frac{1}{4}$ they are the owners of the minerals, including the oil and gas that could be extracted from the right of way extending thereover, and therefore the Government could not subsequently issue a lease for their extraction or enter into any agreement respecting the same.

The record shows that on June 3, 1901, the Sunset Railway Company acquired a 200-foot right of way under the act of March 3, 1875 (18 Stat. 482), which crosses the subdivision in question and that on January 1, 1908, this subdivision was located as an oil placer claim and patented April 29, 1918, to the predecessors in interest of the movents. The Director of the Geological Survey has heretofore reported that the oil and gas under said right of way is affected through drainage of producing wells on adjacent land.

In the decision assailed the department held that the mineral claimants "have no title to the land included in the right of way nor have they any right, title, or interest in or to the mineral deposits beneath said land."

The movents agree with the view recently expressed by the department in *Windsor Reservoir and Canal Company v. Miller* (51 L. D. 27), after very full discussion of the question, that no right, title, or interest to underlying minerals passes under a grant of right of way either under the act of March 3, 1891 (26 Stat. 1095, 1102), or the act of March 3, 1875, *supra*, but that such right, title, and interest remain in the United States, subject only to such disposition as may be authorized by law, but argue that if, as so held, no mineral estate passed to the railroad it would follow that by the patent to the placer location which passed all the right, title, and interest of the United States in the subdivision described in the patent, the minerals within but excluded from the right-of-way grant passed to the patentee.

Argument is further made to the effect that the characterization by the Supreme Court of the estate of a railroad under a grant of a right of way under the act of March 3, 1875, as "neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceases to use or retain the land for the purpose indicated in the act" does not rob it of its attributes as an easement, as a fee may exist in an easement although not a fee simple. Excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *United States v. Big Horn Land and Cattle Company* (17 Fed. (2d) 357) are set forth for the purpose of showing that the court, after particular consideration of the opinions in *Kern River Company v. United States* (257 U. S. 147), and *Rio Grande Western Railway Company v. Stringham* (239 U. S. 44, 47), concluded that: "In any event it (the grant of right of way under the act of March 3, 1891) is a limited fee in the nature of an easement." The deduction sought to be drawn is that the right-of-way grant, though a base fee, is, nevertheless, an easement, carrying no rights in the mineral, and therefore the patentee of the placer claim took a fee title to the entire subdivision burdened with the easement so long as it should exist, and the company having only an easement for its right of way, the general rule would apply that the minerals belong to the owner of the fee, and the railroad grantee would have no right to remove them except surface minerals, which must be removed in the construction of its road. See Railroads, Sec. 237, 51 C. J. 573.

No reason or authority is, however, perceived for the conclusion that the grant of the right of way under the act of 1875 effected a severance of the surface and mineral estate, so as to make them susceptible of separate disposition. A grant of a right of way through the public lands includes a right of way over mineral lands and *mineral lands* within the right of way unappropriated at the time that the grant attaches, pass under the grant and can not afterwards be located. *Doran v. Central Pacific Railway Company* (24 Cal. 245); *Wilkinson v. Northern Pacific Railroad Company* (5 Mont. 538, 6 Pac. 349); Lindley on Mines, Sec. 153. There are intimations in certain decisions of the department (See *Eugene McCarthy*, 14 L. D. 105, 109; *Grand Canyon Railway Company v. Cameron*, 35 L. D. 495), that the subsequent location of a mining claim over land subject to the grant of a right of way conferred the right to explore and mine for minerals within the right-of-way limits so long as it does not interfere with any present or prospective use of right of way for railroad purposes, but an examination of these and other cases to the same effect discloses that such view was

based upon the theory that the grant of the right of way conveyed a mere easement, and no title to the land passed thereunder. But since the Supreme Court has defined the estate as not a mere easement but a limited or base fee made upon an implied condition of reverter, in the event the grantee ceases to use or retain the land for the purposes for which it is granted, the department has held in the case of a prior grant of right of way and a subsequent conflicting placer location: "That land included within the common limits of the claims in question and the right of way was not subject to location and appropriation under the mining laws of the United States, and hence that in any event such areas would have to be eliminated from the claims" (*United States v. Bullington, On Rehearing*, 51 L. D. 604, 606). No other conclusion than that just quoted seems warranted when the respective estates acquired in a placer location and a grant of a right of way over public lands are considered. Under the mining law, except as modified by the acts of July 17, 1914 (38 Stat. 509), and December 29, 1916 (39 Stat. 862), which have no bearing here, a mining location and likewise a patent thereto carries exclusive rights of possession of the surface so patented or located as well as rights in and to the minerals therein contained, except in certain cases where known lodes exist within placers; there is no statutory authority for location, sale or disposal of the minerals apart from the surface. *Joseph E. McClory* (50 L. D. 623), departmental letter (50 L. D. 650).

As to the property rights in railroad grants, the Supreme Court has said—

* * * A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Company*, 172 U. S., 171. We there said (p. 183) that if a railroad right of way was an easement it was "one having the attributes of a fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property."

* * * "But whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature." * * *

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. *Western Union Tel. Co. v. Penn. R. R. et al.* (195 U. S. 540, 570).

In *Stalker v. Oregon Short Line Railroad Co.* (225 U. S. 142), the same court said (p. 154)—

We therefore conclude that the subsequent issue of a patent to the land entered by Reed was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but *in so far as it included lands validly acquired theretofore, was, in violation of law, and inoperative to pass title.* [Italics supplied.]

In *Northern Pacific Railway Co. v. Townsend* (190 U. S. 267, 270) the court said—

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

In the light of these expressions of the Supreme Court, no other conclusion seems possible than that, upon the grant of the right of way, the land therein ceases to be public land and becomes private property, and any attempted appropriation thereof under the mineral or other public land laws would be void and ineffective, and that any patent issued pursuant to such an appropriation must be deemed inoperative as to the land in the right of way, the same as if it had been expressly eliminated therein by description. The fact that the railroad grantee under the act authorizing the grant must use the land only for the legitimate purposes of the railroad (*Northern Pacific Railway Co. v. Townsend, supra*) and is not invested with any rights to mine and remove the minerals thereunder for any other purpose, and has no authority to lease the land for the extraction of the oil and gas (*Missouri, Kansas and Texas Railway Company, 33 L. D. 470, 34 L. D. 504*), would not, under the doctrine above set forth, authorize the appropriation of such minerals by locations under the mining law because the land was not subject to such appropriation. It is therefore clear the movents have no present rights in the minerals under the right of way.

Furthermore, it seems equally plain that they have no possibility of a future estate therein by virtue of the placer patent. In *E. A. Crandall* (43 L. D. 556), it was held that upon abandonment of the right of way the title reverts to the United States and does not pass to the owners of the subdivisions through which the right of way passes. This conclusion is based on the language of the Supreme Court in the *Townsend case* as to the nature of the estate granted under the right-of-way acts, and the common-law principle that a possibility of reverter is not an estate and is therefore not assignable. See also Tiffany on Real Property, Possibility of Reverter, Sec. 132. Certain acts of Congress providing for the disposition of land in the right of way within patented lands upon its extinguishment are plainly predicated upon the assumption that upon the extinguishment of the right-of-way grant the United States resumes full title to the right-of-way strip. The act of February 25, 1909 (35 Stat.

647), declaring a statutory forfeiture as of its date of rights of way over which the railroad had not been constructed, further declares—

* * * and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurances or conveyances, inure to the benefit of the owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds.

Similarly, the act of March 8, 1922 (42 Stat. 414), provides that upon extinguishment of rights of way granted on public lands by forfeiture of abandonment the right-of-way strip, if not embraced in a public highway or municipality, shall be transferred and become vested in title holders of the lands traversed or occupied by such railroad or railroad structures, but with this further proviso: "That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove the same."

These acts, as well as the act of May 21, 1930, *supra*, plainly indicate that the United States did not part with all its interest in the right of way by patenting the subdivisions traversed by it.

The department has not overlooked *Denver and Rio Grande R. Co. v. Mills* (222 Fed. 481), holding that upon the abandonment of a right of way granted under the act of June 8, 1872, the title merged in the title held by those holding under the patentee, or the case of *Hurst et al. v. Idaho-Iowa Lateral and Reservoir Co.* (202 Pac. 1068), holding that a grant of right of way for ditches and canals under the act of March 3, 1891 (26 Stat. 1095, 1101), carries with it all the interest of the United States in the land, but is unable to reconcile those cases with opinions of the Supreme Court and acts of Congress above mentioned.

But even if it be assumed that the grant of the patent subject to the right of way carried with it, as an incident, the "possibility of reverter," nevertheless, such a right is not an immediate right of present or future employment, that is, not a vested right, but one contingent on the happening of an event or condition that may never happen until some other event may prevent its vesting. (See as to vested rights, *Pearsall v. Great Northern Railway*, 161 U. S. 646, 673).

Therefore, whatever may have been the effect of the patent as a conveyance, under the common-law rule, the rule has been changed by statutes wherein the United States declares it retains ownership of the minerals. The act of May 21, 1930, which limits the right to grant an oil and gas lease solely to the holders of such right of way, may be regarded as an act of the grantor enlarging the rights of

the grantee as to the purposes to which the right of way may be devoted by granting mining rights in deposits in which no other than the parties to the lease have any right, title, or interest.

It is therefore concluded that the land in the right of way on the above-mentioned southeast quarter is subject to the operation of the act of May 21, 1930, and the motion must, therefore, be

Denied.

**STOCK-RAISING HOMESTEADS WITHIN PETROLEUM RESERVES—
ACT OF FEBRUARY 28, 1931—PRIOR INSTRUCTIONS SUPERSEDED**

INSTRUCTIONS

[Circular No. 1244]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 3, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

The act of February 28, 1931 (46 Stat. 1454), provides—

That section 1 of the Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December 29, 1916, is hereby amended to read as follows:

"That from and after the passage of this Act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated, unreserved public lands in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as 'stock-raising lands': *Provided further,* That for the purposes of this Act lands withdrawn or reserved solely as valuable for oil or gas, shall not be deemed to be appropriated or reserved unless such lands shall be within the limits of the geologic structure of a producing oil or gas field, and any patent therefor shall contain a reservation to the United States of all minerals in said lands, and the right to prospect for, mine, and remove the same: *And provided further,* That the provisions of this Act shall not apply to naval petroleum reserves and naval oil-shale reserves."

The said act permits stock-raising homestead applications to be made for lands withdrawn or reserved solely as valuable for oil or gas, except as hereinafter stated. The act is construed to permit stock-raising homestead applications to be made for lands containing deposits of oil-shale which lands and deposits by Executive order of April 15, 1930, No. 5327, were temporarily withdrawn from lease or other disposal and reserved for the purpose of investigation, examination and classification.

The act requires the rejection of stock-raising homestead applications for lands within the limits of the geologic structure of a pro-

ducing oil or gas field or within a naval petroleum reserve or a naval oil-shale reserve. Such applications should also be rejected where the land sought is included in an approved oil lease. (See 49 L. D. 312.)

These instructions will be considered as superseding all instructions heretofore issued in conflict herewith, including those contained in paragraph 2 of Circular No. 523 (51 L. D. 1, 2), in paragraph 52 of [the July 16, 1926, revision of] Circular No. 541 [unpublished] and in Circulars Nos. 913 (50 L. D. 261), 983 (51 L. D. 65), and 1220 (53 I. D. 127).

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

PROHIBITION AGAINST UNITED STATES DEPUTY SURVEYORS ACTING AS AGENTS BEFORE THE LAND DEPARTMENT

Instructions, April 4, 1931

AGENTS—ATTORNEYS—PRACTICE—DEPUTY SURVEYORS—MINERAL SURVEYORS—
OFFICERS—LAND DEPARTMENT.

United States deputy surveyors and United States mineral surveyors are persons holding an office or place of trust or profit under the Government of the United States within the contemplation of paragraph 8 of the rules and regulations prescribed by the Secretary of the Interior governing the recognition of agents, attorneys or other persons representing claimants before his department (46 L. D. 206).

Commissioner Moore of the General Land Office to Chief of Field Division Ramsey, Anchorage, Alaska, approved by Assistant Secretary Edwards:

I have your letter of September 24, 1931, requesting to be advised as to whether or not a United States deputy surveyor is barred from acting as an agent or attorney in filing applications for lands included in nonmineral surveys.

Section 5 of the act of July 4, 1884 (23 Stat. 98, 101), authorizes the Secretary of the Interior to prescribe rules and regulations governing the recognition of agents, attorneys or other persons representing claimants before his department and pursuant thereto the Secretary has from time to time prescribed such regulations, the current issue of which was approved September 27, 1917 (46 L. D. 206).

Paragraph 8 of these regulations, in so far as material to the question herein, is based upon the prohibition contained in section 109 of the act of March 4, 1909 (35 Stat. 1107), and provides that—

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.

The paragraph quoted does not specifically mention mineral or deputy surveyors, so that the matter of their eligibility to represent claimants before the Land Department hinges upon the other question as to whether or not such surveyors are by reason of their appointment as such holding any office or place of trust or profit under the Government of the United States.

In considering the latter question we will briefly refer by analogy to section 452 of the Revised Statutes which prohibits "the officers, clerks and employees" of the General Land Office from directly or indirectly becoming interested in the purchase of any public land under penalty of dismissal.

In adjudicating cases involving the prohibition of this section the department has consistently held that both the United States deputy surveyors and the United States mineral surveyors come within the intendment of the statute. See *Floyd v. Montgomery* (26 L. D. 122) and other cases cited, with approval by the Supreme Court of the United States in the case of *Waskey v. Hammer* (223 U. S. 85), wherein the question involved was the right of a United States mineral surveyor to readjust the lines of a mineral claim made by him before his appointment and the court held that the surveyor came within the purview of section 452, Revised Statutes, and was disqualified to make or amend a mineral location.

In the case of *Herbert McMicken* (10 L. D. 97; 11 L. D. 96), the department made it clear that in its opinion the disqualification to enter public lands contained in section 452, Revised Statutes, extended to officers, clerks and employees in any branch of the public service under the control and supervision of the Commissioner of the General Land Office, including such officers, clerks or employees in the offices of surveyors general and the weight of subsequent decisions unhesitatingly upholds this view. See *John S. M. Neill* (24 L. D. 393); *Frank A. Maxwell* (29 L. D. 76); *Muller v. Coleman* (18 L. D. 394); *Alfred Baltzell* (29 L. D. 333); and *Seymour K. Bradford* (36 L. D. 61). See also approved circular letter of September 15, 1890 (11 L. D. 348), addressed to the officers and employees of the Land Department informing them that any person employed under the supervision of the Commissioner of the General Land Office, whether in the offices of the surveyors general, the local land offices, or elsewhere is, during such employment, prohibited from entering or becoming interested directly or indirectly in any public land of the United States.

This continued repetition and reassertment of the theory that mineral surveyors and deputy surveyors are officers, clerks, or employees of the Land Department so as to bring them within the purview of section 452, Revised Statutes, would appear to settle the theory in so far as that particular situation is concerned and no good reason appears why a different rule should be applied when construing paragraph 8 of the regulations governing the recognition of agents and attorneys to represent claimants before the department and its bureaus and after giving due consideration to the whole matter I do not believe it is advisable or proper in the interest of good administration that mineral surveyors or deputy surveyors should be allowed to appear as agents or attorneys in any case before this office or its several district offices. The impropriety of permitting the appearance of such mineral or deputy surveyor is more apparent in view of his almost unlimited access to the records in the offices under control of the supervisor of surveys, and in keeping with that view it is the express opinion of this office that neither United States mineral surveyors nor United States deputy surveyors are eligible to recognition as the representative of any person presenting a claim against the United States in this, or any of the local land offices.

The regulations approved April 20, 1907 (35 L. D. 534), governing the recognition of agents and attorneys before district land offices, are modified by [unpublished] Circular No. 127, dated June 11, 1912, so as to require the register to advise the chief of field division of every application to practice as an agent or attorney before his office and to defer action pending the chief's report therein, and in view of the opinion herein expressed you may adverse any application for admission to practice as an agent or attorney before any local land office in Alaska wherein the applicant holds a commission as United States mineral surveyor or United States deputy surveyor.

APPLICABILITY OF STATE FISH AND GAME LAWS TO LANDS ALLOTTED TO INDIANS FROM THE PUBLIC DOMAIN

Opinion, April 15, 1931

INDIAN LANDS—"INDIAN COUNTRY"—INDIANS—JURISDICTION.

The political jurisdiction of the Federal Government for all purposes appertaining to the protection, control, welfare, and civilization of the Indians is exclusive as to offenses committed by or against them in "Indian Country."

INDIAN LANDS—"INDIAN COUNTRY"—WORDS AND PHRASES.

Since the repeal of section 1 of the Indian Intercourse Act of June 30, 1834, the phrase "Indian Country", as used in the Federal statutes, includes only that portion of the public domain which has been set apart as a reservation in the usual sense for the use and occupancy of an Indian tribe by treaty, act of Congress, or Executive order.

INDIAN ALLOTMENT—PUBLIC LANDS—"INDIAN COUNTRY"—JURISDICTION.

An Indian allotment on the public domain not charged with a subsisting trust in favor of the allottee by virtue of the act of Congress restoring the land from the Indian reservation is not "Indian Country" and not subject to the operation of Federal laws appertaining to the government of such country.

STATE FISH AND GAME LAWS—PUBLIC LANDS—INDIAN ALLOTMENTS—JURISDICTION.

The State has full power to regulate fishing and the killing of game on the Federal public domain within its borders, including lands allotted to Indians from the public domain not subject to a trust growing out of a former reservation.

FINNEY, *Solicitor*:

Upon recommendation of the Commissioner of Indian Affairs, my opinion is requested—

Relative to the right of the Indians to hunt and fish on land they have homesteaded on the public domain under the act of July 4, 1884 (23 Stat. 76, 96), and also allotments made under the fourth section of the general allotment act (Act of February 8, 1887, 24 Stat. 388), as amended by the act of June 25, 1910 (36 Stat. 855).

The question presented is primarily one of assumed conflict between Federal and State jurisdiction and although it arises upon an inquiry involving land in the State of California it is of such importance in many of the public-land States that it must be considered generally. The act of July 4, 1884, provided—

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.

Section 4 of the said act of February 8, 1887, provides—

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, * * * to have the same allotted * * * as provided in this act for Indians residing upon reservations.

The said amendatory act of 1910 provides—

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 * * * to have the same allotted * * * in manner as provided by law for allotments to Indians residing upon reservations * * *.

For the purpose of limiting the argument and thus avoiding unnecessary complications in considering the case as stated, it should here be said that this same act of February 8, 1887, provides a scheme for the allotment of Indian *reservation lands* but inasmuch as the

question submitted does not include reservation allotments as such no question arises with reference thereto. With respect to reservation allotments, therefore, further reference will not be made except as it becomes necessary to explain certain judicial decisions which bear on the question of allotments on the unreserved public domain.

The general principles of political jurisdiction necessarily involved and which indeed constitute the very foundation of this inquiry are conclusively settled by the highest authority. It is deduced from the decision of the Supreme Court of the United States in *Pollard's Lessee v. Hagan* (3 How. 212), that prior to the adoption of the Constitution of the United States the power of the original thirteen States over the territories which they severally occupied was exclusive and plenary and that upon the execution of that compact the Federal Government thereby created took by cession from the States such powers of government as were therein specifically defined. Among other things, the United States was invested with the *eminent domain* of the country ceded, both national and municipal, *for the purpose of temporary government*. But "when the United States accepted the cession of the territory they took upon themselves the trust to hold the municipal eminent domain for the new States and to invest them with it to the same extent in all respects that it was held by the States ceding the territories." When a new State was admitted into the Union it was on an equal footing with the original States. The new State succeeded to all the rights of sovereignty, jurisdiction and eminent domain possessed at the date of cession, "except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession and the legislative acts connected with it." Nothing remained to the United States according to the terms of the agreement but the public lands, and "if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a State or elsewhere except in the cases in which it is expressly granted"—the exceptions noted being the power given to Congress by the 16th clause of the 8th section of the first article of the Constitution, "to exercise exclusive jurisdiction" over a territory not exceeding ten miles square, which by cession of particular States and the acceptance of Congress may become the seat of Government of the United States; and to exercise like authority over "all places purchased by the consent of the legislature of the State in which the same may be for the erection of

forts, magazines, arsenals, dockyards, and other needful buildings," and these are the only cases within the United States in which all the powers of government are united in a single government except in the cases already mentioned of the Territorial Governments and there a local government exists. "The right * * * of every new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted and remain unquestioned except so far as they are *temporarily* deprived of control over the public lands." *Pollard's Lessee v. Hagan, supra.*

But sovereignty jurisdiction does not in any wise depend upon whether the United States came into the possession of the land since the adoption of the Constitution by State grant or whether they acquired it by cession from foreign countries. In *Pollard's Lessee v. Hagan*, cited above, the case was that the territory involved had been ceded by the State of Georgia to the United States April 24, 1802, and the State of Alabama had been thereafter erected on that territory. But since the adoption of the Constitution the United States have by cession from foreign countries come into the possession of a large country lying between the Mississippi River and the Pacific Ocean and out of these Territories several States have been formed and admitted into the Union. Having the title, they have usually reserved certain portions of their lands from sale or other disposition for the uses of the Government. It is gathered from the decision of the same court in *Fort Leavenworth Railroad Co. v. Lowe* (114 U. S. 525), as in the case cited above, that only with the consent of the legislature of the State does the United States acquire jurisdiction exclusive of all State authority. Lands owned by the United States acquired by purchase without the consent of the State or by cession from other governments confers no jurisdiction on the United States except in the execution of its constitutional powers and "the State jurisdiction still remains complete and perfect." The exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers but "when not used as such instrumentalities the legislative power of the State over the places acquired will be as full and complete as over any other place within her limits." The land constituting the Fort Leavenworth Military Reservation was acquired by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. "It not being a case where exclusive legislative authority is vested by the Constitution of the United States, the ces-

sion could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post." *Fort Leavenworth R. R. Co. v. Lowe, supra.*

The political powers of the United States with respect to Indians are defined by the Constitution of the United States as follows: (a) Section 8, Article I, "The Congress shall have power * * * to regulate commerce * * * among the several States and with the Indian tribes," and (b) "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." There is also the further power conferred upon the President of the United States by section 2, Article 2 of the same instrument, "to make treaties by and with the advice and consent of the Senate."

The United States in the beginning adopted the principle originally established by European nations that the aboriginal tribes were to be regarded as the owners of the territories they respectfully occupied. See *United States v. Rogers* (4 How. 567); *Johnson v. McIntosh* (8 Wheat. 543, 574, 584); *United States v. Kagama* (118 U. S. 375, 381, 382). Indian natives have always been regarded as distinct political communities between which and our Government certain international relations were maintained. These relations were established by treaties to the same extent as with foreign powers until discontinued by the act of March 3, 1871 (16 Stat. 544, 566; section 2079, Revised Statutes), since which time it has been the policy of the United States to govern the Indians by acts of Congress. *United States v. Kagama, supra.* They were treated as sovereign communities possessing and exercising the right of free deliberation and action, but in consideration of protection owing a qualified subjection to the United States. See *Ex parte Reynolds*, U. S. C. C. W. D. Ark (1879), Parker, District Judge (18 Alb. L. J. 8; Fed. Cas. 11, 719; 5 Dillon 394). See also *Cherokee Nation v. Georgia* (5 Pet. 1, 16) (1831); *Worcester v. Georgia* (6 Pet. 515, 584) (1832).

Such being the political status of Indian tribes, it became of necessary importance that some sort of definition be given circumscribing the territorial domain of the several tribes and thus came into common parlance the term "Indian country" as later defined by the so-called "Indian Intercourse Act" of June 30, 1834 (4 Stat. 729). The definition comprehended "that part of the United States west of the Mississippi and not within the States of Missouri or Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River and not within any state to which the Indian title has not been extinguished."

In 1882 the Circuit Court of Appeals for the 8th Circuit held that said act of June 30, 1834, was repealed by section 5596, Revised Statutes, and consequently said act "is no longer a part of the law of the land." But the question as to what is the Indian country since the repeal of said act though mooted was "not decided" at this time. However, from a decision of the Circuit Court for the District of Oregon, February 3, 1883, in *United States v. William Martin* (8 Saw. 473, 480-481; 14 Fed. 817, 822-823), I quote the following:

Ever since the phrase "the Indian country" found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by them and set apart or designated as exclusively for their use under and by the authority of the United States.

In the progress of time what are known as "the Indian reservations" have come to be the only country so occupied by them; and these now constitute the Indian country of the United States, and there is no other. And they are such in both law and fact. In *Forty-three Gallons of Brandy*, 11 Fed. Rep. 47, Mr. Justice McCrary held that section 1 of the intercourse act of 1834, *supra*, was repealed by section 5596 of the Revised Statutes, and that in his judgment the phrase "Indian country" as used in the Revised Statutes now only includes "that portion of the public domain which is set apart as a reservation, or as reservations, for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished." Upon a rehearing of this case (14 Fed. Rep. 539) the learned judge said: "An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe of Indians. It may be set apart by an act of Congress, by treaty, or by executive order." See also upon this point *United States v. Bridleman*; *United States v. Leathers*, and *United States v. Sturgeon*, *supra*.

The foregoing statement became and remains the settled law of the subject and properly understood there are no decisions to the contrary. And these involved elements were grouped and their relation to each other considered by the Supreme Court of the United States at its October term, 1929, in *Surplus Trading Company v. Cook* (281 U. S. 647, 650) as follows:

It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. *Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter can not affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.*

A typical illustration is found in the *usual Indian reservation* set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. *Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State. Another illustration is found in two classes of*

military reservations within a State—one where the reservation, although established before the State is admitted into the Union, is not excepted from her jurisdiction at the time of her admission; and the other where the reservation, although established after the admission of the State, is established either upon lands set apart by the United States from its public domain or upon lands purchased by it for the purpose *without the consent* of the legislature of the State. In either case, unless there be a later and affirmative cession of jurisdiction by the State, the reservation is a part of her territory and within the field of operation of her laws, *save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained.* [Italics supplied.]

Thus it results that lands set apart for an Indian tribe are reserved for the use and occupancy of such tribe and the United States have jurisdiction to the end that these reservation Indians may be led into the ways and habits of civilized life. The jurisdiction of the Federal Government is sufficient and exclusive to promote the end to be attained. The Congress of the United States has the duty to legislate to that end and the power to declare the means and methods necessary thereto, and in furtherance of such policy it has enacted a code of criminal laws within its powers. Pursuant to treaty stipulations with the tribe and congressional legislation based on agreements of less dignity than treaties, it has reduced and circumscribed the area owned and occupied by the tribe. Such a reduced area became "the usual Indian Reservation" within the meaning of the decision above cited and the land formerly owned or occupied by the tribe became the property of the United States freed of all Indian claim and, therefore, public domain of the United States. It was no longer "Indian country." When in the pursuance of that same policy it appeared necessary to allot the land in these diminished reservations and to sell the surplus land therein for the benefit of the Indians and such surplus land was restored to the public domain *charged with that trust*, it remained Indian country and still subject to the qualified sovereignty of the United States. But just so soon as the trust was satisfied the remaining lands within the reservation were restored to the public domain, ceased to be Indian country and there remained with the United States no duty to perform with reference thereto. So thus there became a large body of the public lands within the exclusive political jurisdiction of the State wherein such lands were located and as to which the United States had no right of sovereignty except such as it might exercise within its constitutional powers hereinbefore reviewed.

In *United States v. Pelican* (232 U. S. 442), it was held that the Colville Indian Reservation in the State of Washington, set apart by Executive order in July, 1872, has been repeatedly recognized by acts of Congress as a legally constituted reservation and as such "is included in Indian country;" that the authority of Congress to

deal with crimes committed on or against Indians within an Indian reservation is not affected by the admission of the territory within which it is included as a State into the Union; that lands allotted in severalty to the Indians of that reservation when the remainder of the reservation was thrown open to settlement were held in trust by the United States for the allottees under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and control of the Indians and that Congress has power to punish crimes committed by or against Indians upon lands so allotted inasmuch as the allotments in severalty are embraced in the term "Indian country" and the allotments of the Colville Reservation "have not been excluded therefrom by the statutes providing for the allotments." But in *Clairmont v. United States* (225 U. S. 551, 560), which involved the construction of Federal statutes relative to introduction of liquor into the "Indian country," it was said—

In the present case there was no provision, either in the treaty with the Indians or by act of Congress which limited the effect of the surrender of the Indian title. * * * The Indian title or right of occupation was extinguished without reservation and the relinquished strip came under the jurisdiction of the territory and later under that of the State of Montana. It was not "unappropriated public land" or land "owned or held by any Indian or Indian tribe."

* * * in accordance with the repeated rulings of this court it was not Indian country. The District Court therefore had no jurisdiction of the offense charged.

These two cases illustrate the line of cleavage. Thus if the Indian allotment was of lands in reservation for the future use of the Indians it remained subject to that use and was, therefore, Indian country within the jurisdiction of the United States and subject to its applicable laws so long as they held the sovereign title in trust for Indian wards. On the other hand if the Indian title to a piece or tract of land was extinguished it ceased to be Indian country and the full sovereign jurisdiction of the State attached when the trust expired, whether upon or after the admission of the State into the Union.

In this connection it becomes necessary to consider at some length the case of *Donnelly v. United States* (228 U. S. 243). That was a case of the prosecution of a white man for the murder of an Indian on the Extension of the Hoopa Valley Indian Reservation in California established by Executive order of President Harrison October 16, 1891, as an enlargement of the Klamath River Indian Reservation established by President Pierce in 1855. Only so much of the issue will be stated as bears on the question involved in this opinion, namely, whether the *locus in quo* being within a lawfully established Indian reservation was "Indian country." The Court held that it was such on the following state of facts: The land involved was

acquired from Mexico by cession, and the conditions of the cession are found in the treaty of Guadalupe Hidalgo of February 2, 1848 (9 Stat. 922). By Article 11 of that treaty in consideration of the fact that a great part of the territories ceded by Mexico is "to be comprehended for the future within the limits of the United States is now occupied by savage tribes who will hereafter be under the exclusive control of the Government of the United States and whose incursions within the Territory of Mexico would be prejudicial in the extreme," it is solemnly agreed that "when providing for the removal of the Indians from any portion of said territories or for its being settled by citizens of the United States * * * special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes by permitting those invasions which the United States have solemnly obligated themselves to restrain." The State of California was admitted into the Union by the act of September 9, 1850 (9 Stat. 452), "on an equal footing with the original States in all respects whatever." By section 3 of the same act it was provided:

That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits and shall pass no law and do no act whereby the title of the United States to and the right to dispose of the same shall be impaired or questioned.

April 8, 1864, Congress passed an act entitled "An Act To provide for the better organization of Indian affairs in California" (13 Stat. 39), which, among other things, provided in section 2 that there should be set apart by the President not exceeding four tracts of land within the limits of the State "to be retained by the United States for the purposes of Indian reservations * * * *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district." Upon the basis of facts shown by the foregoing recital, the reservation in question was made pursuant to that act and the court said (p. 269)—

* * * With reference to country that was formerly subject to Indian occupancy, the cases cited furnish a criterion for determining what is "Indian Country." But "the changes which have taken place in our situation" are so numerous and so material, that the term can not now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can be more appropriately deemed "Indian Country" within the meaning of those provisions of the Revised Statutes that relate to the regulations of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

At first impression, there is a disturbing element in the *Donnelly case*. At the date of the admission of California into the Union the United States had full dominion and exclusive jurisdiction over that

territory. Upon the admission of the State full and complete jurisdiction passed to the State. The Indians did not then occupy lands embraced by the reservation. They had no right, title or claim thereto, so they had no title to extinguish. There was therefore no "Indian Country" in the usual sense. But there is asserted by the court the exclusive right of the United States under its treaty with Mexico under the international obligations imposed upon a new sovereign to secure and promote the welfare of a dependent people and under reservations in the act of admission hereinbefore set out, the right to set apart its public domain for the exclusive use and benefit of the Indian tribe. This the court says thereby became "Indian Country." And a white man, a citizen of the United States and of the State of California, was tried and convicted of murder as of a case within the exclusive sovereignty of the United States by virtue of sections 2145 and 5339, Revised Statutes, the first of which had been repealed in so far as it defined Indian Country, and the other being limited to a place or district of country over which the United States had a constitutional jurisdiction. But without questioning the legal integrity of that decision (Mr. Justice Van Devanter did and Justices Holmes, Lurton and Hughes dissented on grounds that throw no light on the present discussion), it will be enough to say that public lands in California so long as they are in reservation for the use of an Indian tribe constitute Indian country and, therefore, are not subject to the operation of State laws which would impair the effective use of the reservation for the purposes for which it is maintained.

For all practical purposes, therefore, the situation in California is the same as in other public-land States and where lands have been reserved for the use of the tribe, have been allotted to members of the tribe under an agreed pro rata distribution and the excess lands of the reservation have been restored to the public domain discharged of all trust, the lands so restored are no longer Indian country but public domain of the United States. In the one case the entire public domain of the State of California was subject to reservation for such disposition as the United States cared to make of it for the government of the Indians, and in the other the land had been released to the full sovereignty of the State upon its admission into the Union so far as the claim of the Indian was concerned or if released after the admission of the State in so far as was preserved to the United States the right of sovereign proprietorship to use the land for any purpose of government. If and when these reservation lands in the State of California have been released from occupancy of the tribe they will be fully restored to the public domain unless a further trust shall have been set up for their allotment to members of the tribe. In that event the sovereignty of the United States will continue until the trust shall have

been duly executed but if no further trust follows, the full and complete sovereignty of the State will attach as of other lands of the United States held for disposition under general laws.

It results that lands held in trust for an Indian tribe whether for its government as such or for allotment to its members is "Indian Country" within the legislative powers of Congress and that such laws may be enacted with reference thereto as the policy of the Government may dictate not inconsistent with the purpose for which these reservations were created but such Federal powers are not plenary and do not exclude the sovereignty of the State in the exercise of political powers that do not infringe on the powers of the Federal Government as above defined. Differently and more precisely stated, the State upon its admission into the Union came into being as a political entity invested with full powers and the United States under its several compacts had only such contingent powers as are found necessary to administer Indian affairs.

It does not appear upon this record under which of the three laws mentioned in the reference for opinion the particular allotments in question were made, nor is it material. If they were lawfully allotted under any one of those acts the lands covered by these allotments were necessarily "lands of the United States not otherwise appropriated" and the allottee must have been an Indian "not residing upon a reservation or for whose tribe no reservation has been provided by treaty, act of Congress or Executive order." See act of July 4, 1884 (23 Stat. 76, 96), and section 4 of the act of February 8, 1887, as amended by the act of June 25, 1910 (36 Stat. 855). See also section 4 of the act of February 28, 1891 (26 Stat. 794). They were not reservation lands and did not by their allotment become such in "the usual" or any legal sense.

In *Ex parte Moore* (133 N. W. 817), the Supreme Court of South Dakota had the precise question in all its pertinent aspects on a writ of *habeas corpus* for the discharge of an Indian from the State penitentiary pursuant to his conviction of the crime of murder on an Indian allotment. It was held that the trial court had jurisdiction and the writ was discharged. The court said that it would take judicial notice of the location of a section of land in a Government survey; that the United States courts do not have exclusive jurisdiction over an offense committed by an Indian on an Indian allotment upon the public domain outside the boundaries of any reservation and within the limits of the State; that the enabling act did not prevent the State from taking jurisdiction over crimes committed in the Territory which was restored to the public domain; that the mere fact that an Indian took allotments therein did not make such allotments *quasi* Indian reservations under the exclusive jurisdiction of the United States; that the *locus in quo* being upon lands restored

to the public domain under the act of Congress dissolving the Great Sioux Reservation, which provided that Indians residing upon that portion of the reservation so restored might procure an allotment upon the Government domain in the restored territory outside the boundary of the diminished reservation, did not create a trust for such Indians; that the section of land in question was no longer an "Indian country reservation" and that the allotment of it to an Indian did not change its character.

At page 820 of the decision it was said—

* * * The fact that thereafter some Indian might obtain an allotment of some portion thereof under the federal law permitting an Indian to acquire an allotment on the public domain off his reservation would not reinvest the United States with exclusive jurisdiction as to crimes committed by Indians generally on such an allotment. Neither would such fact constitute such an allotment a little quasi Indian reservation off by itself, and also thereby creating the possibility of having a great number of half a mile square little Indian reservations, all under the exclusive jurisdiction of the United States, scattered and intermixed all around over a county or counties of a state. We cannot believe that any such result was ever intended, but that all such allotments, so far only as the commission of offenses are concerned, are subject to the general laws and jurisdiction of the state courts just the same as any other public domain within a state and not within the limits and boundaries of an Indian reservation.

That decision was later reviewed by a Federal court (221 Fed. 954), wherein it was held that the State court did not have jurisdiction of the case because the Indian title had never been extinguished and the land had not been restored to the public domain. This left the case in the same status with that of *United States v. Pelican*, above noticed, and does not impinge upon the general principles of municipal jurisdiction announced in both decisions.

I advise you that an Indian allottee of lands on *the unreserved public domain at the date of allotment* is subject to the laws of the State and that he may be prosecuted by the State as any other offender for the violation of such laws though he may be at the time of his offense a ward of the Federal Government in the sense that his allotment is restricted and held in trust for his use and benefit. And this is especially true of minor offenses, like hunting and fishing in violation of State laws, not covered by section 9 of the act of March 3, 1885 (23 Stat. 362, 385), which does not have operation outside of a technical Indian reservation or former Indian reservation lands still held in trust, and which would leave the Indian allottee who belongs to no tribe without any restraining influence whatsoever and subject to no applicable law, Federal or State. Even a treaty entered into by and between the United States and a band of Indians that the Indians shall have the right to hunt and fish on "unoccupied lands of the United States" within a described territory

is superseded by the act admitting the State into the Union; and on the public domain "The power of all the States to regulate the killing of game within their borders will not be gainsaid." (*Ward v. Race Horse*, 163 U. S. 504.)

Approved:

JOS. M. DIXON,

First Assistant Secretary.

FRED E. DOTY

Decided April 18, 1931

**PRIVATE CLAIM—BOARD OF LAND COMMISSIONERS—LAND DEPARTMENT—COURTS—
JURISDICTION—PATENT—SURVEY.**

The Board of Land Commissioners created by the act of March 3, 1851, was vested with the power to adjudicate private land claims, subject to review by the courts, and the only jurisdiction conferred upon the Land Department was that of surveying the tracts and issuing patents after confirmation.

EDWARDS, Assistant Secretary:

This is an appeal by Fred E. Doty from decision of February 14, 1927, by the Commissioner of the General Land Office rejecting his homestead application for SW $\frac{1}{4}$ Sec. 31, T. 6 S., R. 9 W., S. B. M., California, because of conflict with a patented private land claim. Numerous other similar applications were rejected in the same decision for reasons stated as follows:

The boundaries of the following Mexican grants meet at a point in the northeast part of T. 5 S., R. 9 W., S. B. M., California:

Lomas de Santiago (Docket 356) which lies to the east of the point of common intersection and which was patented to Teodocio Yorba February 1, 1868 (Vol. 6, pages 479 to 487, inclusive).

San Joaquin (Docket 359) which lies to the south and which was patented to Jose Sepulveda September 19, 1867 (Vol. 6, pages 437 to 452, inclusive).

Santiago de Santa Ana (Docket 578) which lies to the north and west of the point of common intersection and which was patented to Bernardo Yorba and others, December 21, 1883 (Vol. 12, pages 250 to 295, inclusive).

The three grants together make one large tract within the exterior boundaries of which there are no lands other than those embraced in the grants mentioned.

All the lands applied for are within the exterior limits of the combined tract so patented and therefore the lands are not subject to homestead entry. *Ben McLendon* (49 L. D. 548 and 49 L. D. 561), and *John Adams et al.* (51 L. D. 591) and the cases cited therein.

The grant known as Lomas de Santiago was confirmed by the Board of Land Commissioners on August 15, 1854, under the act of March 3, 1851 (9 Stat. 631), according to described boundaries and as containing four square leagues, more or less. Upon review of the case by the United States District Court for the Southern District of

California, the decree of confirmation was affirmed December 11, 1856, in language as follows:

It is ordered, adjudged and decreed that the decision of the said Board of Commissioners be and the same hereby is affirmed, and that the claim of the appellee is good and valid, and that the same be and hereby is confirmed to him to the extent of eleven square leagues and no more, within the boundaries specified in the grant or Titulo filed in the case, reference being had to the expediente and map referred to in said grant and to the act of judicial possession filed in this case: Provided, That if there be less than the quantity of eleven square leagues of land contained and included within the boundaries mentioned, the confirmation is hereby made in such less quantity.

No appeal was taken to the Supreme Court, and the decree of confirmation accordingly became final. Pursuant to the provisions of section 13 of the act, the tract was surveyed and patent issued as stated, embracing an area of 47,226.61 acres.

The San Joaquin was confirmed by the Board of Land Commissioners April 25, 1854, and upon review by the United States District Court for the Southern District of California, at its December term, 1856, the confirmation was affirmed to the extent of 11 square leagues and no appeal having been taken to the Supreme Court the confirmation became final. Survey was thereafter made and patent issued.

The Santiago de Santa Ana grant was confirmed by the Board of Land Commissioners on July 10, 1855, and upon review thereof by the United States District Court at its June term, 1857, the said decree was affirmed and declared final. Thereafter the tract was surveyed and patented as stated.

The substance of the argument in support of the homestead applications is that the said patented grants were confirmed in violation of the laws governing the recognition of such claims, and that the patents issued thereon are mere nullities and should be ignored.

This department was never vested with authority to adjudicate such claims. The Board of Land Commissioners was given that power by the act of March 3, 1851, subject to review by the courts. Upon confirmation it was incumbent upon this department to survey the tracts and issue patents. This having been done the grants became final as against the United States. This department has no further jurisdiction in the premises. The decisions cited by the Commissioner are full and comprehensive and conclusively dispose of all the questions raised herein. They have been reaffirmed and followed in more recent cases, and it is deemed unnecessary to again review the authorities in refutation of the contentions reiterated in the present matter. See the similar case of *Ada Monika Williams* (52 L. D. 491).

The decision appealed from is accordingly

Affirmed.

LOUISIANA FURS, INC., ET AL. v. STATE OF LOUISIANA

Decided April 18, 1931

SCHOOL LAND—SWAMP LAND—LOUISIANA—CONFIRMATION—SURVEY.

The act of April 23, 1912, expressly confirmed title in the State of Louisiana to unsurveyed lands shown by official protraction of the Government surveys to be embraced within sections numbered sixteen in those townships in which unsurveyed swamp lands had been certified or patented to the State, and further surveys by the Government are unnecessary.

EDWARDS, *Assistant Secretary*:

The State of Louisiana applied for the survey of a large area of lands involving 24 townships in the State alleged to be swamp in character and to have been omitted from certain patents theretofore issued to the State for lands inuring to it under its swamp land grant.

The Louisiana Furs, Inc., and a number of other alleged transferees, protested against the application for survey on the ground that the lands had been embraced in patents to the State and that practically all of them had been transferred by the State to the protestants.

By decision of November 28, 1930, the Acting Commissioner of the General Land Office held that the lands in question had been disposed of by Government certifications and patents and that the United States was now without authority to survey the same or to adjust disputes as to titles or boundaries as between the State and its transferees or between the transferees themselves.

These lands were not actually surveyed, but they were certified or patented by township descriptions ascertained by protraction from prior surveys to fill in a large area of unsurveyed lands notoriously swamp and practically surrounded by surveyed lands. It was found by the General Land Office that the existing surveys on the north, east, west, and south, together with the high-water mark of the Gulf, formed a perimeter of the swamp area and sufficiently identified the lands within that boundary, and that all of the lands within that area not otherwise disposed of or reserved were certified or patented to the State by descriptions with reference to the protracted townships.

The State contends that there are large excess areas over the acreage called for by the certifications and patents, but conceding such to be the case, that would not afford good ground for surveys if the lands were included in the patents as found by the General Land Office. The rule in respect to title to excess areas is the same whether patent be issued for lands actually surveyed or estimated by protraction.

The appeal states in part as follows:

In the decision appealed from it is held that all of the land in the said unsurveyed townships was approved to the State, subject to the right of the State under the school grant, and that the United States has not now, nor has it had, since said approvals any interest in the land conveyed thereby.

This may be true if a designation of unsurveyed townships by number without survey or the official protraction of the township lines identifies and describes with sufficient accuracy to designate particularly and clearly the lands confirmed as swamp, but the mere designation of a section numbered sixteen in such unsurveyed townships does not constitute a sufficient location of such school sections, when taken in the light of the decisions of the courts and of your department.

Section numbered sixteen of each township was granted to the State of Louisiana for school purposes under the acts of April 21, 1806 and March 3, 1811, a grant *in praesenti* subject to location by the Federal Government, and it has been uniformly held that the grant of a school section in place does not attach to any particular tract of land until the same is identified by survey.

* * * * *

Moreover the area of the alleged twenty-four townships contain two permanent bodies of water, White and Grand Lakes, and the question of indemnity for lost land in place under the school grant naturally arises.

* * * * *

While it is apparent that it was the intention of the Land Department to confirm in the State of Louisiana all of the swamp lands in the said unsurveyed area of the twenty-four townships, it is here contended that the unsurveyed areas designated by alleged township numbers and so confirmed cannot be classed as a boundary survey case; that the area of the lands approved has not been identified and described with sufficient accuracy to designate particularly and clearly the lands so approved; and that the Federal Government has not fulfilled the necessary obligations and requirements of law in the allocation and identification in place of the sections numbered sixteen in the alleged townships within the said unsurveyed area, or in the adjustment of indemnity for such sections lost in place.

The answer made by the protestants to the appeal calls attention to the fact that the Supreme Court of the State has recognized that the State may acquire title to unsurveyed lands under its swamp grant, and that it is immaterial whether the actual acreage be more or less than the area called for in the patents. Attention is also called to the fact that the legislature of the State has provided for the sale of unsurveyed school sections, thus in effect acknowledging that the State acquired title to school sections in the areas identified by the protracted surveys.

The title of the State to school sections under such circumstances was expressly confirmed by Act of Congress of April 23, 1912 (37 Stat. 90), which reads as follows:

That all the unsurveyed lands in the State of Louisiana which are shown by official protraction of the Government surveys heretofore made to be embraced within sections numbered sixteen and which lie in the same township as lands which have been certified or patented in that State under the Act ap-

proved March second, eighteen hundred and forty-nine, entitled "An Act to aid the State of Louisiana in draining swamp lands therein," and the Act approved September twenty-eight, eighteen hundred and fifty, entitled "An Act to enable the State of Arkansas and other States to reclaim swamp lands within their limits," be, and the same are hereby, fixed, reserved, and confirmed to that State for the benefit of public schools as though the official surveys had been regularly extended over such townships.

This act seems to be clearly applicable and effective to dispose of the contention that it is necessary to survey these lands in order to pass title to school sections numbered sixteen.

In respect to the suggestion that it will be necessary to have surveys made in order to determine the right of the State to indemnity for school sections lost in lake areas, the department expresses no opinion as to what method of adjustment, if any, in that regard should be adopted, as no definite claim for indemnity has been made.

Upon full review of the record, the department finds no sufficient reason for disturbing the decision appealed from, and the same is accordingly

Affirmed.

STATE OF UTAH

Decided April 18, 1931

SCHOOL LAND—RECLAMATION—WITHDRAWAL—WORDS AND PHRASES.

A temporary reclamation withdrawal made pursuant to the act of June 17, 1902, comes within the meaning of "other reservations of any character" excepted from the grant of school lands to the State of Utah by the proviso to section 6 of the enabling act of July 16, 1894.

SCHOOL LAND—WITHDRAWAL—RESTORATIONS—EQUITABLE TITLE—VESTED RIGHTS.

The title to a designated school section in place does not vest *eo instanti* in the State of Utah under section 6 of the enabling act of July 16, 1894, upon the extinguishment of a reservation created prior to survey, but the State must await restoration of the land to the public domain, and the intervening of another withdrawal will postpone further the attachment of the grant.

PUBLIC LANDS—WORDS AND PHRASES.

The term "public lands" varies in different statutes passed for different purposes and is sometimes used in larger signification than a mere designation of lands subject to sale and disposal under general laws.

SCHOOL LAND—SURVEY—WORDS AND PHRASES.

The phrase "otherwise disposed of under the authority of any Act of Congress," as used in the school land grant to the State of Utah in section 6 of the enabling act of July 16, 1894, covers other disposition, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed.

SCHOOL LAND—MINERAL LANDS—PHOSPHATE LANDS—WITHDRAWAL.

Lands within a phosphate reserve at the date of the additional grant of school sections mineral in character by the act of January 25, 1927, are by reason of such reservation excluded from the provisions of that act by subsection (c) thereof.

EDWARDS, *Assistant Secretary*:

The State of Utah through its attorney general has appealed from a decision of the Commissioner of the General Land Office dated January 14, 1930, holding that the rights of the State of Utah do not attach as to Sec. 16, T. 3 S., R. 25 E., S. L. M., under the provisions of the act of July 16, 1894 (28 Stat. 107), or the act of January 25, 1927 (44 Stat. 1026).

The record shows that the survey of said land was accepted June 22, 1906; that the land was temporarily withdrawn from all disposition under the first form, act of June 17, 1902 (32 Stat. 388), by the Secretary of the Interior on March 1, 1905, Island Park Reservoir site, and that said withdrawal was revoked May 21, 1919, the section having previously been included in Phosphate Reserve No. 24 by Executive order of May 11, 1915. There are no other withdrawals.

Section 6 of the act of July 16, 1894, *supra*, which became effective upon the admission of Utah into the Union January 4, 1896, by proclamation of the President, reads as follows:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become part of the public domain.

The first paragraph of section 1 of the act of January 25, 1927, *supra*, reads—

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

Thereinafter subsection (c) reads—

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

It does not appear that the State applied to take indemnity for the section. It is conceded in the Commissioner's decision that there is no data available tending to show that the land was known to be valuable for phosphate or other minerals prior to 1914. The first question is whether upon the facts stated, the State's rights have attached to the land under section 6 of the act of July 16, 1894.

It will be assumed for the purpose of argument that the temporary reclamation withdrawal of 1905 was not a "permanent reservation," within the meaning of the proviso to section 6 but comes within the meaning of "other reservations of any character" thereinafter mentioned. Now, it will be observed that under this proviso, the sections designated in the granting clause are not made subject to such "Indian, military or other reservations of any character" but it is expressly prescribed that "nor shall any lands embraced in * * * other reservations of any character be subject to the grants * * * of this act until the reservation shall have been extinguished *and such lands be restored to and become a part of the public domain.*" [Italics supplied.] Plainly, in view of the provisions last quoted, the State acquires no vested right to the section by its identification on survey, made while the reservation exists as the vesting of title is by the language of the statute definitely postponed until the reservation is extinguished and the land restored to the public domain. The theory that upon the extinguishment of a reservation created prior to survey, the land becomes *eo instanti* State property is incompatible with the statutory declaration that a restoration to the public domain must first follow before the right of the State attaches. Prior to such restoration full title to the land is in the United States.

The department has frequently expressed the view that under similar provisions in grants to other States the State does not acquire any right to the school sections until the reservation embracing them is finally extinguished. *State of California* (37 L. D. 499, 501); *Black Hills National Forest* (37 L. D. 469, 473); *State of Washington v. Lynam* (45 L. D. 593, 595); *State of Montana* (38 L. D. 247); *Joseph C. Bringham et al.* (50 L. D. 628, 632). In *State of Utah v. Work* (6 Fed. (2d) 675; affirmed, 273 U. S. 649), it was held that a petroleum withdrawal created prior to the survey

removed the school sections embraced therein from the operation of the State's grant until such time as the withdrawal should be revoked. Withdrawals under the first or second form made prior to the acceptance of the plat of survey of a school section therein included, are reservations within the meaning of the granting act to Utah. *Joseph C. Bringham et al., supra*, instructions of April 9, 1920 (47 L. D. 361). It is no longer open to question that Congress has the power to reserve for public purposes the sections in each township designated in the grant prior to the survey thereof and their reservation by the Secretary under the act of June 17, 1902, is under the authority of Congress, which retains absolute power over them, the State being entitled to take indemnity therefor, *United States v. Morrison* (240 U. S. 192), or might, if it so elected, await the extinguishment of the reservation and the restoration of the lands and then take the sections. Section 2275, Revised Statutes; *State of Washington v. Lynam, supra*; *Elizabeth J. Lawrence* (49 L. D. 611).

Lands reserved to the United States are the absolute property of the Government. *Rector v. United States* (92 U. S. 698); *Van Lear v. Eisele* (126 Fed. 823). As such property the Government had absolute power and dominion over them, and these lands being included within a reclamation withdrawal, remain under the jurisdiction of the Secretary of the Interior. While the lands within the reclamation withdrawal were not subject to sale or other disposal under general laws, they were not excluded from the term "public lands" by reason of the attachment of any rights of the State. Compare *Payne v. Central Pacific Railway Company* (255 U. S. 228). The words "public lands" vary somewhat in different statutes passed for different purposes and they should be given such meaning in each as comports with the intention of Congress. *Union Pacific Railway Company v. Karges* (169 Fed. 459); *United States v. Blendaur* (128 Fed. 910); *Dugan v. Montoya* (173 Pac. 118). They are sometimes used in a larger and different signification than a mere designation of lands subject to sale and disposal under general laws. *Kindred v. Union Pacific Railroad Company* (225 U. S. 582). The words "otherwise disposed of under the authority of any Act of Congress" in the grant, covered other disposition, whether prior or subsequent, if made before the land had been appropriately identified by survey *and title had passed*. *United States v. Morrison, supra*, p. 205.

It is therefore believed that the creation of the phosphate reserve by Executive order while the lands were covered by the previous withdrawal for reclamation purposes was a valid exercise of power under the act of June 25, 1910 (36 Stat. 847). In *Norton v. United*

States (19 Fed. (2d) 836; *Certiorari* denied, 275 U. S. 558), a withdrawal by the President made under section 2380, Revised Statutes, was upheld as against the claim of a prior settler. That section authorized the President "to reserve from the *public lands*, whether surveyed or unsurveyed, townsites," etc. The status of the land at the time of such withdrawal was that it had been released from a previous withdrawal for lighthouse purposes and restored to the public domain "subject to the public-land laws and the jurisdiction of the Interior Department." While the lands there in question were not "public lands" in the sense of being subject to sale or other disposition under general laws, they were held to be "public lands" in the words of the statute authorizing the withdrawal.

It follows from the views expressed that by reason of the existence of the phosphate reserve, no rights of the State have attached under its grant of 1894, nor can they attach because of such reservation under the additional grant of January 25, 1927, as by subsection (c) thereof lands "within the limits of existing reservations" are excluded from the provisions of that act. Regulations of March 15, 1927 (52 L. D. 51).

The decision of the Commissioner is, accordingly,

Affirmed.

RECREATIONAL AND GRAZING USE OF LANDS WITHDRAWN FOR PROTECTION OF WATERSHEDS IN CALIFORNIA—ACT OF MARCH 4, 1931

REGULATIONS

[Circulars Nos. 1247, 1254¹]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 18, 1931.

CHIEF OF FIELD DIVISION, SAN FRANCISCO, CALIFORNIA:

By the act of March 4, 1931 (46 Stat. 1530), the public lands described therein were withdrawn from settlement, location, filing, entry or disposal under the land laws of the United States for the purpose of protecting the watersheds now or hereafter supplying water to the city of Los Angeles and other cities and towns in the State of California. A diagram showing the exterior boundaries of the withdrawn land will be furnished you as soon as the same can be prepared.

¹ Circular No. 1254, approved June 6, 1931, merely amended the last paragraph, p. 372, by striking out the last phrase thereof.—Ed.

Section two of said act provides as follows:

That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase permit or lease under the mining or mineral leasing laws of the United States so far as same apply to minerals in said land, and to the acquisition of rights or easements under laws of the United States applicable for rights of way for railroads, highways, reservoirs, ditches, canals, electrical power plants, and transmission lines, telegraph and telephone lines, or other rights of way authorized to be granted under any of the laws of the United States: *Provided*, That nothing in this Act contained shall be construed as affecting any existing valid water right or lawful homestead or desert-land claim heretofore initiated, or upon which any valid settlement has been made and is at the date of this Act 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 upon the extinguishment of any such claim by cancellation, relinquishment or otherwise, this withdrawal shall immediately apply to and become effective upon such land: *And provided further*, That nothing herein contained shall be construed as affecting the use or occupation of any of said withdrawn lands for recreational or grazing purposes under such rules and regulations as the Secretary of the Interior may deem necessary to conserve the natural forage resources of the area.

In order to comply with the terms of the proviso concerning the use and occupancy of the reserve for recreational or grazing purposes, it is hereby declared to be the policy of this department—

1. To protect the water supply in the withdrawn area from contamination.
2. To protect the watersheds.
3. To conserve and develop the native vegetative growth to the utmost practicable limit obtainable by range management.

The use of the land for recreational or grazing purposes, therefore, will be permitted only subject to the exercise of reasonable care in the preservation of the natural vegetative growth, the prevention of infectious diseases and avoidance of any action which either directly or indirectly might contaminate, pollute or otherwise impair the value of the water in the area for municipal purposes or reduce the annual growth of forage for livestock. Due care in the use of camp fires and the extinguishment of same must be exercised by all persons using the lands and the cutting of timber or other action injurious to the scenic beauty is prohibited.

Until further notice use of the land for recreational purposes will not require any special permit, but on and after September 1, 1931, grazing on the withdrawn lands is hereby prohibited except under the rules and regulations hereinafter set forth.

Use of the land for recreational purposes will also be subject to any applicable regulation herein set forth except the requirement for permit.

A systematic investigation will be conducted by the Geological Survey for the purpose of evaluating the forage resources of the area and the proper methods for practice of grazing to permit maintenance of vegetative growth at maximum permanent practicable range carrying capacity. It shall include a determination of the existing herbaceous and scrub species as well as the number and kind of livestock which may be grazed on the land, the appropriate period of use of the range and other matters relating to livestock activities necessary to efficient management of grazing.

Studies shall also be made by the Geological Survey to determine where and to what extent stockwater development is needed, what provision should be made for salting and other appropriate measures to insure complete economic use of the range. The examination will seek to coordinate observed conditions with the customary grazing practice in the region and further examinations may be made to determine whether any deterioration of the range is occurring.

You are hereby placed in direct charge of administration of said act as to the recreational and grazing features thereof, with authority to issue grazing permits. Applications for such permits must be filed in your office. In case of any controversy between applicants for permits appeal from your decision will lie to this office and to the department in the same manner as in other cases involving public lands.

Permits for the grazing will be issued on the basis of use preceding the withdrawal, subject to any reduction or adjustment which may be necessary to conserve the forage resources, distribute the water satisfactory on the range, to reduce waste resulting from unnecessary movement and to establish a permanent plan of range use to insure judicious and profitable consumption of the forage resources. These adjustments will be made on the basis of the investigation by the Geological Survey above described.

Permits may be issued to an individual stockman or to an association and may be for a specified number of stock in a certain unit or for a specified unit with a prescribed limitation on the use thereof.

When a satisfactory basis of permanent operation has been established, permits for a period of years may be issued subject to modification to conform to any provision of law which may be enacted. A duplicate copy of each permit issued shall be forwarded to this office for its records.

Stockmen or any person utilizing the forage without permission subsequent to September 1, 1931, will be subject to prosecution under section 56 of the Criminal Code. [Act March 4, 1909, 35 Stat. 1088].

The violation of the conditions of a permit will be sufficient cause for the cancellation of same. Upon application of any proper party

in interest in any controverted matter you may direct that a hearing be had before the register of the district land office. Such hearing will be governed by the rules and regulations customarily followed in other land cases involving public lands under the jurisdiction of this department. Should you decline to order a hearing, appeal from your decision will lie to this office and to the department.

A notice of cancellation of the permit will also contain a notice to remove stock from the withdrawn land and failure to comply with such notice will subject the permittee to prosecution as a trespasser.

No fees will be charged unless and until legislation therefor shall be enacted by Congress, but by agreement of the permittees a pro rata charge may be assessed to provide any range improvements that are needed, such as corrals, drift or diversion fences, roads, trails, watering tanks or other permanent improvements to facilitate use of the range. The employment of a range rider or other permanent employee which may be deemed necessary or desirable at any time by a majority of the interested stockmen and by the city of Los Angeles, California, may be authorized by the Secretary of the Interior, but the expenses incident to such employment shall be assessed on the benefited parties in such ratio as the Secretary may deem reasonable and just. These assessments and expenditures will be handled by such local organization as may be affected.

Permits for grazing on the withdrawn land will be issued to persons entitled to share in the grazing resources by reason of use thereof prior to the withdrawal of the lands or by local residence and ownership of ranch property within or near the reserve and dependence upon the grazing. When there is any surplus range, temporary permits may be issued for transient stock or for increased use by regular permittees and special use permits may be issued authorizing stock to be driven across the reserve.

Ranch property will be construed to mean lands producing cultivated crops used for feeding livestock or range land used for grazing livestock during seasonable periods or in rotation with use of grazing on reserved land. The ranch property likewise must be commensurate with the grazing privileges permitted on the reserved lands and a permit will not be issued to any person for a larger number of stock than can be properly cared for during the period when the reserved land is not used. Nearby ranch owners will be given preference over remote land owners and holders of forest reserve permits will be construed as entitled to a quantum of grazing privileges determined in the same manner as owners of ranch property, [but leased grazing privileges will not be so counted].²

² Phrase in brackets stricken out by amendatory Circular No. 1254, approved June 6, 1931.—Ed.

To preserve the public health, the carcasses of all animals which die of contagious or infectious diseases must be burned and if death of any animal occurs in or near any water, the carcass must be removed and buried or burned. Likewise, camp refuse or débris of any kind must not be left in an exposed or unsanitary condition or deposited in or near any stream, lake or other body of water in a manner which may directly or indirectly cause pollution of said water.

For convenience a board of representatives may be selected by the livestock owners or a majority of the users of the range in all or any part of the withdrawn land and if this board is authorized to enter into agreements binding on the represented owners, such committee will be recognized as an advisory board entitled to notice and to be heard in any matter arising in connection with the utilization of the grazing on the withdrawn land.

In order that these regulations may be made effective on or about September 1, 1931, you are directed to promptly get in touch with the Los Angeles authorities and ascertain to what extent the city will be willing to cooperate with respect to the land owned by it in the district; you will also confer with the grazing interests with a view to the formation of a local organization for administrative purposes under the general supervision of the Secretary of the Interior. Ascertain the number and kind of stock to be grazed in the district, the names of their owners and the season of use of the grazing privileges. Give all possible publicity locally to these regulations and the date it is proposed to make them effective, advising interested parties of the importance of promptly filing applications for permits for action by you before that date. Permit forms will be furnished you later.

The representative of the Geological Survey expects to reach the field around May 1, 1931, and you will cooperate with him in all matters wherein joint action is appropriate.

You will give this matter your earnest attention with a view to having a good working plan ready for operation by September 1, 1931, and keep this office advised of developments.

C. C. MOORE, *Commissioner.*

I concur:

W. C. MENDENHALL,
Acting Director, Geological Survey.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

NATURALIZATION AND CITIZENSHIP OF MARRIED WOMEN—
CIRCULARS NOS. 361 AND 857, SUPERSEDED SO FAR AS IN
CONFLICT

INSTRUCTIONS

[Circular No. 1248]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 18, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

In the case of the marriage of a woman citizen of the United States to an alien prior to the passage of the act of September 22, 1922 (42 Stat. 1021), her citizenship followed that of her husband. If she lost her citizenship by marriage she could on the death of her husband resume the citizenship in the manner provided by section 3 of the act of March 2, 1907 (34 Stat. 1228). If she married on or after September 22, 1922, and prior to March 3, 1931, her citizenship remained the same unless she married an alien ineligible to citizenship.

The act of March 3, 1931 (46 Stat. 1511), amended section 3 and repealed section 5 of said act of September 22, 1922. Attention is particularly called to subsection (a) of section 3 of the act of September 22, 1922, as amended by said act of March 3, 1931. Said subsection reads as follows:

A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.

A married woman, or widow, who is required to furnish evidence of citizenship in this country in connection with an application or entry under the public land laws must show by affidavit the facts upon which she bases her claim to such citizenship.

1. A married woman must show the date of her marriage.
2. A widow must show the date of her marriage and the date of the death of the husband.
3. If applicant married prior to September 22, 1922, and if she claims citizenship through her husband, she must show that at the time of the marriage he was a citizen of the United States. If he was a naturalized citizen, satisfactory evidence of the naturalization must be furnished in the manner provided by Circular No. 1202 (52 L. D. 728).
4. If applicant married on or after September 22, 1922, and prior to March 3, 1931, she must show that she did not marry an alien ineligible to citizenship in this country.

An applicant who married on or after March 3, 1931, need not make any showing as to the citizenship of her husband.

An applicant who claims citizenship through her own naturalization separate and apart from the naturalization of the husband or who bases her right to file a particular application on the filing by herself of a declaration of intention to become a citizen must in the manner provided by Circular No. 1202 furnish satisfactory evidence of her naturalization or of the filing of the declaration.

An applicant who fails to make the showing required, as stated, should be allowed thirty days from receipt of notice within which to do so, or to appeal.

If in any case you are in doubt as to the citizenship of an applicant, you will transmit the papers to this office for consideration.

These instructions will supersede all instructions heretofore issued in conflict herewith including those contained in Circulars Nos. 361 of November 4, 1914 (43 L. D. 444), and 857 of August 12, 1930 (53 I. D. 166).

C. C. MOORE, *Commissioner*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

ACT OF SEPTEMBER 22, 1922 (42 STAT. 1021), AS AMENDED BY ACTS OF JULY 3, 1930 (46 STAT. 849 AND 854) AND MARCH 3, 1931 (46 STAT. 1511)

An Act Relative to the naturalization and citizenship of married women

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged, because of her sex or because she is a married woman.

SEC. 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.

SEC. 3 [As amended by section 4 of the Act of March 3, 1931, 46 Stat. 1511.]—

(a) A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.

(b) Any woman who before this section, as amended, takes effect, has lost her United States citizenship by residence abroad after marriage to an alien

or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 4 of this Act, as amended. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 4 on account of her race.

(c) No woman shall be entitled to naturalization under section 4 of this Act, as amended, if her United States citizenship originated solely by reason of her marriage to a citizen of the United States or by reason of the acquisition of United States citizenship by her husband.

SEC. 4¹ [As amended by the Act of July 3, 1930, 46 Stat. 854.]—(a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the county where the petition is filed shall be required;

(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect.

SEC. 5. [This section of the Act of September 22, 1922, which provided "that no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status," was repealed by section (4) *b* of Act of March 3, 1931, 46 Stat. 1511.]

SEC. 6. That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

SEC. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.

SEC. 8.² That any woman eligible by race to citizenship who has married a citizen of the United States before the passage of this amendment, whose husband shall have been a native-born citizen and a member of the military or naval forces of the United States during the World War, and separated therefrom under honorable conditions; if otherwise admissible, shall not be excluded from admission into the United States under section 3 of the Immigration Act of 1917, unless she be excluded under the provisions of that section relating to—

¹ The act of July 3, 1930 (46 Stat. 854), provides that this section as amended by that act "shall not terminate citizenship acquired under such section 4 before such amendment."

² This section added by the Act of July 3, 1930 (46 Stat. 849).

(a) Persons afflicted with a loathsome or dangerous contagious disease, except tuberculosis in any form;

(b) Polygamy;

(c) Prostitutes, procurers, or other like immoral persons;

(d) Persons convicted of crime: *Provided*, That no such wife shall be excluded because of offenses committed during legal infancy, while a minor under the age of twenty-one years, and for which the sentences imposed were less than three months, and which were committed more than five years previous to the date of the passage of this amendment;

(e) Persons previously deported;

(f) Contract laborers.

That after admission to the United States she shall be subject to all other provisions of this Act.

Section 3 of the Act of September 22, 1922 (42 Stat. 1021), prior to its amendment read as follows:

SEC. 3.³ That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who married an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign state of which her husband is a citizen or subject, or for five years continuously outside of the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of sec. 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the Expatriation Act of 1907 with reference to expatriation.

ENTRIES AND FILINGS ON SWAMP LANDS—PRIOR INSTRUCTIONS SUPERSEDED

INSTRUCTIONS

[Circular No. 1246]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 20, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

By decision of the department, dated February 5, 1931 (53 I. D. 254), upon the appeal of J. G. Hofmann, it was held that the old circular of December 13, 1886 (5 L. D. 279), which permitted entries

³ The last three sentences of this section were repealed by the Act of July 3, 1930 (46 Stat. 854), and the sentence preceding them was repealed by the Act of March 3, 1931 (46 Stat. 1511). The first-mentioned Act provided that the repeal should not "restore citizenship lost under such section 3 before such repeal."

to be made in conflict with pending swamp-land selections subject to the swamp-land claim, had been superseded by later regulations and decisions.

Pursuant to the said decision, the department, under date of April 6, 1931, ordered that the following rules will supersede all prior instructions in conflict herewith:

1. In those States where the adjudication of swamp-land claims is based on the evidence contained in the survey returns, applications adverse to the State for lands returned as swamp will be rejected unless accompanied by a showing that the land is non-swamp in character.

2. In such case, the claim adverse to the State must be supported by a statement of the applicant under oath, corroborated by two witnesses, setting forth the basis of the claim and that at the date of the swamp-land grant the land was not swamp and overflowed and not rendered thereby unfit for cultivation. In the absence of such affidavit the application will be rejected. If properly supported, the application will be received and suspended subject to a hearing to determine the swamp or non-swamp character of the land, the burden of proof being upon the non-swamp claimant.

3. In those States where the survey returns are not made the basis for adjudication of the swamp-land selections, junior applications for lands covered by swamp-land selections may be received and suspended, if supported by non-swamp affidavits corroborated by two witnesses, subject to hearing to determine the character of the land, whether swamp or non-swamp, and the burden of proof will be upon the junior applicant. Likewise, the State, if a junior applicant, may be heard upon furnishing an affidavit corroborated by two witnesses alleging that the land is swamp in character within the meaning of the swamp-land grant, in which case the burden of proof at the hearing will be upon the State.

4. Where hearings are ordered in any such cases, the usual rules of practice governing contests will be applied, except as herein otherwise provided.

It will be observed that these instructions supersede those contained in the circular of December 13, 1886 (5 L. D. 279). Govern yourself accordingly.

C. C. MOORE, *Commissioner*.

**ACCOUNTS—FEES WITH APPLICATIONS FOR SODIUM, POTASH,
AND OTHER MINERAL LEASES AND PERMITS—CIRCULAR NO.
1004, AMENDED**

INSTRUCTIONS

[Circular No. 1251]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 7, 1931.**

REGISTERS, UNITED STATES LAND OFFICES:

Circular No. 1004, dated May 2, 1925 (51 L. D. 138), is hereby amended to include fees on applications for potash and sodium leases and permits, and to read as follows:

Hereafter fees paid with applications for permits, leases, or other rights under the mineral leasing act of February 25, 1920 (41 Stat. 437), under the amendment thereof as to sodium, dated December 11, 1928 (45 Stat. 1019), or under the potash leasing act of February 7, 1927 (44 Stat. 1057), shall not be applied until receipt of notice from this office that the application has been allowed. Pending the allowance or rejection of an application, the fee will be held as "Unearned Moneys." All instructions inconsistent herewith are hereby modified accordingly.

C. C. MOORE, Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

WALTER G. BRYANT

Decided May 27, 1931

HOMESTEAD ENTRY—MINERAL LANDS—MINING CLAIM—BURDEN OF PROOF—CONTEST.

The allowance of a mineral application for land covered by an existing entry is in disregard of the mining regulations and as the burden is on the mineral claimant to show the mineral character of the land, institution of a contest by the homestead entryman is not necessary.

HOMESTEAD ENTRY—MINING CLAIM—ADVERSE PROCEEDINGS—ERROR—INTERVENTION.

Where adverse proceedings have been brought against a homestead entry charging that the land is covered by valid and existing mining claims, the mineral claimant whose entry for such claims has erroneously been allowed over the existing homestead entry should be permitted to intervene in the proceedings and, should the charges be proved and the homestead entry canceled, the invalidating cause of the mineral entry is thereby removed and it will be permitted to stand.

EDWARDS, *Assistant Secretary*:

On March 10, 1926, Walter G. Bryant made homestead entry, Coeur d'Alene 012602, under section 2289, Revised Statutes, for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 1, E $\frac{1}{2}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 2, T. 36 N., R. 5 E., B. M. On June 18, 1929, the entry was canceled on relinquishment to the extent of its conflict with the Ajax, Ajax No. 1, and Ajax Fraction lodes. On July 2, 1929, adverse proceedings were directed against the entry charging—

That the homestead entry is partly covered by valid subsisting mining claims known as the Dream and Dream Extension lodes.

These proceedings are still pending.

On April 14, 1930, the local office received mineral application 013209 filed by Fred Forsman for the Dream and Dream Extension lodes, the dates of the location thereof being stated respectively as August 22, 1913, and June 7, 1926. Mineral entry was allowed June 25, 1930.

On June 30, 1930, the homestead claimant filed application to contest the mineral entry alleging that the land within the lode locations was not mineral in character and requested that such contest be substituted for the prior adverse proceedings. On August 6, 1930, the mineral claimant filed a denial of such allegation and requested dismissal of the contest. By decision of September 9, 1930, the Commissioner of the General Land Office rejected the application to contest. The grounds assigned for rejection were, briefly stated: (1) that it is the duty of his office to see that only nonmineral lands pass to patent under section 2289, Revised Statutes, and (2) that a judgment as to the character of the land in the private contest proceeding would not bind the Government. The homestead claimant has appealed.

The allowance of the subsequent mineral application for land covered by an existing homestead entry was in disregard of paragraph 44 of the Mining Regulations. (See 49 L. D. 70, *Elda Mining and Milling Co.*, 29 L. D. 279.) The material facts in the case last cited are the same as those in the instant case, and the following quoted excerpts from that decision are applicable and should govern the instant case (p. 280):

It is apparent that the mineral entry, to the extent that it conflicts with the existing prior homestead entry of Mrs. Johnson, was erroneously allowed by the local officers. The application for mineral patent should either have been rejected to the extent of such conflict, or notice should have been given to the homestead entrywoman for the purpose of affording her an opportunity to be heard. Her entry, existing of record at the date of the application for mineral patent, was notice to the world of a prior record appropriation and segregation of the land in controversy, and no further entry thereof could be lawfully allowed while her entry still existed of record.

Even if it be true, as now alleged, that the conflicting mining claim was located prior to the homestead entry, it is nevertheless equally true that the homestead entry was regularly allowed, in the absence of any claim of record in the local office at the time, as to any portion of the tract so entered. With the application to make homestead entry was filed the usual non-mineral affidavit, declaring that the land contained no mineral, and that no portion thereof was claimed for mining purposes, thus establishing *prima facie* the non-mineral character of the land covered by the homestead entry.

The certificate of location of the mining claim is not, of itself, evidence of the mineral character of the land. (*Magruder v. Oregon and California R. R. Co.*, 28 L. D., 174.) Neither can the tract in conflict be assumed to be mineral because it is situated in a mineral belt and mining district and is adjacent to numerous mining claims.

It is manifest from the state of the record that a hearing should be had for the purpose of determining the character of the ground claimed by the mineral applicant in conflict with the prior existing homestead entry of Mrs. Johnson—that is, whether the same is more valuable for agricultural or mineral purposes—and you will accordingly direct that such hearing be had, with notice to all parties. *Hooper v. Ferguson* (2 L. D., 712).

The burden of proof at such hearing will rest upon the mineral applicant, who is in the position of one contesting a prior entry of record apparently regularly allowed.

The decision of your office is accordingly modified. All further proceedings upon either of the entires, as to the ground in conflict between them, will be suspended to await the final determination of the question in issue at the hearings hereby ordered.

Accordingly it is held that the mineral claimant in this case has but the status of a contestant carrying the burden of proving the mineral character of the land within his locations. There is no necessity for the homestead claimant to institute contest to protect his entry from cancellation.

The mineral claimant should be permitted to exercise his right of challenging the validity of the homestead entry, and not be bound by an adjudication as to the character of the land in a proceeding to which he is not given opportunity to become a party. He accordingly should be given notice to appear and intervene in the adverse proceedings pending. Should the charge preferred therein be held hereafter to be proven and the homestead entry canceled to the extent of the locations involved, the invalidating cause of the mineral entry will be removed, and it will, though erroneously allowed, be permitted to stand in accordance with long-settled rules. *Meyers v. Smith* (3 L. D. 526); *Owen D. Downey* (6 L. D. 23); *Schrotberger v. Arnold* (6 L. D. 425); *Thomas v. Spence* (12 L. D. 639); *Fawell v. Lexington Townsite* (15 L. D. 389); *Cole v. Northern Pacific R. R. Co.* (17 L. D. 8, 19); *Adams et al. v. Polglase et al.* (32 L. D. 477).

As herein modified, the Commissioner's decision is

Affirmed.

AINSWORTH COPPER COMPANY v. BEX

Decided June 2, 1931

STOCK-RAISING HOMESTEAD—APPLICATION—AFFIDAVIT—MINING CLAIM—ADVERSE CLAIM—OCCUPANCY—BURDEN OF PROOF—EVIDENCE.

An oath in support of a stock-raising homestead application alleging that no part of the land applied for is claimed, occupied or being worked under the mining laws, or occupied or appropriated under any other public land law except by the claimant himself, establishes a *prima facie* case that the land was unoccupied and unappropriated, and where the entry was regularly allowed the burden of proof is upon a mineral claimant asserting a right under the mining laws to establish by extrinsic evidence the illegality of the entry.

STOCK-RAISING HOMESTEAD—CONTEST—MINERAL LANDS—MINING CLAIM—ADVERSE CLAIM—EVIDENCE.

In a contest by a mining claimant against a regularly allowed stock-raising homestead entry, illegality of the entry is not proved by merely establishing that the land is mineral in character, but it must be shown that there existed either a prior perfected location under the mining law, or a mining location, though not perfected by discovery, yet in the actual possession of the locator who is diligently engaged in the search for mineral.

MINING CLAIM—POSSESSION—LOCATION CERTIFICATE—CONTEST—EVIDENCE.

Where the right of possession to a mining claim is founded upon an alleged compliance with the law relating to a valid location all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate.

MINING CLAIM—LOCATION CERTIFICATE—DISCOVERY—EVIDENCE.

The date of discovery given in the recorded certificate of location is not evidence of the fact of discovery of mineral in a mining claim, and if controverted must be proved independently of the recital in the certificate.

MINING CLAIM—STOCK-RAISING HOMESTEAD—POSSESSION.

A valid mining claim to which the owner has a vested right of exclusive possession under the mining law is not subject to entry under the stock-raising homestead act.

EDWARDS, Assistant Secretary:

John Henry Bex has appealed from a decision of the Commissioner of the General Land Office dated February 14, 1931, holding for cancellation his stock-raising homestead entry, Phoenix 063430, made June 13, 1928, for land in Ts. 16 and 17 S., R. 3 E., G. & S. R. M., containing 640 acres.

The Ainsworth Copper Company on May 8, 1929, instituted a contest against the entry, alleging a superior right to the land by virtue of subsisting and valid lode mining locations all made prior to said entry and together covering its entire area. Upon the evidence adduced at a hearing between the parties the local register held that the entryman had totally failed to show the invalidity of the alleged locations and (therefore) that his entry should be

canceled. The Commissioner held that it was shown by a clear preponderance of evidence that the lands embraced within the entry were "practically entirely covered by the aforesaid lode mining claims, shown to have been valid and subsisting at the time the entry was applied for."

The register did not state a sound basis for the conclusion that the entry should be canceled. The entryman made oath in support of his application "that no part of said land is claimed, occupied or being worked under the mining laws; that said land is unoccupied and unappropriated by any person claiming same under the public land laws other than myself", thus establishing *prima facie*, that the land was unoccupied and unappropriated under the mining or other public land laws—a necessary prerequisite to the allowance of his entry under the stock-raising homestead law. The entry being regularly allowed, the burden of proof was upon the mineral claimant at a hearing between him and the entryman to establish by extrinsic evidence the illegality of the entry. *Magruder v. Oregon and California Railroad Company* (28 L. D. 174); *Elda Mining and Milling Company* (29 L. D. 279); *Harlerader v. Goldstein* (31 L. D. 87, 93). It is necessary then to examine the record to ascertain whether this was done by the mineral claimant. Illegality of the stock-raising entry is not shown by merely establishing that the land is mineral in character, all minerals being reserved by the act under which it is made. In *United States v. Hurliman* (51 L. D. 258), wherein was considered the conflicting claims of stock-raising and mineral claimants to the same land, it was held that at the date of the inception of the stock-raising entry, there must exist either a prior perfected location under the mining law, or a mining location though not perfected by discovery in the actual possession of the locator who is diligently engaged in the search for mineral, to warrant cancellation of the entry to the extent so claimed to be located or possessed.

Neither of these conditions being shown to exist, no part of the land can be deemed to be claimed, occupied or as being worked under the mining law. With respect to perfected mining locations, it was said in the *Hurliman case* (p. 262)—

The acts of Congress prescribed two and only two prerequisites to the vesting in a competent locator of a complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land, within the limits of the claim of a mineral-bearing lode and the distinct markings of the boundaries of the claim so that they can be readily traced. No appropriation of the land is made until these requirements are fulfilled. *Erwin v. Perago* (93 Fed. 608, 611); *Nevada Sierra Oil Co. v. Home Oil Company* (98 Fed. 673, 677).

After careful review of the record and evidence in the instant case the department is unable to find competent and satisfactory evidence

in behalf of the mineral claimant supporting the conclusion of the Commissioner that the land was practically covered by valid and subsisting claims at the time of entry, or that any part thereof was so covered.

The contestant introduced certificates of 37 lode locations depicted on a map filed as in conflict with the homestead entry. These certificates bear dates of discovery and location long prior to the date of the homestead entry. No evidence was offered by contestant, however, independent of the recitals in these certificates of the monumenting of the ground, or other acts of location, and the evidence of discovery prior to the entry upon individual claims was obviously incompetent, inasmuch as it definitely appears that the three mining engineers, namely, Beauchamp, Hemphill and Welton, who assumed to express an opinion as to such discoveries, over objection, were never on the land until 1929.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.

While many of the States require the date of the discovery to be stated in the recorded certificate, this would not be evidence of the *fact* of discovery. A discovery once proved, such a record would, *prima facie*, fix the date. Discovery is the most important of all the acts required in the proceedings culminating in a perfected location. But it is not a matter of record, but *in pais*, and if controverted must be proved independently of the recital in the certificate. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (Idaho, Montana and Oregon), the certificate is executed with no solemnity. It is neither acknowledged nor sworn to. It is a mere *ex parte*, self-serving declaration on his own behalf of the party most interested. The same may be said of marking the boundaries.

* * * * *

The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity. These facts once proved, the recorded certificate may be considered as *prima facie* evidence of such other facts as are required to be stated therein, which is, of course, subject to contradiction. *Lindley on Mines, section 392, and departmental and other cases there cited.*

The contestant offered uncontradicted evidence of the finding and sampling subsequent to the entry of minerals in lodes in place on ten of the claims, and over objection offered unauthenticated papers purporting to be assays of such samples showing substantial values in lead and copper; also specimens of rock stated to have been taken

from nine other claims, without testimony as to their content or significance as proof of discovery upon the claims from which they were taken; also estimates that in times past, without specification of time, there had been expended \$188,000 in mining development and equipment and as a result thereof ore to the value of \$75,000 had been removed from the land, and that in 1926 and 1927, contestant's lessee had shipped 10 or 12 carloads of ore to a smelter from the property. Unsigned papers were offered purporting to be the returns in mineral value of the shipments. Not only was evidence of prior discovery lacking, but also definite evidence from which the department could determine that there was any actual occupation of the premises for mining purposes at or about the time the entry was made, testimony being offered however that the annual assessment work had been kept up.

The entryman called as a witness for contestant testified to the effect that he had applied for the land upon the belief resting upon legal advice that a stock-raising entry could be made covering subsisting mining claims; that he had knowledge of the fact that there were dumps, shafts, buildings and works of a mining nature on the land at the time he filed; that while he did not know the land was occupied when he filed, he had seen men about on the premises in the years 1928 and 1929, and knew it was occupied; that he was working in mines to make a living but had never seen any mines on the surface of the ground and it has no mineral value as he had ever seen. It also appears the entryman has a home valued at \$150 on the Omega claim, and has made it his place of residence with his family since December, 1928, and that he pastures a few livestock on the entry.

While the evidence of the extraction and shipment of ores from the land prior to the entry tends to show there were discoveries on some part of it, nevertheless, in the absence of evidence specifying from what claim or claims it came, the department is unable to pronounce judgment as to which claims are valid. Manifestly such evidence creates no presumption of discovery on every one of the claims involved in the contest. Likewise the evidence is insufficient and indefinite as to what claims, if any, the contestant or those claiming under it, were in actual possession diligently engaged in the search for mineral at the date of the inception of the stock-raising entry so as to justify cancellation thereof as to any part solely on that ground.

The department is, however, satisfied from the evidence that the entryman, from visible conditions on the ground affording notice, did not pursue the inquiry far enough as to the existence of superior

rights in the mineral claimant, and the latter has shown sufficient equities which entitle him to a further opportunity to properly establish to what extent he has superior rights.

There is no merit in the contention of the entryman's attorney, to the effect that the stock-raising homestead act permits entry thereunder of land within a valid mining claim to which, under the mining law, the owner thereof has a vested right of exclusive possession.

A further hearing is therefore ordered between the parties in which the mineral claimant is given opportunity to offer evidence showing as to each individual location to which it asserts title, that there was a proper location and sufficient discovery prior to the homestead entry, or that the contestant or those claiming under the location were in actual possession thereof seeking discovery at such time.

Evidence on the immaterial question as to how little or how much the land is valuable for grazing which unduly burdens the present record should be excluded. In accordance with the views above expressed, the Commissioner's decision is reversed, and the case remanded for further evidence as herein above directed.

Reversed and Remanded.

UNIT OPERATION OF OIL AND GAS PERMITS AND LEASES UNDER ACT OF MARCH 4, 1931

INSTRUCTIONS

[Circular No. 1252]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 4, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

By the act approved March 4, 1931 (46 Stat. 1523), sections 17 and 27 of the act of February 25, 1920 (41 Stat. 437), as amended, were amended and reenacted to read as follows:

SEC. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in units reasonably compact of not exceeding six hundred and forty acres, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum in amount or value of the production, and the payment in advance of a rental of not less than \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year.

Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the department having jurisdiction thereof, unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That any lease heretofore or hereafter issued under this act that has become the subject of a cooperative or unit plan of development or operation of a single oil or gas pool, or area, or other plan for the conservation of the oil and gas of a single pool or area, which plan has the approval of the Secretary of the department or departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan: *And provided further*, That said Secretary or Secretaries shall report all leases so continued to Congress at the beginning of its next regular session after the date of such continuance.

Any cooperative or unit plan of development or operation which includes land owned by the United States shall contain a provision whereby authority, limited as therein provided, is vested in the Secretary of the department or departments having jurisdiction over such land to alter or modify from time to time in his discretion the quantity and rate of production under said plan. The Secretary of the Interior is authorized, whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease heretofore or hereafter issued, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order. Whenever the average daily production of any oil well shall not exceed ten barrels per day the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the well can not be successfully operated upon the royalty fixed in the lease. The provisions of this section shall apply to all oil and gas leases made under this act.

SEC. 27. That no person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits, during the life of such leases or permits in any one State exceeding in aggregate acreage, two thousand five hundred and sixty acres for each of said minerals; no person, association, or corporation shall take or hold at one time, oil or gas leases or permits exceeding in the aggregate, seven thousand six hundred and eighty acres granted hereunder in any one State, and not more than two thousand five hundred and sixty acres within the geologic structure of the same producing oil or gas field; and no person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this act, or which, together with any other interest or interests, as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of mineral leases hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this act. Any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest

forbidden in this act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly, in the transportation of oil from their several wells, or from the wells of other lessees under this act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this act: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That for the purpose of more properly conserving the natural resources of any single oil or gas pool or field, permittees and lessees thereof and their representatives may unite with each other or jointly or separately with others in collectively adopting and operating under a cooperative or unit plan of development or operation of said pool or field, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest, and the Secretary of the Interior is thereunto authorized in his discretion, with the consent of the holders of leases or permits involved, to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases or permits, and to make such regulations with reference to such leases and permits with like consent on the part of the lessee or lessees and permittees in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of such public interest: *And provided further*, That when any permit has been determined to be wholly or in part within the limits of a producing oil or gas field which permit has been included, with the approval of the Secretary of the Interior, in a unit operating agreement or other plan under this act the Secretary of the Interior may issue a lease for the area of the permit so included in said plan without further proof of discovery: *Provided further*, That the Secretary of the Interior is hereby authorized, on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more permittees or lessees in oil or gas leases or permits, with one or more persons, associations, or corporations, whenever in his discretion and regardless of acreage limitations, provided for in this act, the conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby: *And provided further*, That except as herein provided, if any of the lands or deposits leased under the provisions of this act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this act, the lease thereof shall be forfeited by appropriate court proceedings: *And provided further*,

That nothing in this act shall be construed as affecting existing leases within the borders of the Naval Petroleum Reserves or agreements concerning operations thereunder or in relation to the same, but the Secretary of the Navy is hereby authorized, with the consent of the President, to enter into agreements such as those provided for herein, which agreements shall not, unless expressed therein, operate to extend the term of any lease affected thereby.

The new legislation makes provision for cooperative or unit development of a single oil or gas field for the purpose of conserving the natural resources thereof—when determined and certified to be in the public interest; authorizes approval of operating, drilling, or development contracts regardless of acreage limitations—when required by the conservation of natural products or the public convenience or necessity or when the interests of the United States may best be subserved thereby; and confirms by specific authorization current practice in the matter of suspension or modification of the drilling or producing requirements of outstanding oil and gas leases—when deemed to be necessary or in the public interest. Consent of the holders of existing permits or leases is prescribed as a prerequisite to modification of the terms thereof. With such consent, however, the Secretary of the Interior is authorized to establish, alter, change, or revoke drilling, producing, and royalty requirements of leases or permits included in a cooperative or unit plan of development or operation, to make such regulations with reference to such leases and permits as he may deem necessary or proper to secure the proper protection of the public interest; and to suspend or modify the drilling or producing requirements of leases though not included in a cooperative or unit plan. The act further authorizes issuance of leases without further proof of discovery when any permit under an approved unit operating agreement or other plan has been determined to be wholly or in part within the limits of a producing oil or gas field; provides that any lease that has become the subject of an approved cooperative or unit plan of development or operation or other approved plan for the conservation of the oil and gas of a single pool or area shall continue in force at least until the termination of such plan; and requires that cooperative or unit plans of development or operation shall vest authority, limited as therein provided, in the Secretary to alter or modify from time to time the quantity and rate of production under said plan.

(1) Any cooperative or unit plan of operation or development of a single pool or field after discovery of oil or gas has been made must be by agreement of all the Government lessees and permittees or their representatives and the owners or lessees of the lands in private ownership, or by such lessees, permittees and owners or their representatives as will give effective control of the production

of the pool or field. Such an agreement must contain a provision giving authority, limited as agreed upon and therein fixed, to the Secretary of the Interior to alter or modify from time to time the quantity and rate of production under the plan. In general, exercise of authority to modify quantity and rate of production will be limited to modification for the purpose of preventing waste, discouraging unreasonable prices, or accomplishing other objects deemed necessary in the public interest.

(2) Application for a determination by the Secretary of the Interior that a cooperative or unit plan of development or operation of a pool or field is necessary or advisable in the public interest, must be filed with the appropriate oil and gas supervisor, who will consider the same and transmit it to the Director of the Geological Survey with report and recommendations. The application should be in triplicate, and should supply complete and detailed facts and conditions which in the opinion of the applicants go to make the adoption of the plan necessary and advisable in the conservation of the natural resources of the field or pool. Maps showing graphically the boundaries of the area proposed to be included in the plan, the geological features on which the limits of the pool or field are predicated, the location of the wells drilled, and the status of the land holdings in the area, should be furnished. Any other data necessary to present the complete picture of the project should be included. A showing as to all interests—record, operators and royalty interests—is desirable, as is also the names of any other than the applicants who have indicated a purpose to join in the unit plan.

(3) Such a plan may be submitted by lessees, operators or others having substantial interests in the production of the field for determination either before or after the interests therein have completed an agreement to unite in a cooperative or unit plan of operation of development, but no such plan which involves Government permits or leases will become operative until certified by the Secretary of the Interior as provided in the act, nor until the completed articles of agreement, duly executed, have been submitted to the Secretary and formally approved by him.

(4) The provision of section 27, authorizing the Secretary of the Interior to approve operating, drilling, or development contracts without regard to acreage limitations is primarily intended to permit pipe-line companies or other operators to enter into contracts with permittees and lessees in numbers sufficient to justify operations on a large scale for the discovery, development, production, or transportation of oil or gas and to finance the same.

The contract submitted for approval under this provision should be accompanied by a statement showing all the interests held by the

contractor in the field and the proposed or agreed plan of operation or development of the field. All the contracts held by the same contractor in the field should be submitted for approval at the same time, and full disclosure of the project made. There must be complete details furnished in order that the Secretary of the Interior may have facts to make a definite determination in accordance with the provisions of the act, and prescribe the conditions on which approval of the contracts is made.

(5) Leases included in a plan approved by the Secretary of the Interior will automatically continue in force beyond the 20-year period for which issued until the termination of the plan. The approval of operating, drilling, or development contracts under the provisions of section 27, does not constitute an approval of a plan for the conservation of the oil and gas of a single pool or area within the meaning of section 17. The benefits of extension beyond the normal 20-year period is limited to leases which have been included in a field, pool, or areal plan for conservation of oil and gas consented to by effectively controlling interests of the field, pool, area, determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest and formally approved by him as a plan for the conservation of oil and gas.

(6) Where a permit is wholly or in part within the limits of a pool or field included in an approved cooperative or unit plan, a lease may be issued for such area of the permit as is within the limits of the pool or field without further proof of discovery. This provision will result generally in the granting of no further extension of such permit as to the lands in the pool or field, but the permittee will be required to apply for and hold under lease. Such lease will be at a royalty of 5 per cent for not exceeding one-fourth of the area of the permit within the pool or field. The area not included in the lease may be held under and subject to the terms and conditions of the outstanding permit.

(7) Sections 17 and 27, as amended, do not affect existing leases in naval petroleum reserves, but the Secretary of the Navy is authorized, with the consent of the President, to enter into agreements such as those provided for in the act.

C. C. MOORE, *Commissioner.*

I concur:

W. C. MENDENHALL,
Acting Director, Geological Survey.

Approved:

RAY LYMAN WILBUR,
Secretary.

APPLICATIONS BY INDIANS TO MAKE STOCK-RAISING HOME-STEAD ENTRIES**INSTRUCTIONS**

[Circular No. 1253]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 6, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

On May 29, 1931, the Assistant Secretary of the Interior instructed this office in respect to applications to make stock-raising homestead entries by Indians, as follows:

"This will refer to the letter of your office forwarding a telegram from John T. Murphy, Chief of Field Division at Santa Fe, New Mexico, which reads as follows:

Large number Navajo Indians living off reservation on public land desire and contemplate making stock raising homesteads for land occupied and unoccupied by them under existing laws and regulations. Will it be necessary for Indians to pay legal fees and commissions?

"A more recent telegram from Mr. Murphy shows that there are two classes of persons who contemplate making stock raising homesteads on the public domain, viz:

'(1) Those desiring to make entries for 640 acres under what is known as the Indian Homestead Act of July 4, 1884 (23 Stat. 76, 96), as Indians and receive trust patents, and,

'(2) Those desiring to make entries for 640 acres under the stock-raising homestead act of December 29, 1916 (39 Stat. 862), as citizens and receive fee patents.'

"The act of July 4, 1884, *supra*, provides—

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.

"After setting out in your letter that this act has received varying interpretations in your office, the opinion is expressed therein that said act 'should be construed to apply to homestead entries by Indians under the general, the enlarged or the stock raising homestead laws. It does not seem that the benefits of the act should be withheld from the Indians because of modifications in the homestead laws subsequent to the passage of the act.'

"The act of March 3, 1875 (18 Stat. 402, 420), contains the first legislation extending the benefits of the general homestead law to Indians. It is provided in sections 15 and 16 of said act—

SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, *and the acts amendatory thereto* [italics supplied], 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 interest he may hold or claim by reason of his former tribal relations shall be void.

SEC. 16. That in all cases in which Indians have heretofore entered public lands under the homestead law, and have proceeded in accordance with the regulations prescribed by the Commissioner of the General Land Office, or in which they may hereafter be allowed to so enter under said regulations prior to the promulgation of regulations to be established by the Secretary of the Interior under the fifteenth section of this act, and in which the conditions prescribed by law have been or may be complied with, the entries so allowed are hereby confirmed, and patents shall be issued thereon; subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance.

"For quite a long period the act of 1884 was construed as being intended to amend or supersede the act of 1875; among other things, that an entryman under the act of 1875 who had not fully complied with all the requirements of that act prior to the act of 1884, might complete his entry and receive patent under the later act, which provides that the land shall be held in trust for 25 years. But the Supreme Court in the case of *United States v. Hemmer* (241 U. S. 379), held that the act of 1884 did not repeal, amend, nor modify the provisions of the act of 1875; that all of the provisions of the two acts stand together and remain in force; and that the act of

1884 did not have the effect to extend from 5 years to 25 years the restriction on alienation of the land acquired by an Indian homesteader under the act of 1875.

“However, as to policy it is clear that the act of 1884 was but a continuation of that established by the act of 1875; that is, to protect the Indians against a hasty and improvident alienation of their lands, both acts relating to the same subject. Bearing this in mind, the provision in the act of 1875, ‘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*,’ [italics supplied], taken in connection with the provisions of the act of 1884, would seem to support the position of your office as follows: ‘It does not seem that the benefits of the act should be withheld from the Indians because of modifications in the homestead laws subsequent to the passage of the act.’ (1884.) Therefore, it is the view of the department that the persons above referred to as class 1 may be permitted to make stock-raising homesteads under the act of July 4, 1884, as Indians, and under the provisions of which they are to receive trust patents and be relieved from the payment of fees and commissions.

“As to class 2 of persons above referred to who desire to make stock-raising homestead entries under the act of 1916 as citizens and receive fee patents, they must proceed as such as distinguished from Indians, subject to compliance with the conditions, qualifications, and requirements of said act as amended, including the payment of regular fees and commissions.”

Accordingly, when an Indian presents an application to make a stock-raising homestead entry for vacant unreserved surveyed public land, under the act of July 4, 1884, without payment of fee and commissions, and presents a certificate from the Commissioner of Indian Affairs that he is entitled as an Indian to make entry under the said act of 1884, you will allow the entry, if all else appears regular under the homestead laws, without requiring the payment of fee and commissions, and forward the same with your regular returns and report the allowance on your abstract of entries.

If the Indian desires to make entry under the act of 1884, but does not present the required certificate from the Indian Office, you will suspend the application for a period of 60 days, to allow the Indian to procure the certificate. If not filed within the time allowed, you will reject the application subject to the usual right of appeal.

If the Indian applicant applies to enter under the stock-raising act as a citizen, paying the usual fee and commissions, you will treat the application precisely the same as applications by citizens not Indians.

C. C. MOORE, *Commissioner*.

WALTER N. BUSH, HUGH C. WOOD, ATTORNEY IN FACT (ON REHEARING)

Decided June 13, 1931

FOREST LIEU SELECTION—DESERT LAND—REGISTER—JURISDICTION—APPEAL—RES JUDICATA.

Action of a register rejecting a forest lieu selection because of conflict with a pending desert-land application, when the selection should have been merely suspended to await final determination of the latter, becomes effective by acquiescence, and failure on the part of the selector to appeal from that officer's action making the rejection final defeats all rights that he might otherwise have secured had he proceeded further.

EDWARDS, *Assistant Secretary*:

There has been filed a motion for rehearing of the department's decision of April 6, 1931, in the above-entitled case.

Although the facts were quite fully set forth in the decision complained of, a brief review of them will here be made.

Hugh C. Wood filed forest-lieu selection for the E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4, T. 2 S., R. 31 E., M. D. M., California, and other lands, on July 1, 1930. The register rejected the selection list as to said E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4 for the reason that the land was included in a pending desert-land application. After due service of notice of the rejection no appeal or other action in regard thereto was taken and due publication of the allowed selections was made. On October 13, 1930, one of the parties in interest wrote to the register that he wanted additional time of 30 days to select 80 acres in lieu of said E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4. He was advised by the register that an amendatory selection for 80 acres could not be received because the papers in the case had been forwarded to the General Land Office, but that there seemed to be no reason why he should not file a new selection for 80 acres if he so desired.

By decision of December 16, 1930, the Commissioner of the General Land Office directed that the parties in interest be allowed 60 days from notice in which to amend by including 80 acres in place of the said E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4 which had been eliminated by the rejection and failure to appeal. It was also stated that in the event of failure to amend or to appeal within the time allowed the selection would be considered as it stood and the excess base of 80 acres would be considered as waived.

On March 16, 1931, resident counsel for the parties in interest filed an appeal, contending that there was error of law in rejecting the selection in part in place of suspending the same pending disposition of the desert-land application; and that there was error of law in requiring that the entire base of selection be exhausted within 60 days or any other specified period of time.

In the decision complained of the department took the view that it was too late to raise any question regarding the rejection in so far as the segregative effect of the original selection was concerned. It was conceded that the register erred in rejecting in place of suspending the selection as to said 80 acres. It was held that there would be no waiver of base by failing to amend or to file a new application within 60 days. It was also stated (the former desert-land application having been finally rejected on March 20, 1931)—

Should the selector now desire to apply for the said 80-acre tract, his application would be junior and subordinate to any intervening application by an adverse claimant. In the absence of such intervening application, no reason is seen why amendment of the selection may not be allowed to include that tract.

The movent calls attention to the fact that no application to amend or new application or selection for the said 80 acres can now be filed because the records of the General Land Office show that by Executive order of October 27, 1930, this land was withdrawn from entry for the purpose of protecting the water supply of the city of Los Angeles; that on January 21, 1931, it was reserved from entry under the provisions of section 24 of the act of June 10, 1920 (41 Stat. 1063), in connection with Power Project No. 1060 upon the application of Gilbert G. Humphrey; and that by the act of March 4, 1931 (46 Stat. 1530), the land was withdrawn from settlement, location, filing, entry, or disposal under the land laws of the United States for the purpose of protecting watersheds now or hereafter supplying water to the city of Los Angeles and other cities and towns in the State of California.

It is contended in the motion that the register's rejection was in excess of his jurisdiction and was therefore void and of no effect even in the absence of appeal therefrom; that the right of the selector vested at the time of the selection, provided that the desert-land application should be rejected and that all should be found regular; and that no act of the selector or failure of action on his part had the effect of divesting him of his equitable title to the land.

There can be no question of the jurisdiction of the register. In the case of *Santa Fe Pacific Railroad Company* (33 L. D. 161, 163), it was held that local land officers had the power to reject an application to select lands under the exchange provisions of the act of June 4, 1897 (30 Stat. 36), where the lands covered thereby were not subject to such selection because embraced within a pending railroad indemnity selection list. It was stated—

The local officers are not mere perfunctory clerks, whose sole duty is to receive, register, and forward applications for public lands. They are local agents of your office to see that the rules and regulations for administration of the public lands are complied with, and their intelligent and impartial attention to

duty greatly facilitates the business of your office, enabling applicants more speedily to transact their business by avoiding defects and irregularities which tend to confusion and delay. Power to reject an improper application is incident to their office under the laws for organization of the land department, and needs not to be conferred specially in each set of instructions under every new act relating to disposals of public lands, but is expressly provided for in the circular of July 7, 1902 (31 L. D. 372), governing selections under the act of June 4, 1897, in force at the time this application was presented at the local office.

The register should not have rejected the selection as to the acres involved but should have suspended the same. But when the register had made the rejection final for want of appeal by the selector that became a closed incident. In the case of *McKernan v. Bailly* (17 L. D. 494), the department held (syllabus)—

The failure of a pre-emptor to appeal from the rejection of a declaratory statement defeats all rights that might have been secured thereunder by proper diligence; and such failure to appeal is not excused by the fact that the title to the land was erroneously believed to not be in the United States.

In support of the contention that equitable title vested in the selector by the mere filing of the selection the attorney cites the cases of *Payne v. Central Pacific R. R. Company* (255 U. S. 228) and *Payne v. New Mexico* (255 U. S. 367). But the department is not impressed by the argument. The attorney himself virtually admits the incorrectness of his reasoning when he at another point states—

As a matter of fact, even if the register had not rejected the selection as to this tract, he would have had no right to include it in the published notice, as it was still included in the pending desert-land application of Sturtevant.

No selection of the land could be allowed when it was filed and of course no equitable title could vest in the selector.

The withdrawals which were made after the selector had acquiesced in the rejection and before any appeal was filed from the later action of the Commissioner, especially the withdrawal under the act of June 10, 1920, must be considered in the light of an intervening and adverse appropriation.

The motion for rehearing is

Denied.

WALTER N. BUSH, HUGH C. WOOD, ATTORNEY IN FACT

Petition for exercise of supervisory authority of the Secretary in departmental decision of June 13, 1931 (53 I. D. 395), denied by Assistant Secretary Edwards, October 19, 1931.

MINING CLAIM—PATENT PROCEEDINGS—REPUBLICATION OF NOTICE

Instructions, June 20, 1931

MINING CLAIM—ADJUSTMENT TO SURVEY—REPUBLICATION OF NOTICE.

Where in the adjustment of the boundaries of placer claims to conform to legal subdivisions of the Government survey, the claims as so adjusted collectively include land not described in the posted and published notice of application for patent, republication must be made.

Assistant Secretary Edwards to the Commissioner of the General Land Office:

Herewith I return, without approval, your letter 1082021 "E" FM, pertaining to applications for patents to oil shale claims, Denver 040132, 041633, 040514. In effect, this letter advises the claimants that where the department consents to an adjustment of the boundaries of the placers to conform to legal subdivisions, and the placers as so adjusted collectively include land not described in the posted and published notice of application for patent, the entry may be amended to the adjusted description and patent issued accordingly without republication.

The strip of land in this case added to the land as described in the said notice, may be insignificant in value and extent; the probability of the existence of any one entitled to adverse the application may be remote, nevertheless, it is believed that the department has no discretion under the mining law to waive a departure from the principle very clearly embodied therein that the land which the department has authority to patent is identically that which the world was given notice in the posted and published notices.

In *Silver King Coalition Mines Company v. Conkling Mining Company* (255 U. S. 151, 162), the Court said—

* * * The notice is jurisdictional. *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 259. Obviously therefore a patent can convey only the claim as to which notice has been given. A notice of an application for a patent of land determined by monuments cannot give priority to a junior location, such as was that of the Conkling Mining Company, in respect of land outside the monuments, to which adjoining claimants had no notice that the patent would purport to extend.

The fact that in that case lodes and not placers were involved does not militate against the principle announced. Likewise, the department has ruled that "Lands not included in the application for patent, the published and posted notice and other proceedings, can not be embraced in the entry." *Roman Placer Mining Claim* (34 L. D. 260).

I, therefore, suggest a change in your letter, stating that republication is necessary under the mining law and will be required.

PAYMENT FOR DAMAGES TO PRIVATE PROPERTY RESULTING FROM CONSTRUCTION OF WORKS ON FORT HALL INDIAN RESERVATION IRRIGATION PROJECT

Opinion, July 10, 1931

FORT HALL INDIAN IRRIGATION PROJECT—DAMAGES—CONSTRUCTION COSTS.

The damages referred to in the act of February 4, 1931, authorizing the construction of the Michaud division of the Fort Hall Indian Reservation irrigation project, are the damages incident to the construction of irrigation works and become a part of the construction cost similar to the charges for the purchase or condemnation of land required for flowage purposes or for canal rights of way.

FORT HALL INDIAN IRRIGATION PROJECT—DAMAGES—STATUTES.

The act of February 4, 1931, authorizing the construction of the Michaud division of the Fort Hall Indian Reservation irrigation project, does not supersede the act of February 20, 1929, with reference to the payment for damages, except that payment of specific damages enumerated in the former act must be made from the appropriation authorized by that act.

DAMAGES—TORTS—OFFICERS—SUITS AGAINST THE GOVERNMENT.

The Government can not, except with the consent of Congress, be sued for the torts, misconduct, misfeasance, or laches of its officers or employees, but it is liable for property taken or injured by its employees for public use.

IRRIGATION PROJECT—DAMAGES.

The Government, like a private irrigator, is not an insurer against damages resulting from the construction, operation, or maintenance of irrigation works.

IRRIGATION PROJECT—DAMAGES—SECRETARY OF THE INTERIOR—OFFICERS.

The Authority granted to the Secretary of the Interior by the act of February 20, 1929, is sufficient to permit that officer to liquidate by agreement and to pay claims for damages caused to owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works.

RIGHT OF WAY—IRRIGATION WORKS—DAMAGES.

The Government may allow compensation for damage to crops and improvements on lands within a right of way reserved under the act of August 30, 1890, resulting from the construction of irrigation works, but no allowance will be made for damage to the land.

FINNEY, Solicitor:

You [Secretary of the Interior] have submitted to me for opinion questions propounded by the Commissioner of Indian Affairs in his letter of June 24, 1931, to you. The questions are stated as follows:

1. Whether or not the act of February 20, 1929 (45 Stat. 1252), is applicable to the Fort Hall Indian Reservation project, Idaho, in view of sections 2 and 10 of the act of Congress of February 4, 1931 (46 Stat. 1061), authorizing the

construction of the Michaud division of the Fort Hall Indian Reservation project?

2. Whether or not under the provisions of the act of Congress of February 20, 1929 (45 Stat. 1252), the conditions under which these damages resulted are such as to create a legal liability on the part of the irrigation project.

3. Does the act of February 20, 1929, *supra*, make the Secretary of the Interior or other Government officials insurers of the water users of the Indian irrigation project so that payment for damages, even though they come under the class *damnum absque injuria*, is obligatory on the Secretary of the Interior if satisfactory agreements have been reached as to the amount of damages sustained?

The first question propounded has no relation to the second and third questions except that they all involve the authority given the Secretary of the Interior to settle damage claims by agreement.

The act of Congress authorizing the construction of the Michaud division of the Fort Hall Indian Reservation irrigation project provides in section 2 as follows:

The Michaud division shall bear its equitable share of the cost of the present existing works and for the development of that part of the water supply that will be used on the lands of the Michaud division. Of the cost of the existing system \$362,500 is hereby allocated to the Michaud division, as provided in section 3 hereof in consideration of the share of the developed water supply hereby allocated to that division and of its share of the existing works. The said \$362,500 is hereby authorized to be used in completing the distributary system of the Fort Hall and Gibson divisions, including the rebuilding of the Tyhee siphon; the completion of storage facilities, and the enlargement and straightening of the Blackfoot River Channel, and including payment of damages for the benefit of the entire irrigation project.

Prior to the enactment of this law the Fort Hall Indian irrigation project had been under construction for a number of years and there had been developed a large storage dam on the Blackfoot River capable of storing 410,000 acre-feet of water to be used on land 25 to 50 miles west of the reservoir on the Snake River in Idaho. The stored water on its way to the irrigated land passes down the channel of the Blackfoot River for a distance of perhaps 40 miles. The stream bed is tortuous and in the irrigation of lands in the Fort Hall and Gibson units, comprising some 70,000 acres, it was discovered that lands adjacent to the Blackfoot River were flooded on certain occasions and damage was done to the property. The stored water required for the Fort Hall and Gibson units and also on the Michaud division must traverse the same course down the Blackfoot River to the irrigable lands.

With this information at hand the legislation set forth in the act of Congress approved February 4, 1931, *supra*, provided for payment of damages due to the enlargement and straightening of the Blackfoot River Channel for the benefit of the *entire* irrigation project.

The damages referred to in this act are damages incident to the construction of irrigation works. The payment is for a purpose similar to that made in the purchase or condemnation of land required for flowage purposes or for canal right of way. It becomes a part of the construction cost of the project works.

It is my conclusion that the Michaud Act does not supersede the act of February 20, 1929, *supra*, except that payment of specific damages enumerated in the Michaud Act must be made from the appropriation made pursuant to the authorization of such act.

Turning our attention to questions Nos. 2 and 3, it may be stated that these questions are hypothetical. A reading of the files and records, however, discloses that the questions are based upon 11 claims which arose in 1929 due to operation and maintenance of the Wapato project, Washington. Instead of expounding the law in reply to the questions submitted, I shall content myself by showing what action should be taken upon the claims that have been submitted by the field office of the Wapato project to the Commissioner of Indian Affairs.

The claims may be listed as follows:

	Amount claimed	Contracted
Henry Benzel.....	\$150.00	\$50.00
H. B. Miller.....	479.00	259.00
Jasper McDonald.....	500.00	225.00
J. Faucher.....	100.00	100.00
A. Z. Moore.....	408.00	210.50
F. D. Wirt.....	25.00	25.00
Lorne and Ralph Campbell.....	968.00	402.50
W. C. Kennedy.....	348.00	162.00
J. L. Meikle.....	2,347.60	500.00
Thomas B. Toumey.....		52.50
Congdon Orchards (Farmer).....	241.00	176.00
		2,162.50

The first seven claims are due to damages resulting from a break in the Wapato Canal on April 26, 1929, alleged to be due to burrowing animals. The next two claims arise from a break in Lateral No. 3 on June 30, 1929, which choked a pipe drain, causing the water to back up and flood certain crops belonging to the claimants. The next claim is for damages to trees on a right of way taken by the United States which was reserved under the act of August 30, 1890 (26 Stat. 371, 391), and the last claim arises from the destruction of bees, beehives, and other equipment caused by a fire which escaped from maintenance men while they were burning weeds on the canal banks. All of these claims, except the one for the destruction of trees upon the canal right of way, must be con-

sidered in connection with the act of February 20, 1929 (45 Stat. 1252), which is quoted in full—

That the Secretary of the Interior be, and he is hereby, authorized to pay out of the funds available for the Indian irrigation projects for damages caused to owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works of such projects and which may be compromised by agreement between the claimant and the Secretary of the Interior, or such officers as he may designate: *Provided*, That the total of any such claims authorized to be settled as herein contemplated shall not exceed 5 per centum of the funds available for the project under which such claims arise during any one fiscal year.

This act is the counterpart of similar provisions carried in Interior Department bills since 1915 for payment of damages due to survey, construction, operation and maintenance under the act of June 17, 1902 (32 Stat. 388).

On the recommendation of the Bureau of Reclamation the department has issued regulations covering the determination of facts and decision upon payment of claims arising under these laws which authorize the Secretary of the Interior to pay damages providing he can agree with the claimant as to the amount of damages which shall be paid.

Injuries upon which such claims are based may be due to (a) actual negligence of Government employees or to (b) unavoidable causes in which the element of negligence does not appear. A general rule of law is that, without the consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasance, or laches of its officers or employees. *Bigby v. United States* (188 U. S. 400). Another general rule of law is that the Government is liable for property taken or injured by its employees for public use. *United States v. Lynah* (188 U. S. 445); *Bothwell v. United States* (254 U. S. 231).

In addition to the two acts above referred to there is a provision of law authorizing the adjustment of claims involving negligence of not exceeding \$1,000. Act approved December 28, 1922 (42 Stat. 1066). These acts relate exclusively to damages to property and do not cover damages to persons.

The degree of care and watchfulness exercised by employees of the United States should be such that it may not be said in any case that negligence existed to such an extent that an individual would have been liable under like circumstances. The courts have held generally that a private irrigator is liable for damages due to negligence or unskillfulness in the construction or in the operation and maintenance of his irrigation works. He must keep the works

in good repair and is liable for all damages caused by failure to do so. He is not an insurer against damage without reference to the question of negligence, but is liable only when negligent. He must prepare to meet only such emergencies as may reasonably be expected to arise in the course of nature. He is not required to prepare for storms of such unusual violence as to surprise cautious and reasonable men. If in the actual operation of a canal sudden and unexpected damage results by reason of some hidden defects which could not reasonably have been foreseen, he would not be liable. *Sutliff v. Sweetwater Water Co.* (182 Cal. 34; 186 Pac. 766). After discovery of the defect, however, and after reasonable opportunity to correct it, if he continue to use the canal system his liability for subsequent damages would be the same as if he had known of the defect at the time of construction. *Tormey v. Anderson-Cottonwood Irrigation District* (53 Cal. App. 559; 200 Pac. 814); *Howell v. Big Horn Basin Colonization Co.* (14 Wyo. 14; 81 Pac. 785); *Watts v. Billings Bench Water Association* (Mont.) (253 Pac. 260).

The field officers in charge of the Wapato project have secured the benefit of well prepared briefs of the irrigation district attorney.

The only facts submitted in the case are those accumulated by the employees of the Government. Two years have elapsed since these claims arose. It is possible that a jury would decide that the claimants for damages due to breaks in the canals and to the escaping fire were entitled to recover. A judge would probably submit the matter to a jury.

A history of this legislation, authorizing settlement of damages by contract is well within my personal knowledge. Congress was asked to pass the legislation in 1915 in order that small claims could be adjusted. Experience had shown that in the ordinary operation and maintenance of an irrigation project injury would result to the property of farmers on the project due to unforeseen cause or to carelessness and negligence on the part of laborers and subordinate employees. Until the enactment of the first legislation in 1915 there was no authority vested in the Secretary of the Interior to consider or pay any claim which sounded in tort. All of the claims outlined fall in that class.

A very strict construction of the law might permit the Secretary to refuse to approve the payment of any of the claims submitted. There is evidence that the section of the Wapato Canal where the break occurred is subject to damage by burrowing animals. The records also indicate that great care had been exercised by men on the project to overcome the natural conditions which made carrying

of water in the canal a dangerous operation. That their efforts have been reasonably successful is evidenced by the fact that the only claims which have been considered for payment are those arising in a space of four days in 1929.

The claim for the destruction of bees and beehives indicates that the maintenance men were engaged in their lawful operations of burning the weeds on the canal banks. It has been found that this is the most efficient method of destroying the weeds and maintaining the ditches so that they will carry the quantity of water for which they were designed. Reasonably prudent men in carrying on this work might expect that a sudden change of wind would occur, but this is a necessary risk incident to the work. The sudden change of wind is an act of God, and if the men were proceeding with due care in the handling of the fire and the wind changed and the fire escaped, the damages could be liquidated by agreement between the Secretary of the Interior and the claimant.

The actual settlement of the claims and the approval of the vouchers are administrative acts. However, in my opinion the authority granted to the Secretary of the Interior by the act of February 20, 1929, *supra*, is sufficient to permit the payment of the 10 claims submitted.

Turning my attention now to the payment for damages to trees destroyed on a right of way reserved under the act of August 30, 1890, *supra*, it can be stated that the reservation provided by this act is sufficient, if strictly construed, to prevent the recovery of any sum of money for improvements upon the right of way required for the construction of the irrigation works.

It has not been the policy of the department to adhere strictly to the legal possibilities, and it has decided in an opinion of April 24, 1919 (47 L. D. 158), that the landowner may be compensated for the actual value of his improvements on the right of way, but no allowance can be made for the resulting damages to the land. In this case the canal right of way cut the small farm into two nearly equal parts and made it much more expensive and difficult to irrigate. Payment was authorized for the crops growing on the right of way and rejected as to claim for resultant damage to the land. When the United States utilizes a right of way reserved under the act of August 30, 1890, *supra*, it may pay for the value of the crops and the improvements on the land taken.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

ACQUISITION OR USE OF PUBLIC LANDS BY STATES, COUNTIES,
OR MUNICIPALITIES FOR RECREATIONAL PURPOSES—PRIOR
CIRCULARS SUPERSEDED

INSTRUCTIONS

[Circular No. 1085]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 16, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of June 14, 1926 (44 Stat. 741), the Secretary of the Interior is authorized to make preliminary withdrawals for classification and sell or lease unreserved nonmineral public lands to States, counties, or municipalities for recreational purposes. The acquisition of such lands by States as recreational sites through exchange is also authorized. The act of April 13, 1928 (45 Stat. 429), extended the provisions of the said act of June 14, 1926, to reverted Oregon and California Railroad and Coos Bay Wagon Road grant lands under certain conditions.

1. *Lands subject to withdrawal.*—Unreserved nonmineral public lands not desired for Federal administration, surveyed or unsurveyed, exclusive of those situated in the Territory of Alaska, may be withheld from appropriation in aid of the classification and disposition or use authorized under a proper petition therefor. Any withdrawal for such purpose will, however, be subject to valid existing appropriations under the public land laws legally maintained. The land must be surveyed before title may be acquired. The duration of these withdrawals will depend upon the good faith shown by the petitioners in prosecuting the necessary preliminary work in connection with the recreational project involved.

The aforesaid act of April 13, 1928, is applicable only to such former Oregon and California Railroad and Coos Bay Wagon Road grant lands reverted in the United States under the acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as have been reported or classified under said act of 1916 as either timber or agricultural in character, lands classified thereunder as chiefly valuable for water-power sites and reserved for that purpose being excepted from the operation thereof. The lands subject to the recreational law as amended are hereinafter referred to as reverted lands.

2. *Petitions.*—Petitions for withdrawal should be addressed to the Secretary of the Interior and filed in duplicate in the proper district land office, should describe the land desired withdrawn by legal sub-

divisions, if surveyed, or by metes and bounds in conformity with the regulations approved November 3, 1909 (38 L. D. 287), if unsurveyed, and contain a statement that the area is unoccupied and non-mineral and chiefly valuable for recreational purposes.

Such petitions should set forth the plan of recreational development proposed, giving details as to any contemplated improvements, state whether acquisition is sought through exchange or purchase, or whether a lease is desired. They should contain proof or a citation of the authority of the official or officials signing the petition to act for the State or county or counties when a State or county recreational project is involved, or, when a municipal project is concerned, of the authority of the signing official or officials to act for the town or city, and, under the terms of the law, all such petitions must be ratified by the proper State or county officers. In event that acquisition is sought through exchange, the petition of the State seeking the exchange should contain a description of the State land proffered as a basis therefor.

Upon receipt in the proper district land office of a duly executed petition, the lands described therein will be temporarily segregated from disposition pending action thereon by the Secretary of the Interior. The register will assign a current serial number to the petition and at once forward the same, in duplicate, to the General Land Office with a report as to the status of the affected land as shown by the records of his office. Pending and during such temporary segregation, applications to enter or select any affected lands may be received and suspended. If the withdrawal applied for be not made as to the lands covered by suspended applications, the same will be allowed in the absence of other objection. If the petition for withdrawal be approved, all suspended applications will be rejected.

3. *Action by chiefs of field divisions.*—In event of favorable action upon such a petition, the proper chief of field division will, if necessary, be instructed to cause an examination to be made to determine whether the withdrawn land is nonmineral and chiefly valuable for recreational purposes and will thereafter submit report to the Commissioner of the General Land Office. The report submitted will also contain information as to the comparative values of the public and State lands involved when an exchange is proposed. In order that the department may determine a proper charge in case purchase or lease is desired the chief of field division will ascertain and report what is a fair and reasonable price per acre or annual rental for the area, taking into consideration the purpose for which it is to be used. The Commissioner of the General Land Office will forward such reports to the Secretary of the Interior with recommendation.

When application is filed for any revested lands classified or reported as timber in character the district cadastral engineer at

Portland, Oregon, will be instructed to submit report and recommendation thereon, and the chief of field division may also, if necessary be directed to report upon the land.

4. *Applications.*—The Commissioner of the General Land Office will notify the register of the district land office in which the land is situated of the findings of the department and the register will then advise the State, county, or municipality which has requested the withdrawal thereof. Thereafter, in event the land has been found subject to use or acquisition under the law, such State, county, or municipality may file formal application for the land in the district land office. No fixed forms of applications have been prepared, but these instructions should be followed as nearly as possible.

The application of a State for an exchange should follow in so far as applicable the form used by the State in making application for indemnity for losses in its school grant where the land tendered as a basis has been granted to the State by the United States for school or other purposes and has thereafter remained the property of the State. A deed of relinquishment of the base land must be executed by the proper State officer or officers and should be submitted for examination without being recorded. Such deed must be accompanied by a certificate of the officer, or officers, of the State charged with the care and disposal of the land reconveyed, showing that same has not been alienated or contracted to be alienated in any way by the State, that the said land is not in the possession of, or subject to the claim of any third party under any law or permission of the State, and that except for such conveyance the title of the State is unimpaired, together with a duly authenticated abstract of title showing that at the time the deed was executed the title was in the State making the conveyance and that the land was free from encumbrance of any kind. If the exchange is found satisfactory, the deed will be accepted and the selection approved, subject to the recording of the deed, which will be returned for that purpose, and to its retransmittal accompanied by a supplemental abstract brought down to show such recordation and that the land is free from all liens or encumbrances and supplemental certificate by the State of nonencumbrance. Only such lands as are within or contiguous to the former limits of the Oregon and California Railroad and Coos Bay Wagon Road grants may be accepted in exchange for such grant lands, and all lands and timber secured by virtue of any such exchange shall be disposed of in accordance with the terms and provisions of the revestment act of June 9, 1916 (39 Stat. 218).

There should be tendered with the application of a State, county, or municipality to purchase or lease lands withdrawn under this law the amount fixed as the purchase price or as annual rental

therefor. Such application should contain proof or a citation of the authority of the official or officials signing the application to represent the State, county, or municipality in the transaction. No sale of revested lands of class 3, agricultural lands, shall be made for less than \$2.50 per acre and of lands of class 2, timberlands, for less than the appraised value of the timber thereon. Publication of notice of applications to purchase will be required in accordance with the practice governing sales of public lands. In so far as applicable, the general regulations of the department relating to the execution of contracts will be followed in the preparation of leases issued. Any revested lands leased for recreational purposes shall thereafter be exempt from any further claim by the county wherein such leased lands are located for payment of moneys, the equivalent of taxes, as authorized under the act of July 13, 1926 (44 Stat. 915). During the existence of any such lease, the timber on the land will not be sold.

Applications presented under these regulations not in substantial conformity with the requirements herein made and not accompanied by the prescribed proof will be rejected subject to appeal or curing the defect where possible.

5. *Reservations and conditions.*—Any patent or lease issued to a State, county, or municipality will contain the mineral reservation and forfeiture provision prescribed by the law. No provision is made at this time for development of the reserved mineral deposits in lands to be conveyed or leased under the terms of this law, and until such regulations shall have issued the reserved deposits will not be subject to disposition.

6. *Proceeds.*—The proceeds from sales or leases under the general law will be credited to Sales of Public Lands except in those instances in which other provision has been made in the laws authorizing disposition of the land. All moneys received from or on account of any revested lands leased or sold or acquired through exchange under the amendatory act shall be applied in the manner prescribed by the acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179).

Former Circular No. 1085 of July 23, 1926 (51 L. D. 505), that part of Circular No. 1122 of April 27, 1927, relating to recreational sites (52 L. D. 135), and Circular No. 1156 of June 18, 1928 (52 L. D. 407), are hereby superseded and all instructions in conflict herewith are modified to conform hereto.

C. C. MOORE, *Commissioner.*

Approved:

Jos. M. DIXON,

First Assistant Secretary.

[PUBLIC—No. 386—44 STAT. 741]

AN ACT To authorize acquisition or use of public lands by States, counties, or municipalities for recreational purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized, in his discretion, to withhold from all forms of appropriation unreserved nonmineral public lands, which have been classified by him as chiefly valuable for recreational purposes and are not desired for Federal administration, but only after a petition requesting such withdrawal has been signed and filed by the duly constituted authorities of the States or of the county or counties within which the lands are located, and to accept title on behalf of the United States from any States in and to lands granted by Congress to such State, and in exchange therefor to patent to such State an equal quantity or value of surveyed land so withheld and classified, any patent so issued to contain a reservation to the United States of all mineral deposits in the land conveyed and of the right to mine and remove same, under regulations to be established by the Secretary, and a provision for reversion of title to the United States upon a finding by the Secretary of the Interior that for a period of five consecutive years such land has not been used by the State for park or recreational purposes, or that such land or any part thereof is being devoted to other use: *Provided*, That lands so withheld and classified may, in the discretion of the Secretary of the Interior, be also held subject to purchase and may be purchased by the State or county in which the lands are situated, or by an adjacent municipality in the same State, at a price to be fixed by the Secretary of the Interior, through appraisal or otherwise, subject to the same reservation of mineral deposits and the same provision for reversion of title as are prescribed for conveyances to the States in consummation of exchanges hereby authorized, or be held subject to lease and may be leased to such States, counties, or municipalities for recreational use at a reasonable annual rental for a period of twenty years, with privilege of renewal for a like period. And the Secretary of the Interior is hereby authorized to make all necessary rules and regulations for the purpose of carrying the provisions of this Act into effect: *Provided further*, That the Secretary of the Interior shall for each year make a report to Congress giving in detail a list of lands exchanged under the provisions of this Act.

Approved, June 14, 1926.

[PUBLIC—No. 274—45 STAT. 429]

AN ACT Extending the provisions of the Recreational Act of June 14, 1926, to former Oregon and California Railroad and Coos Bay Wagon Road grant lands in the State of Oregon

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act of Congress approved June 14, 1926 (Forty-fourth Statutes at Large, page 741), entitled "An Act to authorize acquisition or use of public lands by States, counties, or municipalities for recreational purposes," are hereby extended to former Oregon and California Railroad grant lands revested in the United States under the Act of June 9, 1916 (Thirty-ninth Statutes at Large, page 218), and to former Coos Bay Wagon Road grant lands reconveyed to the United States under Act of February 26, 1919 (Fortieth Statutes at Large, page 1179): *Provided*, That any lands leased hereunder shall thereafter be exempt from any further claim by the county wherein such leased lands are located for payment of moneys, the equivalent of taxes, as authorized under

the Relief Act of July 13, 1926 (Forty-fourth Statutes at Large, page 915): *Provided further*, That only such lands as are within or contiguous to the former limits of said grants may be accepted in an exchange hereunder for such former grant lands and that all lands and timber secured by virtue of any such exchange shall be disposed of in accordance with the terms and provisions of said Revestment Act of June 9, 1916: *And provided further*, That no sales of lands classified under said Act of June 9, 1916, as of class 3, or agricultural lands, shall be made for less than \$2.50 per acre, and of lands of class 2, or timberlands, for less than the appraised value of the timber thereon.

SEC. 2. That all moneys received from or on account of any lands leased or sold hereunder shall be applied in the manner prescribed by the aforesaid Acts of June 9, 1916, and February 26, 1919.

Approved, April 13, 1928.

BIG PINE MINING CORPORATION

Decided July 20, 1931

MINING CLAIM—LODE CLAIM—PLACER CLAIM—DISCOVERY.

A lode discovery will not sustain a placer mining location.

MINERAL LANDS—MINING CLAIM—LIMESTONE.

Lands containing limestone or other minerals, which under the conditions shown in the particular case can not probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law.

DIXON, *First Assistant Secretary*:

The Big Pine Mining Corporation has appealed from a decision of the Commissioner of the General Land Office of May 18, 1931, which affirmed the local register in holding its mineral entry, Los Angeles 045160, for cancellation. The application for patent made March 6, 1928, embraced the following named and described placer locations alleged to be valuable on account of limestone deposits, viz, Little Johnnie, covering lots 3, 4, 5, and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 6, T. 3 N., R. 7 W.; Big Pine, covering lots 1 and 2, Sec. 1, T. 3 N., and S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 36, T. 4 N., R. 7 W.; Eagle, covering lots 2 and 4 Sec. 1, T. 3 N., and S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 36, T. 4 N., R. 8 W., S. B. M.; all within the Angeles National Forest.

Upon consideration of the testimony adduced at a hearing held November 19, 1929, in protest proceedings brought by the Forest Service, the Commissioner concurred in the findings of the local register, that the limestone on the claims had no commercial value; that \$500 had not been expended in labor and improvements upon or for the benefit of each or any of the claims; that the land is chiefly valuable for recreational purposes. Claimant on appeal contends these conclusions are not warranted.

It appears without dispute in the testimony that these claims in controversy are laid over mountain ridges with steep sides that rise about 2,500 feet above the desert plain and are adjacent to the Los Angeles Park and a subdivision known as Wrightwood; that a belt of limestone of varying width, amounting to several hundred feet in places, traverses the entire length of the Eagle and Big Pine locations and extends for a considerable distance into the Little Johnnie claim. According to the analyses presented by claimant's witnesses, the calcium carbonate content of the limestone deposit varies from 25.8 per cent on the Little Johnnie to 96.6 per cent on the Big Pine claim. The analysis offered by the Government showed considerable less percentage in calcium carbonate. The testimony on both sides agrees that the lime deposit is in lode formation within well-defined granite walls, and that the method of transportation of the deposit from the claims would be by aerial tramway, estimated to cost, by a Government's witness, at \$40,000 per mile; by claimant's witness, \$20,000 per mile.

The opinions of the Government's witnesses differed with those of claimant's witnesses as to whether the deposit in its situation could be mined, transported and marketed at a profit, and as to whether a reasonably prudent person would expend any money in such a venture.

Witness Lamb for the Government testified that he had been engaged in quarrying limestone in the locality for a number of years and sold thousands of tons of lime rock, and was acquainted with the deposit in question; that the value of a limestone deposit in the locality depended upon its accessibility and that the mining thereof was not economically feasible, because the cost of production and transportation of the deposits would exceed the sale value of the lime obtained therefrom. Roberts, a mining engineer, testified that he at one time had this deposit investigated to see if it could be leased or purchased but stopped all negotiations for the reason that he thought the transportation costs too high. He also testified to the effect that he made a calculation as to the feasibility of developing a similar deposit on NE $\frac{1}{4}$ Sec. 2, T. 3 N., R. 7 W. (adjacent land), either in 1923, 1924, or 1925, and found there would be required 11 $\frac{1}{2}$ miles of aerial tramway and that the cost was prohibitive. Testimony offered by the Government, which is not denied, is to the effect that limestone deposits are widely distributed in the region of these claims, and much of it more accessible. These witnesses and the mineral examiner for the Forest Service also testified that the land was more valuable for recreational than any other purpose. Witness Lamb testified that he was an official land appraiser, and valued the land in Los Angeles Park at \$3,000 per acre, and if a road were

extended therefrom to the land in question, the latter would be worth from \$300 to \$600 per acre for such purposes. For the claimant, Sampson, a mining engineer, and Baverstock, mineralogist and metallurgist, expressed the opinion to the effect that the quality and quantity of limestone on the claims was such as to justify investment for its development, but both are shown to have had no experience in developing, mining or selling limestone deposits, and advance no particular reason as a basis for their opinion. Lands containing limestone or other mineral, which under the conditions shown can not probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law. *Morrill v. Northern Pacific R. R. Co.* (30 L. D. 475, 479); *Cataract Gold Mining Co. et al.* (43 L. D. 248, 254); *United States v. Bullington*, On Rehearing (51 L. D. 604, 607). Considering all the evidence, the department believes that the land is not valuable for its limestone deposits, and therefore not disposable under the mining law. Furthermore, it is undisputed that the deposit is in lode formation. A lode discovery will not sustain a placer location. *Cole v. Ralph* (252 U. S. 286, 295); *Duffield v. San Francisco Chemical Company* (205 Fed. 480, 485); unreported departmental decision of September 14, 1927, in the case of *United States v. Borax Company*. The locations must, therefore, be declared void.

In view of the conclusion reached, it is unnecessary to consider the conflicting evidence as to the value of the labor and improvements made upon the claims. The Commissioner's decision canceling the entry is affirmed, and the claims are adjudged of no validity.

Affirmed.

DISTRIBUTION OF ROYALTIES ON OIL AND GAS PRODUCED FROM A HOMESTEAD ALLOTMENT OF A DECEASED CREEK INDIAN

Opinion, July 20, 1931

CREEK INDIAN LANDS—HOMESTEAD ALLOTMENT—HEIRS—DEEDS—DOCTRINE OF RELATION.

Approval by the Secretary of the Interior of a deed by an heir conveying his interest in the homestead of a deceased Indian allottee is retroactive and the deed becomes effective as of the date of its execution and delivery.

CREEK INDIAN LANDS—HOMESTEAD ALLOTMENT—HEIRS—MINORS—DESCENT AND DISTRIBUTION.

Where a Creek Indian died possessed of a homestead allotment, leaving heirs in general and also issue born since March 4, 1906, the interests of the heirs in general are present vested interests in the fee in remainder, the beneficial use or enjoyment of which is postponed until the termination of the special estate created by the proviso to section 9 of the act of May 27, 1908.

CREEK INDIAN LANDS—HOMESTEAD ALLOTMENT—OIL AND GAS LANDS—LEASE—ROYALTIES—HEIRS—MINORS.

Where issue born since March 4, 1906, joined with other heirs of a deceased Creek Indian allottee, with the approval of the Secretary of the Interior, in leasing the homestead for oil and gas upon a royalty basis, for the benefit of them all, the special estate created by section 9 of the act of May 27, 1908, attached to the royalties, such issue being entitled to the interest or income therefrom until April 26, 1931, but leaving the principal, like the homestead, to go to the heirs in general on the termination of the special estate.

CREEK INDIAN LANDS—HOMESTEAD ALLOTMENT—HEIRS—OIL AND GAS LANDS—DEEDS—ROYALTIES—MINORS.

A deed executed and delivered by an heir in general of a deceased Creek Indian allottee, conveying his interest in the oil, gas and other minerals underlying the homestead, with the approval of the Secretary of the Interior, subject to the special estate in the homestead of minors born since March 4, 1906, operated as of its date to transfer to the grantee all of his title and interest in and to such minerals including his interest or share in the royalties thereafter accruing and on hand on April 26, 1931, the date of termination of the special estate.

COURT DECISION CITED AND DISTINGUISHED.

Case of *United States v. Hinkle* (261 Fed. 518), distinguished.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion upon a question arising out of the distribution of some \$55,600 representing royalties on oil and gas produced from the homestead allotment of Mable Walker, deceased one-half blood Creek allottee, described as the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 29, T. 8 N., R. 8 E., Oklahoma.

Mable Walker, the allottee, died intestate May 7, 1921, leaving a husband, Jeff Walker, and three children, Johnson Walker, an adult, and Turner and Mose Walker, both minors, born subsequent to March 4, 1906. Under the applicable law of descent, the husband took one-third and each of the children two-ninths in the homestead allotment of the decedent subject to the estate especially given to the two children born since March 4, 1906, by the second proviso to section 9 of the act of May 27, 1908 (35 Stat. 312).

March 23, 1923, Johnson Walker, one of the heirs, enrolled as a one-quarter blood Creek, executed a deed conveying to John W. Willmott and B. D. Lack his interest in the oil, gas and other minerals underlying this homestead allotment. The deed was duly delivered to the grantees and by them presented to the Secretary of the Interior and approved by him on April 2, 1924 "subject to the special estate in the homestead of minors born since March 4, 1906, under the proviso to section 9 of the act of May 27, 1908 (35 Stat. 312)." Certain information presented to the department by the superintendent for the Five Civilized Tribes after the execu-

tion, delivery and approval of the deed to Willmott and Lack tended to show that the consideration of \$500 was inadequate and that the deed was obtained under circumstances of a questionable nature. Demand for reconveyance was accordingly made upon the grantees and upon their failure so to do, suit was instituted by the United States in the District Court for the Eastern District of Oklahoma to cancel the deed. The trial court handed down a decree canceling the deed but this decree was reversed by the Circuit Court of Appeals, 8th Circuit, that court holding that the deed having been taken by the grantees and approved by the Secretary of the Interior in subordination to the rights of the minors born after March 4, 1906, was valid. (See *Willmott v. United States*, 27 Fed. (2d) 277.) No appeal was taken, the decision has become final, and the validity of the deed is not now open to question.

At the time of the death of the allottee, Mable Walker, there was an outstanding oil and gas lease upon the land given by the allottee with the approval of the Secretary of the Interior in 1919. This lease was later surrendered and a new or substitute lease taken with the Secretary's approval, in the execution of which all the parties in interest joined. Production of mineral from the land under this lease began in the fall of 1923, and royalties thereon in the amount aforesaid have been collected and are now held by the superintendent for the Five Civilized Tribes. The estate especially given to the minors born since March 4, 1906, by the second proviso to section 9 of the act of May 27, 1908, *supra*, terminated under the provisions of that enactment on April 26, 1931, and the grantees of Johnson Walker have accordingly made demand upon the superintendent for the payment to them of the share of such royalties which their grantor, the said Johnson Walker, would have been entitled to in the absence of a conveyance.

Under these circumstances the question upon which I am asked to rule is whether the deed referred to became effective upon the date of its execution, March 23, 1923, or upon the date of its approval by the Secretary of the Interior, April 2, 1924, or upon April 26, 1931, the date of termination of the special estate of the minors born after March 4, 1906.

It is apparent, I think, without argument that the date upon which the Secretary gave his approval to the deed in controversy can not be regarded as the effective date of the deed. Under the rule laid down by the Supreme Court of the United States in *Pickering v. Lomax* (145 U. S. 310), the approval of the Secretary related back and took effect as of the time of the execution and delivery of the deed, no rights of third parties having intervened in the meantime. See also *Lomax v. Pickering* (173 U. S. 26); *Anchor Oil Co. v. Gray*

(257 Fed. 277, affirmed 256 U. S. 519). This view is fortified in the instant case by the provisions of the deed itself which in express terms declares that it shall convey not only the grantors' interest in the oil, gas and other minerals underlying the land but also "all interest in all my right, title and estate under and by virtue of any oil and gas mining lease, or other mineral lease, now or hereafter existing upon said premises, or any part thereof, including all rents and royalties accrued." All of the royalties now in the hands of the superintendent for the Five Civilized Tribes have accrued since the execution and delivery of the deed and the intention of the grantor as clearly expressed in the deed is that his interest therein should pass by the conveyance.

The Commissioner of Indian Affairs suggests, however, that the deed should be regarded as having no effect until the expiration of the special estate of the minors on April 26, 1931, urging in support of that position that to give effect to the instrument prior to that time is to permit the heir to bargain away his right to receive royalties under an existing lease, which he states is contrary to the views expressed by the Circuit Court of Appeals, 8th Circuit, in *United States v. Hinkle* (261 Fed. 518). The Commissioner further suggests that the deed might be construed as an executory contract to assign or a covenant to convey a remainder in expectancy contingent as to future use and enjoyment upon termination of the special estate of minors born since March 4, 1906. This latter suggestion of the Commissioner appears to be predicated largely upon the theory that the heir, Johnson Walker, inherited no present interest in the land under consideration which he could convey prior to April 26, 1931, with or without the approval of the Secretary of the Interior and it may, therefore, be well to refer briefly to the relative rights of the heirs in general and the owners of the special estate under the second proviso to section 9 of the act of May 27, 1908, *supra*, which reads—

That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

Fortunately we are not without a judicial interpretation of the foregoing statute by our highest court. In *Parker v. Riley* (250 U. S. 66), the Supreme Court of the United States had occasion to consider and define the respective rights of the heirs in general and the owner of the special estate in the homestead of an allottee who died leaving a child born since March 4, 1906. The homestead was under lease for oil and gas mining purposes and the question arose as to whether the child born after March 4, 1906, was entitled to all the royalties accruing during her life but not beyond April 26, 1931, or if not to the royalties to the income or interest therefrom during that period. The court after pointing out that the death of the allottee did not remove the restrictions from the homestead and that the rights of the heirs, including the one born after March 4, 1906, in the royalties were the same as in the homestead, held that the after-born child was entitled to the use of the royalties for her support, that is to say, the interest or income that might be obtained by properly investing them during the period to April 26, 1931, leaving the principal like the homestead to go to the heirs in general upon termination of the special estate of the after-born heir. In so holding, however, the Supreme Court pointed out very clearly that the fee to the homestead descended to the heirs who took the same subject only to the rights of the after-born heir as defined therein. This was also recognized in *Willmott v. United States*, *supra*, and the interest of the heir, Johnson Walker, in the homestead here involved was defined by that court in the following language (p. 279):

* * * Under section nine, however, all that Johnson Walker could convey was an undivided two-ninths interest in the fee in remainder; and so applying the section the Commissioner and the Secretary accepted and approved the deed, with the acquiescence of the grantees, as a conveyance of the undivided remainder interest.

Under the foregoing decisions, it is obvious that the interest inherited by Johnson Walker was not a mere expectancy or even a contingent remainder but a present vested interest in the fee in remainder, the beneficial use or enjoyment of which was postponed until the termination of the special estate of the issue born since March 4, 1906. The trend of the decisions to be sure is that the interest of the heir, regardless of degree of blood, is restricted and inalienable without action by the Secretary of the Interior as provided in the statute. See *Privett v. United States* (256 U. S. 202); *United States v. Martin* (45 Fed. (2d) 836); *Grisso v. Milsey* (230 Pac. 883); *Kimbrow v. Harper* (238 Pac. 840); *Gage v. Harlin* (250 Pac. 82). But where the required action by the Secretary is had there can be little doubt as to the validity of the transaction. *Willmott v. United States*, *supra*.

The approval given by the Secretary of the Interior to the Johnson Walker deed constitutes the important distinction between this and the case of *United States v. Hinkle* (261 Fed. 518), relied upon by the Commissioner of Indian Affairs in asserting the absence of any right in Walker "to bargain away his right to receive royalties under an existing lease." In the *Hinkle case* a deed had been executed on January 5, 1916, by Sophie Robert, nee Cash, full blood heir of Wallace Cash, a deceased full blood Choctaw Indian, conveying to one J. S. Mullen the allotment of the decedent, "together with all claims and demands for rents, revenues and profits of whatsoever kind and description that have theretofore accrued from said land to J. S. Mullen, his grantees or lessees." The deed was not approved by the Secretary of the Interior but was approved by the county court acting as a Federal agency under the provisions of section 9 of the act of May 27, 1908. The validity of the conveyance as to the land appears to have been conceded, the principal question presented involving the right of the United States to require an accounting for the mineral rents and profits from 1904 to 1916, the date of the conveyance, during which period the land was restricted, it being contended that such right of accounting was cut off by the release given in the deed. The court held that the exclusive custody and control of the mineral rents and profits during the restricted period were vested in the Secretary of the Interior and that the deed which had not received his approval was not effective to release the grantee and other defendants from the claim of the United States on behalf of the grantor to the mineral rents and profits taken from the land during the period of restrictions. That decision, which is in harmony with the uniform holdings of the courts that transactions in violation of the Federal restrictions are void, does not hold that the attempted release would not have been validated by the approval of the Secretary of the Interior and the decision contains nothing to support the contention made by the Commissioner that Johnson Walker could not, with the approval of the Secretary, transfer his interest in the land under consideration together with his right to share in the mineral rents and profits therefrom. To the contrary the same court in *Willmott v. United States*, *supra*, said in upholding the validity of this identical deed (p. 280)—

* * * The only contention is, that restrictions against alienation of Johnson Walker's undivided interest in the homestead were not first removed by order of the Secretary as contemplated by section one of the Act of May 27, 1908 (35 Stat. 312); and that the order made by the Secretary on April 2, 1924, approving the conveyance, was not sufficient for that purpose. No ruling to that effect by any court or administrative officer, applicable to the facts here,

has been called to our attention. The Secretary was given plenary power over the subject matter. The contention deals with form and not substance. We think the action of the Secretary in his order of April 2, 1924, if action by him was necessary, served the purpose of the proviso in protecting the rights of the surviving heir born since March 4, 1906. * * * Moreover, the plain purpose of the proviso is to protect the rights of such an heir by prohibiting the conveyance, without the Secretary's approval, of the estate for life or years—to protect that estate for him. A conveyance of the remainder does not interfere with that purpose.

In view of the foregoing, I am of the opinion that the deed executed and delivered by Johnson Walker on March 23, 1923, as approved by the Secretary of the Interior operated to transfer as of that date to the grantees, Willmott and Lack, all of the said Johnson Walker's right, title, and interest in and to the minerals underlying the land described therein, including his interest or share in the royalties subject to distribution on April 26, 1931, the date upon which the special estate of the issue born since March 4, 1906, terminated.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

**TAXATION OF ENTRIES WITHIN RECLAMATION PROJECTS AND
OF HOMESTEADS WITHIN INDIAN IRRIGATION PROJECTS
PRIOR TO ISSUANCE OF FINAL CERTIFICATE—CIRCULAR NO.
1176, AMENDED**

REGULATIONS

[Circular No. 1257]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 22, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

The act of June 13, 1930 (46 Stat. 581), amends the act of April 21, 1928 (45 Stat. 439), to read as follows:

That the Act entitled "An act to permit taxation of lands of homestead and desert-land entrymen under the Reclamation Act," approved April 21, 1928, is amended to read as follows: "That the lands of any homestead entryman under the Act of June 17, 1902, known as the Reclamation Act, or any Act amendatory thereof or supplementary thereto, and the lands of any entryman on ceded Indian lands within any Indian irrigation project, may, after satisfactory proof of residence, improvements, and cultivation, and acceptance of such proof by the General Land Office, be taxed by the State or political subdivision thereof in which such lands are located in the same manner and

to the same extent as lands of a like character held under private ownership may be taxed.

Sec. 2. The lands of any desert-land entryman located within an irrigation project constructed under the Reclamation Act and obtaining a water supply from such project, and for whose land water has been actually available for a period of four years, may likewise be taxed by the State or political subdivision thereof in which such lands are located.

Sec. 3. All such taxes legally assessed shall be a lien upon the lands and may be enforced upon said lands by the sale thereof in the same manner and under the same proceeding whereby said taxes are enforced against lands held under private ownership; but the title or interest which the State or political subdivision thereof may convey by tax sale, tax deed, or as a result of any tax proceeding shall be subject to a prior lien reserved to the United States for all due and unpaid installments on the appraised purchase price of such lands and for all the unpaid charges authorized by law whether accrued or otherwise. The holder of such tax deed or tax title resulting from such tax shall be entitled to all the rights and privileges in the land of an assignee of such entryman on ceded Indian lands or of an assignee under the provisions of the Act of June 23, 1910, as amended, or of any such entries in a Federal reclamation project constructed under said Act of June 17, 1902, as supplemented or amended.

Sec. 4. If the lands of any such entryman shall at any time revert to the United States for any reason whatever, all such liens or tax titles resulting from assessments levied after the date of this amendatory Act upon such lands in favor of the State or political subdivision thereof wherein the lands are located, shall be and shall be held to have been, thereupon extinguished; and the levying of any such assessment by such State or political subdivision shall be deemed to be an agreement on its part, in the event of such reversion, to execute and record a formal release of such lien or tax title.

Section 1 of the act of June 13, 1930, amends the act of April 21, 1928, so as to make it applicable to the lands of any entryman within any Indian irrigation project on ceded Indian lands, after satisfactory proof of residence, improvement, and cultivation, under the homestead law, and acceptance of such proof by the General Land Office, as well as to lands of reclamation homestead entrymen under the act of June 17, 1902, after final proof and compliance with the ordinary requirements of the homestead law have been made and accepted by the Commissioner of the General Land Office.

Section 3 of said act of June 13, 1930, provides that the title or interest conveyed by tax sale, tax deed, or as a result of any tax proceeding shall be subject to a prior lien reserved to the United States for all due and unpaid installments on the appraised purchase price of the lands and for all the unpaid charges authorized by law whether accrued or otherwise.

By section 4 of said act of June 13, 1930, a new section has been added to the act of April 21, 1928. In said section 4 Congress has conditioned its consent to the taxation, by the State or political subdivision thereof, of lands of homestead and desert-land entrymen

under the reclamation act, and of homestead entries within irrigation projects on ceded Indian lands prior to the issuance of final certificate thereon by providing, with respect to liens or tax titles resulting from assessments levied after June 13, 1930, on such entered lands, for the extinguishment of all such liens or tax titles if the lands of the entryman should at any time revert to the United States for any reason whatever; for the execution and recording by the proper State authorities of a formal release of such lien or tax title in the event of such reversion, and that "the levying of any such assessment by such State or political subdivision shall be deemed to be an agreement on its part, in the event of such reversion, to execute and record a formal release of such lien or tax title." The matter of conferring upon the States or political subdivisions thereof permission to tax such land and upon [what] terms rests exclusively with Congress. Following the plain provisions of said section 4 it is held, with reference to liens or tax titles resulting from assessments levied after June 13, 1930, that on the reversion of the entered land to the United States by relinquishment or cancellation for any cause, or for any reason whatever, all such liens or tax titles are thereupon extinguished and the land is restored to the United States free of all such liens or tax titles.

Circular No. 1176 (52 L. D. 511), is amended as set forth herein.

The purpose of the law is to permit taxation by States or political subdivisions thereof, prior to the issuance of final certificate, of lands embraced in reclamation homestead entries, and in desert-land entries within irrigation projects constructed under the reclamation act and obtained a water supply from a reclamation project, and of homestead entries on ceded Indian lands within any Indian irrigation project.

Homestead entries under the reclamation act and homestead entries on ceded Indian lands within any Indian irrigation project are made subject to such taxation after the submission of satisfactory final proof under the ordinary provisions of the homestead law and upon the acceptance thereof by the Commissioner of the General Land Office, and desert-land entries located within irrigation projects constructed under the reclamation act and obtaining a water supply from such project at any time after water from said project has been actually available for the irrigation of the lands in the entry for four years.

Taxes legally so assessed by the State or political subdivision thereof under the acts of April 21, 1928, and June 13, 1930, constitute a lien upon the land, subject to the prior lien of the United States for all due and unpaid installments of the appraised purchase price of the lands and for all the unpaid charges authorized

by law, whether accrued or otherwise, and such lien may be enforced by the State or political subdivision thereof by the sale of the lands under proceedings had as in case of lands held in private ownership.

No tax assessed or levied, if any, prior to April 21, 1928, by the State or political subdivision thereof, is validated by either the act of April 21, 1928, or June 13, 1930.

In case of the sale for unpaid taxes of lands included in homestead entries on ceded Indian lands within any Indian irrigation project, or of a reclamation homestead entry, or a desert-land entry within an irrigation project constructed under the reclamation act and obtaining its water supply from such a project, the holder of the tax deed or tax title resulting from such tax sale shall be entitled to all the rights and privileges, as to such homestead entries, of an assignee homestead entryman on such ceded Indian lands or of an assignee under the provisions of the act of June 23, 1910 (36 Stat. 592), and section 2 of the act of March 28, 1908 (35 Stat. 52), as to desert-land entries, only when application for recognition as assignee has been filed in accordance with the governing regulations (see 47 L. D. 417, as to homestead entries, and 50 L. D. 443, 453, as to desert-land entries), and also satisfactory proof of such tax title and showing that the period of redemption has expired. After acceptance by the Commissioner of the General Land Office of such evidence as satisfactory, the name of such assignee shall be endorsed upon the records of the General [Land Office] and local offices and such assignee shall be entitled to the rights of one holding a complete and valid assignment under said act of June 23, 1910, or the act of March 28, 1908, *supra*, and such assignee may at any time thereafter receive patent with lien reserved (in proper cases) under the act of August 9, 1912 (37 Stat. 265), as amended and extended, for all unpaid installments, including, in proper cases, all sums due or to become due to the United States on account of the purchase price of the land, upon submitting satisfactory proof of reclamation required by the act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof, and in case of desert-land entries, the claimant upon submitting satisfactory final proof under the act of March 3, 1877 (19 Stat. 377), as amended by the acts of March 3, 1891 (26 Stat. 1095), section 5 of June 27, 1906 (34 Stat. 519, 520), June 6, 1930 (46 Stat. 502), and June 13, 1930 (46 Stat. 581), and making the payments required by said acts, shall receive patent with lien reserved in proper cases. The holder of the tax deed or tax title, applying for recognition as assignee, as aforesaid, must submit proper evidence of tax title. As the laws governing the sale of lands for taxes are not the same in the several States affected by this act and as in some instances more than one method of conducting

sales is permitted, and as the period in which redemption may be made varies, it is not thought advisable to formulate specific rules governing evidence or proof of tax titles. However, the following general rules must be observed: If the tax title is based on court proceedings, a copy of the decree or order of the court under the seal of the clerk of the court must be furnished. The certificate of the clerk of the court should make specific reference to the laws governing such sale and show that the period of redemption has expired without redemption having been made, citing the statute. If the sale was made by the State or political subdivision thereof or under other than court proceedings, the certificate of the officer conducting such sale, under the seal of his office, must be furnished. This certificate should show that all steps necessary to legalize such sale were taken, citing the statutes, and should show that the period of redemption has expired without redemption being made.

In cases of application for exchange of reclamation homestead entries under said act of June 17, 1902, in whole or in part (of lands not sold at tax sale), or application to amend, where the proof as to residence, improvements, and cultivation in support of the base land has been accepted as satisfactory (see subsection M. of section 4 of the act of December 5, 1924, 43 Stat. 672, 701, and section 44 of the act of May 25, 1926, 44 Stat. 636, 647, and the regulations under said act of May 25, 1926, 51 L. D. 525, 52 L. D. 193), there must be furnished in addition to the usual evidence a certificate by the proper State or county tax officer showing that there are no unpaid taxes or tax sales charged against the land or tax deeds outstanding and that the accrued taxes for the current year have been provided for. In this connection reference is made of course to assessments or taxes, if any, levied by the State since April 21, 1928, under said acts of April 21, 1928, and June 13, 1930. On allowance of such exchange or amendment, you will promptly notify the proper State or county authorities thereof, to the end that the base lands, in the event that they have been legally assessed, may not be further taxed by the State or political subdivision thereof unless and until they again acquire a taxable status. The notice should describe the base lands, title to which has reverted to the United States, together with the name of the party surrendering title to the land to the United States.

Except in cases of application to exchange, or amend, as set forth in the next preceding paragraph, whenever relinquishments of entries or parts of entries involving taxable lands are filed with the register, he will note the same upon his records as in ordinary cases, and in cases of the cancellation, in whole or in part, of entries involving taxable lands, the register will note such cancellation upon his records and promptly advise the State or county authorities thereof

to the end that the lands involved may be formally relieved of taxes, liens, or tax titles, if any, levied or outstanding thereagainst pursuant to said act of June 13, 1930, between June 13, 1930, and the date when the relinquishment was filed or cancellation made. Such notice should describe the land involved and give the name of the entryman or claimant thereof as shown by the records of the Land Department. The notice to the tax authorities should be substantially in the form shown at the end of these instructions. The release of the lien or tax title should be duly executed and recorded by the proper State or county authorities, after which with evidence of its recordation it should be filed with the register and thereupon forwarded to the General Land Office. A copy of the notice issued to the State or county tax authorities should be transmitted to the Commissioner of the General Land Office on the issuance of the notice to the State.

Failure to notify the State or political subdivision thereof of reversion of title to the base land in cases of application for exchange, or for amendment, or in cases of relinquishment or cancellation of any entry does not mean that such base land or land covered by the relinquished or canceled entry still retains its taxable status, if any such it ever had under said act of April 21, 1928, as originally enacted or as amended, as aforesaid, inasmuch as under law lands owned by the United States and not in a taxable status are not, under any circumstances, subject to taxation by the State or political subdivision thereof.

The register of the local land office will, upon application therefor, furnish the proper taxing authorities lists of reclamation homestead entries upon which final proof has been submitted and accepted under the ordinary provisions of the homestead law, and of desert-land entries where water from a Federal irrigation project has been available for four years, as provided in instructions of October 8, 1907 (36 L. D. 194), and of April 16, 1910 (38 L. D. 575). Circular No. 838 of July 8, 1922 (49 L. D. 168), stands revoked as of November 27, 1928. (52 L. D. 511.)

Neither said act of April 21, 1928, nor the amendatory act of June 13, 1930, enlarges, abridges, or impairs the act of August 11, 1916 (39 Stat. 506), in re irrigation districts in their relation to the public lands of the United States and both the act of April 21, 1928, as amended, and said act of August 11, 1916, may have harmonious operation within their proper spheres. For regulations under said last mentioned act see 52 L. D. 155.

The holder of the tax deed or tax title resulting from the tax sale mentioned in section 3 of said act of April 21, 1928, and of said act of June 13, 1930, should promptly give notice in writing of his

claimed interest in the land to the register of the local land office within whose district the involved land is situated, in accordance with Rule 98 of the Rules of Practice (51 L. D. 547, 563), whereupon he will be entitled to full notice of all action against the entry as provided by said rule.

C. C. MOORE, *Commissioner.*

I concur:

P. W. DENT,
Acting Commissioner, Bureau of Reclamation.

I concur:

C. J. RHODES,
Commissioner of Indian Affairs.

Approved:

Jos. M. DIXON,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE

DISTRICT LAND OFFICE

(Place)

(Date)

SIR: Pursuant to the regulations under the act of June 13, 1930, (46 Stat. 581), in the matter of State taxation of lands of homestead and desert-land entrymen under the reclamation act and of homesteads on ceded Indian lands within Indian irrigation projects before issuance of final certificate, you are hereby notified that _____, serial No. _____, in the name of _____ (Kind of entry)

_____ was canceled _____

(State whether by relinquishment or by decision and if by relinquishment state date of filing of relinquishment).

dated _____ as to the following described land _____ Sec. _____, T. _____, R. _____, _____ Mer., and said land has reverted to the United States. Under the provisions of section 4 of said act of June 13, 1930, all liens or tax titles resulting from assessments levied after June 13, 1930, under authority of said act, on the land that has reverted to the United States are extinguished. You will, accordingly, execute and record a release of such liens or tax titles and forward such release to this office with evidence of its recordation.

Very respectfully,

Register.

NOTE.—In issuing said notice, it is important that the register shall accurately describe therein the particular legal subdivisions which have reverted to the United States, together with the date when said reversion took place.

**GRANT TO SAN FRANCISCO FOR THE HETCH HETCHY WATER
SUPPLY AND POWER PROJECT**

Opinion, July 28, 1931

RIGHT OF WAY—RAILROAD RIGHT OF WAY—RESERVOIR SITE.

The grant of December 19, 1913, to the city and county of San Francisco of public lands for development and use of the Hetch Hetchy water supply and power project is similar to the grant of March 3, 1875, of rights of way and station grounds for railroad purposes, and of March 3, 1891, for reservoir sites, that is, a base or qualified fee not subject to interference by subsequent disposals.

RIGHT OF WAY—OIL AND GAS LANDS—LEASE.

In the administration of the act of May 21, 1930, which empowers the Secretary of the Interior to lease for the extraction of oil and gas lands covered by a right of way, it would not be regarded as consistent with the public interest to grant a lease which would interfere with the Hetch Hetchy water supply and power project grant of December 19, 1913.

*Acting Secretary Dixon to Mr. M. M. O'Shaughnessy, City Engineer,
San Francisco, California:*

Reference is made to your [Mr. M. M. O'Shaughnessy] letter of May 27, 1931, and prior correspondence relative to certain claims in conflict with the grant to the city and county of San Francisco under the act of December 19, 1913 (38 Stat. 242), for development and use of the Hetch Hetchy water supply and power project. You call attention to the provisions of the said act and express the opinion that it contemplates two distinct classes of property, namely (1) rights of way for aqueducts, power lines, etc., and (2) lands for reservoirs, dams, etc.; that section 5 of the act provides for other disposal only of lands affected by the rights of way, subject to such easements, while the "lands" were granted in fee and are not subject to other disposal.

The department is of opinion that the quality of the grant in respect to these two classes is the same, and that the estate so granted is a base or qualified fee in both cases. The provisions for forfeiture relate to the whole project or any part thereof, and upon certain conditions the Secretary of the Interior may declare "forfeited all rights of the grantee herein as to that part of the works not constructed," and suit may be brought for the purpose of "procuring a judgment, declaring all such rights to that part of the works not constructed to be forfeited to the United States."

It is believed that the nature of this grant is the same as that provided by the act of March 3, 1875 (18 Stat. 482), granting rights of way and station ground for railroad purposes, and by the act of March 3, 1891 (26 Stat. 1095, 1101), for reservoir purposes. The legal effect of such grants was fully considered in *Windsor Reservoir and Canal Co. v. Miller* (51 L. D. 27, 305). You will find there

cited many decisions to the effect that such grants can not be disturbed by subsequent disposals. The decision (51 L. D. 305), also expressly overruled the case of *Homer E. Brayton* (31 L. D. 364), which allowed a soldiers' additional homestead entry to be made for a tract covered by a reservoir site approved under the act of March 3, 1891. These later rulings are affected, however, by the more recent act of May 21, 1930 (46 Stat. 373), which empowers the Secretary of the Interior to lease for the extraction of oil and gas lands covered by a right of way, but otherwise they express the present attitude of the department. In the administration of the act last cited it would not be regarded as consistent with the public interest to grant a lease which would interfere with the purpose of the grant under the act of December 19, 1913.

You refer to certain entries for lands covered by reservoir sites selected by the city and county of San Francisco under the act of December 19, 1913, and ask what may be done to clear the title and to maintain a clear title to other such lands granted under that act. As above pointed out, the subsequent entries are inoperative to affect the title of the city and county. They gave no rights whatever as to the lands covered by prior grants to the city and county. At most, they constitute mere clouds on the title, and the department does not feel that the circumstances would justify the expense of litigation in the absence of active interference with the rights of the city and county under the grant.

The statute of limitations appears to be an effective obstacle against proceedings to cancel the patent issued to Fred B. Musante for lot 19, Sec. 31, T. 1 S., R. 16 E., M. D. M., April 24, 1923, on his timber and stone entry. Perhaps some adjustment of the purchase price could be made if he would apply for elimination from his patent that subdivision, the greater portion of which was approved to the city and county.

In respect to lots 9 and 15, said Sec. 31, approved to the State on September 27, 1928, under an indemnity school selection, perhaps a satisfactory adjustment could be arranged upon application of the State or its transferees.

Regarding lot 3, Sec. 1, T. 2 S., R. 14 E., M. D. M., embraced in the stock-raising homestead claim of Andrew Peterson, this tract will be eliminated from the claim because of prior grant of that subdivision to the city and county.

You are further advised that in the future adverse claims will not be allowed in cases where an entire subdivision or a substantial portion thereof is covered by grant to the city and county under the act of December 19, 1913, unless in a clear case the project would not be injured by granting an oil and gas lease under the terms of the act of May 21, 1930.

DISTRIBUTION OF NET PROFITS OF THE SHOSHONE POWER PLANT

Opinion, July 29, 1931

STATUTES—COURTS—OFFICERS.

It is solely the province of the courts to determine the constitutionality of an act of Congress, and until an act is judicially held to be unconstitutional it is the duty of the executive officers of the Government to administer the law as written.

POWER PROJECT—IRRIGATION DISTRICTS—SHARE OF PROFITS—STATUTES.

In view of the special act of March 4, 1929, which specifically prescribes for the distribution of the net proceeds derived from the operation of the Shoshone power plant constructed by the United States at the Shoshone Dam, Wyoming, the general provision contained in subsection 1, section 4, of the act of December 5, 1924, relative to the distribution of the accumulated net profits derived from the operation of project power plants has no application to that project.

FINNEY, *Solicitor*:

The Shoshone Irrigation District of the Shoshone project, Wyoming, has filed with the department a statement in the nature of a claim for credit for a share of the net power revenues from the Shoshone power plant constructed by the United States at the Shoshone Dam, Wyoming. The power plant was built on the Shoshone project primarily for the purpose of developing electrical energy to use in operating draglines for carrying on the extensive drainage construction program designed to relieve seepage conditions on the Garland division (now included in the Shoshone Irrigation District), the Frannie division (now included in the Deaver Irrigation District), and also for construction of the diversion dam and irrigation works of the Willwood division of the project.

While this work was in progress, some electricity was sold from the power plant to municipalities, and for use in the oil fields nearby. The revenues from power amount to approximately \$75,000 per year with a prospect that the revenue will be materially increased after the newly-installed 4,000 kilowatt unit is in operation.

The act of December 5, 1924 (43 Stat. 672), provides, by subsection I, section 4—

That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

While this act was in force, a repayment contract was made between the United States and the Shoshone Irrigation District, and it is the claim of the district that its proportionate share of the cost of the power plant was included in the contract obligation assumed by the district. It is the claim of the Bureau of Reclamation that at the time the repayment contract was made, July 31, 1926, the power plant was a losing venture, and the district representatives did not want an interest in it and declined to agree to repay any of the cost of the power system. It appears from the records and books of account of the Bureau of Reclamation that the cost of power plant and electrical system was carried as a separate item and was not charged to the Shoshone District or any other division of the project, and that the power revenues were credited against cost of constructing the power plant and the electrical system.

The district carried on negotiations with the United States for amending the repayment contract of July 31, 1926, so that it would charge the district with its share of the cost of the power plant, but these negotiations were not fruitful. While they were being carried on, the act of March 4, 1929 (45 Stat. 1562, 1592), was passed, which provided, among other things, as follows:

That the net revenues from the operation of the Shoshone power plant shall be applied, first, to the repayment of the construction cost of the power system; second, to the repayment of the construction cost of the Shoshone Dam; and third, thereafter such net revenues shall be covered into the reclamation fund.

With this directory legislation on the statute books, the district requests and demands that the Secretary of the Interior give it credit, under subsection I, section 4 of the act of December 5, 1924, *supra*, for net revenues from power, notwithstanding such legislation, the district claiming that the act is unconstitutional and, in effect, deprives the district of a vested right in the power plant and the net revenues arising from the sale of power.

It is not the province of the executive officers of the Government to determine the constitutionality of an act of Congress. If this duty falls to any one, it is preferably upon the judicial branch of the Government, and until an act of Congress is held by the courts to be unconstitutional, it generally devolves upon the department to follow the law as written. This means that net revenues from power received from the operation of the Shoshone power plant should continue to be credited as required by the act of March 4, 1929, *supra*.

It is suggested by the district that the department report favorably on a bill proposed to be introduced in Congress that would amend the act of 1929 if legislation is required. Whether the department will oppose or support legislation that may be proposed by the interested

parties must be deferred until the legislation is before it for consideration.

It is my opinion that the act of March 4, 1929, *supra*, prevents the department from applying any of the net power revenues of the Shoshone power plant to a reduction of the annual charges due from the Shoshone Irrigation District to the United States, in accordance with the provisions of subsection I, section 4 of the act of December 5, 1924.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

RIPARIAN RIGHTS IN MEANDERED LAKE BEDS IN THE STATE OF IOWA

Opinion, August 5, 1931

LAKES—RIPARIAN RIGHTS—JURISDICTION.

The United States does not retain the ownership of the beds of streams or other bodies of water, whether navigable or nonnavigable, after the marginal uplands have been disposed of without reservations or restrictions, and the extent of riparian rights is governed by local law. *Hardin v. Jordan* (140 U. S. 371).

LAKES—RIPARIAN RIGHTS—PATENT—IOWA.

In the State of Iowa a riparian owner takes title only to the water's edge of streams or other bodies of water, whether navigable or nonnavigable and Government patents for marginal lands follow the State rule and convey no land under a nonnavigable lake.

Assistant Secretary Edwards to Hon. L. J. Dickinson, Des Moines, Iowa:

Reference is made to your [Hon. L. J. Dickinson] letter of July 22, 1931, in regard to titles to the beds of nonnavigable, meandered lakes in the State of Iowa. You suggest that a conclusion could be reached either by legislation or by action on the part of the Federal Government to be presented on a stipulation of facts and tried on briefs.

The records show that several bills have been introduced in Congress with a view to granting to the State of Iowa all of the right, title and interest of the United States in the lands within the meander lines, as originally surveyed, of the lakes within the State, the beds of nonnavigable bodies of water not passing to the riparian owners in that State. These bills were not enacted into law.

There have been several inquiries recently in regard to the legal ownership of such lands, all of them more or less indefinite as to the names, areas and locations of the lakes or former lakes involved.

Since the case of *Hardin v. Jordan* (140 U. S. 371), this department has followed the doctrine that the Federal Government does not own the beds of streams or other bodies of water, whether navigable or nonnavigable, after it has disposed of the marginal uplands without reservations or restrictions, and that the extent of riparian rights is governed by local law. Therefore this department could not consistently recommend suit whereby the Government would make claim of legal title to the beds of meandered nonnavigable lakes in Iowa, where the uplands were properly surveyed and disposed of.

The court had ample opportunity to rule upon that question in the case of *Marshall Dental Manufacturing Company v. Iowa* (226 U. S. 460), but it chose to leave the question open. It was definitely held therein that the riparian owner did not acquire title to the bed because under the law of Iowa riparian owners take only to the water's edge, and that Government patents for lands in that State follow the State rule and convey no land under a nonnavigable lake. Whether the legal title to the land remained in the United States or passed to the State, the court found it unnecessary to decide, it being held that by virtue of its sovereignty the State had sufficient interest in the condition of the lake to entitle it to maintain the suit against the riparian owner to prevent drainage. This decision indicates the delicacy of the question and the reluctance of the court to decide it. Of course a mere hypothetical case would not be entertained. It would have to be an actual case, and only the pertinent issues in the particular case would be decided. In the absence of such actual controversy, it does not appear appropriate that a case should be made up with a view to settlement of general principles.

I am not aware of any case where the Federal Government is disposed to interfere with the State of Iowa in the control of such lakes, and it does not appear feasible to anticipate and attempt to frame issues so comprehensive as to include all possible questions that might arise in the future. Inasmuch as the matter has been brought to the attention of Congress, I am strongly of the opinion that the subject can best be left for such consideration and action as the legislative branch may find advisable.

WILLIAM F. CARR

Decided August 6, 1931

MINING CLAIM—PLACER CLAIM—BOUNDARIES—SURVEY—RULES AND REGULATIONS.

The rule enunciated in paragraph 30 of the mining regulations fixing a limitation on the length of a placer claim will not be applied where the mineral deposits are confined within a narrow strip of land in the bed and on the banks of a small stream in a canyon flanked by abrupt walls or rocky slopes on each side, containing no mineral, agricultural, or timber value.

EDWARDS, *Assistant Secretary*:

This is an appeal on behalf of William F. Carr, applicant for patent for the Hy-Grade placer mining claim, Survey No. 10638, embracing 80.695 acres, from that part of the decision of June 2, 1931, by the Commissioner of the General Land Office wherein it is stated and held—

The claim which was located by five persons can not be included within three square 40-acre tracts as required by paragraph 30 of the mining regulations.

Allow the claimant 30 days from receipt of notice within which to file * * * evidence that he has begun proceedings looking toward a new survey of the claim with a view to excluding such portion of the claim as will bring it within the requirements of paragraph 30 of the mining regulations. If he complies with these requirements it will be necessary for him to show a discovery within the limits of the claim as amended and improvements to the value of \$500 expended upon or for the benefit of the claim. * * *

If claimant fails to comply herewith or to show cause within the time allowed, the entry, hereby held for cancellation, will be canceled without further notice, in the absence of appeal.

The claim involved is for unsurveyed land within a national forest. Upon receipt of notice of the application for patent the Forest Service reported that it would enter no protest against the issuance of patent.

In the field notes of the survey of the claim the United States Mineral Surveyor reported—

The survey of this placer claim does not conform to legal subdivisions, since it is on unsurveyed land. The land adjoining this claim is extremely broken and mountainous, parts of which being inaccessible.

This placer claim could not legally be made to conform to the rectangular system of the public survey, for it would necessitate taking in ground that carries no placer gold, being ground of no value for any purpose except the rock contained therein.

This placer claim is essentially a gulch or gorge placer claim, being in the canyon of Emigrant Creek.

In an affidavit submitted in support of the appeal the mineral surveyor referred to alleged—

That the walls of the canyon or gulch, on either side of the said Hy-Grade claim are steep and covered with slide rock except where there are rock walls, and that there is very little timber located on the sides of the claim, none of which is commercial timber or likely to become such, and that the lands within the claim and on either side of the claim are not suitable for agriculture;

* * * * *
That the one end of the Hy-Grade Placer Claim is the end line of the Fridley Placer Claim, a patented mining claim, and the other end line of the said claim is the end line of the Stray Horse Placer Mining Claim, Survey No. 10644;

That all of the placer ground, or likely placer ground, in the portion of the canyon where the said claim is located which is not otherwise appropriated is included within the boundaries of the said claim as surveyed and that all of the placer ground at each end of the claim is included within other claims.

The claimant's attorney states in the appeal—

The Land Department has not heretofore applied this illustrative provision literally and we need go no further than some of the claims on the map tendered herewith to show that the rule has not been applied literally. The Fridley Placer, Survey No. 4648, only had one locator, its length is substantially equivalent to the length of two square forty-acre tracts placed end to end, under the literal application of the paragraph of the rule in question it should not have been patented, but it was surveyed for patent May, 1895, and was patented.

Again, the Mary Agnes Placer No. 10008 had but one locator and was surveyed for patent on November 20, 1916, and was thereafter patented, under the same paragraph of the same rule with one locator it could only be patented if it could be included within one square forty-acre tract, yet its length is such that it could not be included within two square forty-acre tracts.

Again, the Pittsburg Placer No. 7391 was surveyed for patent in 1904 and was patented. It had seven locators and yet can not be included within four square forty-acre tracts which is required under the rule.

These claims which we have mentioned, three in number, are located in the same canyon and have been patented at various times and each and all of them violate the rule if it is to be literally and technically applied.

The location of a placer mining claim in the form of the one here involved is not prohibited by any statutory provision in the mining laws.

Paragraph 30 of the mining regulations (49 L. D. 15, 63) is based upon the construction given to the mining laws in the case of *Snow Flake Fraction Placer* (37 L. D. 250). In that case, after having reviewed the decided cases very fully, the department stated in conclusion (p. 258)—

Each case presented must be considered and decided on its own facts. Conformity is required if practicable. In the interest of wise administration and under the power which we think Congress has vested in this department in the phrase "shall conform as near as practicable," taken from section 2331, *supra*, and in order to keep claims in compact form and not split the public

domain into narrow, long and irregular strips, and to provide a less harsh rule than that which has been followed recently, and to cover cases where strict conformity is impracticable, it is the view of this department that a claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved. In stating this rule it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines. Thus, no inordinately long and narrow claim could be patented, and no locator would be compelled to include non-placer ground unless he so desired, as was permitted in the case of Hogan and Idaho Placer Mining Claim, *supra*. Each claim heretofore located, as it comes up for patent, must be adjudged and decided upon its own facts.

The case of *Wood Placer Mining Company* was before the department at three different times (32 L. D. 198, 363, 401). It is shown (p. 199)—

The Discovery claim, which is somewhat irregular in shape and defined by a number of courses is nearly 9,000 feet in length and averages about 500 feet in width. It lies longitudinally in a northeasterly and southwesterly direction. Hughes creek enters the claim at the northeasterly end, flows thence substantially through the center, except at one point, for the entire distance, and passes out of the southwesterly end. The exception occurs near the northeasterly end, where the creek flows south and passes without for a little distance the southerly or southeasterly side of the claim, but soon reenters and courses thence throughout the remaining length thereof, as above described. At the point where the creek makes this fugitive departure from the confines of the Discovery claim, the Annex placer (which occupies a position 1540.3 feet in length along and coincidental with that side of the Discovery from its northeasterly end, and which is apparently 173 feet wide) is situated. Its location and dimensions are such as to embrace and include that part of Hughes creek which leaves and flows without for a short distance the boundaries of the Discovery claim.

It was further found and held (p. 402)—

* * * it is shown that the claims are situated at the bottom of a canyon or gorge, from 200 to 400 feet wide, except at the point of position of the Annex claim, where the width is about 500 feet, surmounted by precipitous cliffs, barren of mineral, from 750 to 1500 and 2000 feet high, and that the claims embrace substantially the area between and practically follow the base lines of the enclosing walls or cliffs. It thus appears that, under the circumstances, the claims conform, as nearly as practicable, to the United States system of public land surveys, and the rectangular subdivisions of such surveys. Without in any manner modifying the doctrine thereof, and of the case of Miller Placer Claim (30 L. D. 225), in its application to appropriate cases, the departmental decision under review (32 L. D. 198), so far as it directs the cancellation of the entry because of the nonconformation of the claims in question is hereby vacated.

The department is of the opinion that the case at bar is one where the rule in said paragraph 30 should not be applied. The mining claim involved is a little over a mile in length and lies in a gulch or small canyon. The land containing gold-bearing gravel is a narrow strip in the bed and on the banks of a small stream. The wall or rocky slope on each side has no mineral, agricultural, or timber value. Under these circumstances the department would not be justified in requiring the claimant to make and perfect another location or mining claim for part of the land merely to observe the rule in said paragraph 30 of the mining regulations.

The decision appealed from is

Reversed.

CONSOLIDATION OF NATIONAL FORESTS—SPECIAL SURVEYS

Instructions, August 6, 1931

NATIONAL FORESTS—EXCHANGE OF LANDS—RIGHT OF WAY—SURVEY.

The execution of a special survey for the purpose of identifying on the ground excepted right of way strips will not be required in connection with the exchange of lands in aid of the consolidation of a national forest pursuant to the act of March 20, 1922, where the possibility of the elimination of the lands from the forest is remote.

Assistant Secretary Edwards to the Commissioner of the General Land Office:

The following is quoted from a letter of the Secretary of Agriculture dated August 3, 1931:

Reference is made to the letter from this department of December 30, 1930, recommending the approval of an informal application for an exchange of land for timber within the Coeur d'Alene National Forest in the State of Idaho, under the provisions of the Act of March 20, 1922 (42 Stat. 465), filed by Maude A. Hogan of Spokane, Washington.

It appears that there is excepted from the land offered the Government in this exchange a strip of land embracing 5.58 acres which is used by the Ohio Match Company for a railroad right of way for the transportation of stumpage purchased from the Forest Service. The existence of this excepted strip will in no way interfere with the administration of the offered land for forestry purposes, and the acceptance of title subject to this exception meets with my approval.

In connection with the acceptance of title to the offered land in this case some question has arisen relative to the necessity for the execution of an exchange survey to identify on the ground and by an official plat the location of the said railroad right of way. It appears that the only circumstances under which it would ever be necessary to describe the location of the excepted strip would be in the event the offered land were eliminated from the national forest and subsequently entered under one of the public land laws. In such an event it would seem that it would be possible for the Government to pass title to the land in question through the issuance of

a patent containing the same metes and bounds description of the excepted strip which is contained in the deed conveying the offered land to the Government in the instant case. By following this procedure the expense and delay incident to the execution of an exchange survey would be avoided.

It has not been the practice of your department to require the execution of special surveys identifying lands embraced in easements granted under the various rights of way acts, and while it is recognized that technically the instant case is different from the ordinary right-of-way easement, in that the land itself rather than the easement is conveyed, nevertheless the actual results in so far as the effect upon the land itself is concerned are the same.

Furthermore, the possibility of any lands which have been acquired through the medium of the General Exchange Act of March 20, 1922 (42 Stat. 465), and other related acts, ever being eliminated from the national forests is extremely remote. The lands acquired through these exchanges are located in areas which have been carefully considered by the Forest Service in connection with its land exchange plans and are tracts the acquisition of which will aid greatly in the consolidation of the national forest lands; therefore such tracts safely can be considered as forming an integral part of the national forest in which they are located.

The question which is here raised regarding the execution of exchange surveys of deeded excepted strips is one of considerable importance, as it affects not only the present case but also will affect all future exchanges where strips having this status are involved.

It also appears that a requirement calling for the execution of exchange surveys in all future cases where conditions similar to those in this case exist, merely because there is a remote possibility that a few small tracts acquired under the provisions of the above mentioned acts may at some future time be eliminated from the national forests, would not be in the interest of economy. It would seem in the event it is held that the execution of a special survey is necessary before the Government can again pass title to tracts acquired through exchange, that a great saving would be made in both time and money if the execution of such a survey were postponed until the necessity therefor arose.

The department is of opinion that the execution of special surveys in the character of cases discussed by the Secretary of Agriculture should not be required. That official is being so advised by me.

JAMES R. CRAWFORD ET AL.¹

Decided August 6, 1931

SCHOOL LAND—INDEMNITY—MINERAL LANDS—MINING CLAIM—EVIDENCE—COL-
LATERAL ATTACK—COURTS—SECRETARY OF THE INTERIOR—JURISDICTION.

Ordinarily where an act granting public lands excludes those known to be mineral, the determination as to whether a particular tract is of that character rests with the Secretary of the Interior, and where such act provides for other action than the issuance of a patent to pass title or afford evidence that it has passed, such as the approval of a list, the

¹ See decision on motion for rehearing, p. 439.

approval imports a final determination of the nonmineral character of the land, is accepted by the courts upon collateral attack as conclusive evidence of such character, and terminates the jurisdiction of the Land Department.

SCHOOL LAND—INDEMNITY—MINERAL LANDS—FRAUD—EVIDENCE.

To establish a charge that a State fraudulently procured title to mineral lands under its indemnity school land grant it must be shown by clear, unequivocal and convincing evidence and not by a mere preponderance of evidence that leaves the question in doubt, that the land was known to be mineral in character at the date of the completion of the selection by the State.

SCHOOL LAND—INDEMNITY SELECTION—ENTRY—FINAL PROOF—EVIDENCE—ERROR.

Where the proofs submitted in connection with an entry or selection show compliance with the applicable law and regulations, allowance of the entry or selection is not erroneous because of the existence of matters which would render it invalid but which do not then appear.

SCHOOL LAND—INDEMNITY—CONTEST—MINING CLAIM—NOTICE—ADVERSE PROCEEDINGS—POSSESSION.

Failure on the part of the holder of a valid mining location to contest a State indemnity selection affecting his location, of which notice by publication was given pursuant to law, is not attended with the same fatality to his possessory right as would his failure to adverse a hostile mineral application.

EDWARDS, *Assistant Secretary*:

On December 12, 1924, the State of Idaho filed its school-land indemnity list, now Coeur d'Alene serial 012369, for various tracts. As to NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 9 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 10, T. 37 N., R. 4 E., B. M., included therein, the selection was perfected by the State February 26, 1926, was clear-listed with the department's approval July 25, 1929, and certified to the State July 31, 1929.

On January 28, 1930, James R. Crawford and Earl McHenry filed application 013186 for patent to five placer locations. Three of them, namely, the Gold Leaf, Divide and John Day, together considered, cover the land above described and are alleged to have been located on July 17, 1922, June 10, 1926, and August 15, 1928, respectively. On March 27, 1930, the mineral applicants filed application to contest the State's right to the land embraced in these locations. The substance of the material allegations are that the land was known to be valuable for its gold deposits prior to the selection and at the time of its approval; that the land was embraced in valid locations at the date of the approval of the list; that they had no knowledge of the filing of the selection by the State of these lands until the filing of their patent application; that the land was not vacant, unoccupied, public land at the date of selection. They

requested the selections be adjudged void and mineral patent be granted to them for the lands.

The Commissioner rejected the mineral application as to land certified to the State as above stated, and dismissed the contest holding he had no power to nullify the approval of the indemnity list. He further held that the grounds were insufficient for the Government to institute proceedings to secure its cancellation.

In *West v. Standard Oil Co.* (278 U. S. 200, 211) the Supreme Court summarized the principles of law that are decisive in this case as follows:

Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. See *Cameron v. United States*, 252 U. S. 450, 464; *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 684-687. But compare *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F. (2d) 351. If such act provides for the issue of a patent, whether it be to pass title or to furnish evidence that it has passed, the patent imports that final determination of the nonmineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. See *Barden v. Northern Pacific R. R.*, 154 U. S. 288, 327-331; *Courtright v. Wisconsin Central R. R. Co.*, 19 L. D. 410; *Heirs of C. H. Creciat*, 40 L. D. 623. And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the non-mineral character. *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 641; *Barden v. Northern Pacific R. R.*, 154 U. S. 288, 327.

Similarly, if the granting act provides for other action by the Secretary equivalent to a patent, such as approval of a list of the lands, the approval ends the jurisdiction of the Department, *Cole v. Washington*, 37 L. D. 387; *Sewell A. Knapp*, 47 L. D. 152, and it, likewise, imports that the necessary determination has been made. *Chandler v. Calumet & Hecla Mining Co.*, 149 U. S. 79. Compare *Fred S. Porter*, 50 L. D. 528, 532-533.

From the foregoing it is clear that the approval of the list ended the jurisdiction of the Land Department over the land, and the Commissioner has thereafter no authority to entertain the subsequent mineral application and contest, and rightfully denied both.

The department further agrees with the Commissioner that no sufficient ground is shown for a suit by the United States to set aside the certification and recover the land with the view of permitting the mineral claimants to obtain patent to their claims.

The record discloses that an examination of these and adjacent lands was made by a mining engineer of the field service, consuming several weeks in August, 1928, in which pits were dug and gravels tested for gold; that in this exploration he was assisted by the present mineral claimants, who declare now, as they did then, that the land was valuable for its gold deposits; that the engineer recommended a nonmineral classification of the tracts here involved and the approval of the State's selection; that the Commissioner considered the examiner's report in clear-listing the selections. There is

not enough in the showings of the contestants to persuade the department that the examiner's conclusions were wrong. To establish that the State fraudulently procured title to the lands it would have to be shown by clear, unequivocal and convincing evidence and not by a mere preponderance of evidence that left the matter in doubt (see 50 C. J. 1115, notes 74 and 75) that the land was known to be mineral in character on February 26, 1926, the date of the completion of the selection by the State; discoveries thereafter would not affect the title of the State. *Wyoming v. United States* (255 U. S. 489, 501); *Andrew A. Malcolm* (50 L. D. 284); *Kern Oil Co. et al. v. Clarke* (30 L. D. 550, 31 L. D. 288); *State of California, Robinson, Transferee* (48 L. D. 384). Two at least of claimants' locations would appear, therefore, to be invalid on their face.

Furthermore, there is nothing to show that the approval of the list was the result of any error, mistake, or inadvertence in the Land Department. True it is asserted by claimants that publication of the notice of selection was not in a paper commonly in circulation in the neighborhood where they reside and in the locality of the land, and they, therefore, did not actually have knowledge of the notice, but it does not appear that it was not published "in a daily or weekly newspaper of general circulation in the county where the land is located," as required by the regulations (Circular No. 659 of October 15, 1919, 47 L. D. 257, amending paragraph 11 of instructions of June 23, 1910, 39 L. D. 39).

The claimants must, therefore, be charged with constructive notice of the State's selection. Not having filed any protest or contest against the same prior to its approval, they can not be heard to say that the land should have been awarded to them or that the approval of the selection was erroneous. If the proofs submitted show compliance with the applicable law and regulations, allowance of the entry is not erroneous because of the existence of matters which would render it invalid but which do not then appear. See *United States v. Colorado Anthracite Co.* (225 U. S. 219); *Olive M. Harrison* (50 L. D. 418); *George McNally* (50 L. D. 627). Nothing therefore appears sufficient to move the department to assail the title of the State.

The Commissioner in his decision made this statement—

Moreover, it is as incumbent upon mineral claimants to keep advised of non-mineral applications pending in the General Land Office as it is to keep advised of mineral applications against which it would be necessary to file an adverse claim.

In so far as this statement may imply, that a failure by the holder of a valid mining location to contest a State indemnity selection affecting his location, of which notice by publication is given pur-

suant to law, would be attended with the same fatality to his possessory right as would follow from his failure to adverse a hostile mineral application, the department is not in agreement. In other respects the Commissioner's decision appears to be right and is
Affirmed.

JAMES R. CRAWFORD ET AL. (ON REHEARING)

Decided October 31, 1931

SCHOOL LAND—INDEMNITY—MINERAL LANDS—MINING CLAIM—NOTICE—PROTEST—EVIDENCE—FRAUD—TRUST.

The Government does not owe any duty to seek to have a trust imposed on the title of a State to an approved indemnity school-land selection, in the absence of evidence of fraud in making and perfecting it, in favor of a mining claimant who had not made claim to the land in the Land Department or filed protest after legally constructive notice before its approval, even though he might have shown a better right to the land under the mining laws.

EDWARDS, *Assistant Secretary*:

Motion for rehearing has been filed by James R. Crawford *et al.*, of departmental decision of August 6, 1931 (53 I. D. 435), wherein mineral application, Coeur d'Alene 013186, to the extent of conflict with approved school-land indemnity list 012369, and application to contest said list were rejected, and wherein it was held that the showings of the applicant were insufficient as a basis for recommending a suit to set aside the title of the State of Idaho to the land claimed under the mineral application.

The ground for rejection of the application and contest was that by the approval of the selection list, title passed to the State, and the department's jurisdiction had ended. The grounds for declining to recommend suit to cancel the selections were that the evidence was insufficient to establish allegations that the State had fraudulently obtained title to land known to be valuable for minerals therein contained, and that it had not been shown that proper legal notice of the selection list had not been given, as alleged; that the approval was not erroneous, and therefore no adequate basis existed for such a suit. The motion attacks the conclusion that the grounds are inadequate to set aside the State's title.

There is nothing material in the motion that has not heretofore been fully considered. As indicated in the decision attacked, the evidence is clearly insufficient to show fraud in making and perfecting the selections. No suit is therefore maintainable to enforce a public right or to protect a public interest; and, irrespective of the known character of the land at the date of the perfection of the

selection list, the mineral claimants not having made any claim to the land in the Land Department or filed any protest after legally sufficient constructive notice, before the selections were approved, the Government owes no duty to them to seek to have a trust in their favor imposed on the title of the State, even if they could show a better right. In such a case "It may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested." *United States v. Beebe* (127 U. S. 338, 342); *United States v. New Orleans Pacific Railway Company* (248 U. S. 507).

The motion is accordingly

Denied.

JAMES R. CRAWFORD, ET AL.

Petition for the exercise of supervisory authority in the above-entitled case (53 I. D. 435, 439), denied by Assistant Secretary Edwards, December 11, 1931.

**EXTENSION OF LEASE FOR OIL AND GAS IN TRIBAL LANDS
WITHIN THE NAVAJO INDIAN RESERVATION**

Opinion, August 8, 1931

**NAVAJO INDIAN LANDS—OIL AND GAS LANDS—EXTENSION OF LEASE—SECRETARY
OF THE INTERIOR.**

Where an oil and gas lease involving tribal lands within the Navajo Indian Reservation was sold at public auction under the act of May 29, 1924, pursuant to an advertisement specifying in the language of the act that the lease should be made for a certain stated period and as much longer thereafter as oil and gas is found in paying quantities, development of the lands and the finding of paying production were conditions precedent to any extension and the Secretary of the Interior is without authority to extend the lease on any other ground.

FINNEY, Solicitor:

You [Secretary of the Interior] have requested my opinion as to your authority to extend for an additional period of five years certain oil and gas mining leases on tribal lands within the Navajo Indian Reservation in New Mexico.

Four leases are involved, all executed July 31, 1926, and approved by the Secretary of the Interior September 13, 1926, in favor of the Continental Oil Company, a Maine corporation, and the Santa Fe Company, a Delaware corporation. The Continental Oil Company subsequently assigned, with the approval of the Secretary of the Interior, an undivided one-half interest in each of the leases to a Delaware Corporation of the same name. The lessees first named

were the successful bidders at a public auction sale had pursuant to the provisions of the act of May 29, 1924 (43 Stat. 244), reading—

That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), *may be leased at public auction* by the Secretary of the Interior, with the consent of the council speaking for such Indians; for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities. [Italics supplied.]

The advertisement pursuant to which the leases were sold specifically provided that the leases should be made "for a period of five years from the date of approval by the Secretary of the Interior and as much longer thereafter as oil or gas is found in paying quantities," and each lease so provides. Development of the lands and the finding of paying production were therefore conditions precedent to extension of the leases beyond the five-year period. No provision for extension on any other ground is contained in either the leases or the advertisement. To extend the leases for a further period of five years, therefore, is to grant to these lessees a material advantage not announced in the advertisement.

In an [unpublished] opinion rendered October 17, 1928, the Attorney General declared invalid a contract between the United States and the Sinclair Crude Oil Purchasing Company for the sale of the Government's royalty oil in the Salt Creek field because the bid of the Sinclair Company as accepted was at variance with the terms of the advertisement, saying—

It is well established law that a public officer given power by statute to enter into a contract on behalf of the public with the best bidder, has no power to grant that bidder any term materially advantageous to him which was not announced in the advertisement for bids. The contract entered into must be the contract offered to the highest responsible bidder by advertisement. This being so, I think the Secretary had no power to enter into a contract with the highest bidder containing an option of renewal provision, when such provision was not offered to all the bidders in the advertisement for bids.

The opinion of the Attorney General rendered August 23, 1871 (13 Ops. Atty. Gen. 510), is to the same general effect. Holding that a bid which did not meet the advertised conditions could not be considered, the Attorney General said—

I am aware that the rigid rule which I advise has not always been observed, and that authority for a somewhat flexible practice in the matter of bids may be found in opinions of my predecessors. But I can see no propriety in announcing terms unless they are to be insisted on; and when, as in this case, they are authorized by law, I think that the officer or public agent who prescribes them is not at liberty to disregard them.

The Attorney General, to be sure, had under consideration contracts which, as originally executed, contained the objectionable provision, as distinguished from the present case in which it is sought to confer the additional privilege or advantage by subsequent agreement. The lack of authority in the latter case, however, follows as a necessary corollary to the want of authority in the former.

See in this connection *Chippewa Bridge Company v. City of Durand* (122 Wis. 85; 99 N. W. 603; 106 Am. St. Rep. 931), in the Supreme Court of Wisconsin, holding (syllabus, p. 932, vol. 106, Am. St. Rep.)—

The plans, specifications and terms submitted as a basis for bidding on a contract for public work must not be changed, except in a manner to affect alike all persons bidding and desiring to bid, and if a change of a substantial nature is made either in the character of the proposed structure or the terms of a proposed contract after the first competition shall have been completed, there must be a second opportunity given to bid upon the new basis.

Indeed, the subsequent agreement proposing to permit the lessee to hold these lands for an additional period of five years savors strongly of the execution of a new lease for that period which when done privately without advertising opens the door to charges of favoritism and defeats the obvious purpose of Congress to secure to the Indians the advantage of fair and just competitive bidding.

The authority to make the lease under consideration having been circumscribed by the mandatory requirement of the statute that they be let upon an award to the highest bidder at a public auction sale, it is my opinion that you would not be warranted in granting to the present lessees through private negotiations the advantage of an additional five-year term, a privilege not extended to other bidders by the original advertisement.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

MERGER OF A PRIOR RIGHT OF WAY GRANT WITH A WATER POWER LICENSE

Opinion, August 8, 1931

POWER SITE—LICENSE—RIGHT OF WAY.

Where a license is issued under section 23 of the Federal Water Power Act of June 10, 1920, in place of a prior right of way grant under the act of March 4, 1911, the legal effect is that the prior grant is merged with and superseded by the license in so far as the license covers the project embraced in the prior grant.

RIGHT OF WAY—POWER SITE—ANNUAL PAYMENTS.

Where a project for which a right of way was granted under the act of March 4, 1911, is partially covered by a license issued under section 23 of the Federal Water Power Act, the grantee will be required to make annual payments under the old grant only to the extent of that portion of it not covered by the license.

FINNEY, *Solicitor*:

By letter of July 28, 1931, the Acting Director of the Geological Survey submitted certain questions and the matter has been referred for my opinion.

It is stated that on May 26, 1919, this department granted to the Southern California Edison Company a right of way covering a distance of seven miles for which the company agreed to pay an annual charge of \$5 per mile, or \$35 yearly; that the company thereafter applied for a license under the Federal Water Power Act of June 10, 1920 (41 Stat. 1063) for practically the same right of way, which was granted upon the same terms as to annual payments. The questions submitted are as follows:

1. Does issuance of a license under the federal water power act terminate a permit under the act of February 15, 1901 (31 Stat., 790), or a grant under the act of March 4, 1911 (36 Stat., 1235, 1253), in so far as there is duplication?
2. If not, as a matter of administrative practice should not relinquishment be suggested to the permittee or grantee in order to clear the records in so far as there is duplication?
3. If relinquishment is not made should duplication of the \$5.00 a mile charge under permit or grant, and under license be continued so long as the land is held under two rights of way or should the permit or grant be modified to reduce or eliminate the charges?

The record shows that the Federal Power Commission license was issued on February 28, 1925, and that the payments to this department were adjusted as of that date. No payments since then have been made by the grantee to this department, although there has been no formal relinquishment of this grant.

The right of way granted by this department was under the act of March 4, 1911 (36 Stat. 1235, 1253), for poles and lines for the transmission and distribution of electric power and for telephone and telegraph purposes. Assuming that the license issued by the Federal Power Commission covered the same purposes and the same ground, there would seem to be no reason for retention of the grant obtained from this department under the act of March 4, 1911.

Section 23 of the Federal Water Power Act reads in part as follows:

That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pur-

suant to law, but any person, association, corporation, State or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder.

The legal effect of this provision is to substitute the license in place of the prior grant, where the project is the same. But to obviate any dispute or misunderstanding as to whether the old grant is fully superseded it would appear advisable in all cases that the grantee be called upon to relinquish the old grant. It is not contemplated that payments shall be required under the grant and also under the license where the project is the same. In the instant case it appears to have been the understanding of all parties that the same project was involved, but as the Geological Survey now reports that "some lands held under grant are doubtfully, if at all, affected by the license," it would seem to be a proper precaution to call upon the company to relinquish its grant under the act of March 4, 1911, *in toto* or to pay for such portion as it desires to retain, if any. If after due notice the company should fail to take action, neither relinquishing nor making payment, then the grant should be noted on the records of this department as merged with and superseded by the license.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

COLLINS v. KELLY

Decided August 11, 1931

COAL LANDS—SURFACE RIGHTS—PATENT—BOND—DAMAGES—SECRETARY OF THE INTERIOR—COURTS.

Section 3 of the act of June 22, 1910, authorizes the Secretary of the Interior to require a bond before allowing any person to enter upon land patented with reservation of the coal to the United States for the purpose of prospecting thereon, but when the right to mine and remove the coal has been acquired his authority to require such a bond no longer exists; in the latter event the owner of the surface estate may by proper court proceedings protect himself from injury or loss in his improvements or crops.

EDWARDS, *Assistant Secretary:*

On October 19, 1926, D. W. Kelly was granted a coal prospecting permit for the N $\frac{1}{2}$ N $\frac{1}{2}$, or N $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, and lot 1, Sec. 7, T. 36 N., R. 55 E., M. M., Montana. The tracts involved had been patented with reservation of coal to the United States.

under the act of June 22, 1910 (36 Stat. 583). Kelly filed application for lease of lot 1, Sec. 7 on October 18, 1928, and the same was awarded to him on May 20, 1930.

On April 24, 1930, P. L. Collins filed a protest against the granting of a lease to Kelly, alleging that he was the owner of, had valuable improvements upon, and was residing upon said lot 1; that Kelly had at one time owned the land but had lost the same on foreclosure; and that Kelly was seeking to obtain a lease merely for the purpose of harassing and taking revenge upon the protestant. Collins filed a further protest on August 22, 1930, which was referred to the chief of field division. An examiner of the General Land Office reported on November 25, 1930, in part as follows:

Field examination disclosed that there is on the said lot 1 a dwelling house, two barns, one granary, hen house, garage, two small dwelling houses, and farm machinery. These improvements, together with the machinery on the land, have a value of \$13000, according to the statement made to me by said P. L. Collins; and, taking into consideration the extensive farm machinery, it appears that the valuation is a reasonable one. These buildings and the machinery cover approximately 20 acres of the said lot 1.

The examiner further reported that Kelly had dug a hole six feet square and four feet deep 40 feet from the main house and 50 feet from the barn, between the two buildings; that there was a coal mine within one-half mile of this land and another within a mile; and that these mines were not selling one-half of the coal they could produce. He recommended that the application for lease be denied.

By decision of February 20, 1931, the Commissioner of the General Land Office dismissed the protest for the reason that no legal grounds for declining to grant a lease were presented. Section 3 of the said act of June 22, 1910, was quoted in support of the ruling. Collins appealed. The case was submitted to the Geological Survey for report and recommendation. On July 31, 1931, the Director reported as follows:

In letter of July 16, 1931, the district mining supervisor reports:

"The shaft sunk by Kelly was to a depth of six feet. The house, barn, store-house, and pump-house reported on Kelly's monthly reports are on the land. However, these were erected as farm buildings and when the mortgage was foreclosed Kelly lost them all. *These improvements were not erected in connection with mining operations* but existed prior to the time Kelly's permit was issued."

In view of the above statements and the evident value of the surface improvements it is now recommended that in addition to the lease terms heretofore set out in my letter of October 15, 1929, the lessee be called upon to file a corporate surety bond in the amount of not less than \$20,000, as security for compliance with the terms of the lease and for the payment of all damages to the crops and improvements on such lands by the lessee.

Section 3 of the act of June 22, 1910, *supra*, reads in part as follows:

* * * 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 for undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal 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 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.

It will be noted that the department is authorized to require a bond or undertaking before allowing any person to enter upon land patented with reservation of coal to the United States under the said act of June 22, 1910, for the purpose of prospecting for coal thereon, but that when the right to mine and remove the coal has been acquired the department is not authorized to require any bond to protect the rights of the owner of the land.

The language in section 2 of the act of July 17, 1914 (38 Stat. 509), with reference to bond or undertaking, is very similar to the portion of section 3 of the act of 1910 hereinbefore quoted.

In the case of *Kinney-Coastal Oil Company v. Kieffer* (277 U. S. 488), the Supreme Court of the United States said (p. 506)—

The circuit court of appeals based its decision on the part of the act of 1914 which—after directing that the patent for the surface estate shall contain a reservation of the underlying oil and gas deposits, with the right to prospect for, mine and remove the same—provides that lessees of the United States may enter, occupy so much of the surface as may be required, and mine and remove the minerals, “upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages.”

The plaintiffs take the position that the bond given by the lessee and approved by the Secretary of the Interior when the lease was issued satisfied that provision. In this the plain words of the provision are neglected. They call for a bond to be given in a judicial proceeding wherein the damages may be ascertained and fixed. The circuit court of appeals so regarded them.

Having been granted a permit and having shown to the department that the land contains coal in commercial quantities Kelly is entitled to a lease. The department can not require any bond from him to protect the owner of the surface estate from injury or loss in his

improvements or crops. But Collins, the protestant herein, may by proper court proceeding compel Kelly to give a good and sufficient bond or undertaking.

The decision appealed from is

Affirmed.

WHITTEN ET AL. v. READ (ON PETITION)¹

Decided January 4, 1928²

FOREST LIEU SELECTION—PUBLIC LAND—JUDGMENT—COURTS—LAND DEPARTMENT—JURISDICTION.

A judgment by a court decreeing that a certain tract is public land and commanding the Secretary of the Interior "to give full legal force and effect to plaintiff's selection," does not deprive the Land Department of its jurisdiction to determine the rights and claims of other persons, not parties to the proceedings, with respect to the land in controversy.

FOREST LIEU SELECTION—COLOR OF TITLE—POSSESSION—PUBLIC LAND.

Land in the actual possession of another under color of title and claim of right is not "vacant public land subject to homestead entry" and is not, therefore, subject to selection under the act of June 4, 1897.

PRIOR DEPARTMENTAL DECISIONS RECALLED AND VACATED.

Cases of *Gleason v. Pent* (14 L. D. 375; 15 L. D. 286), *Lewis W. Pierce* (18 L. D. 328), and *Whitten et al v. Read* (49 L. D. 253; 260; 50 L. D. 10), recalled and vacated.

FINNEY, First Assistant Secretary:

By decision of August 30, 1922 (49 L. D. 253), the department affirmed a decision of the Commissioner of the General Land Office dated December 12, 1921, denying the application for reinstatement of the swamp-land selection by the State of Florida involving lots 1 and 2, Sec. 19, T. 53 S., R. 42 E., T. M. (survey of 1875), rejecting the State's indemnity school land selection for said lots, and rejecting as to said lots the forest lieu selection filed by Henry T. Read. A motion for rehearing was denied by decision of October 26, 1922 (49 L. D. 260). The departmental decisions were based substantially on the ground that any question as to whether the land was disposed of by the issuance of patent to William H. Gleason in 1878 for lots 1 and 2 of said Sec. 19 as per plat of 1845 should not be reopened, the matter having been settled many years ago by three departmental decisions (14 L. D. 375, 15 L. D. 286, 18 L. D. 328), affirming title under the Gleason homestead patent.

¹ See decision of August 11, 1931, p. 453, and decision of December 22, 1931, on motion for rehearing, p. 469.

² Omitted from Vol. 52.

A petition for the exercise of supervisory authority, filed on behalf of Read, was entertained by departmental order of March 15, 1923, but the petition was denied by decision of August 27, 1923 (50 L. D. 10), which also directed that a supplemental patent should be issued to William H. Gleason under his homestead entry in order to put an end to controversy over the matter before the Land Department.

Therefore Read filed a bill in equity in the Supreme Court of the District of Columbia to restrain the department from rejecting or cancelling his forest lieu selection and from issuing a supplemental patent for the said lots 1 and 2 to William H. Gleason, and requiring the department to give full force and effect to the forest lieu selection, excluding from consideration any title alleged to be in William H. Gleason, his heirs or assigns. A motion to dismiss was interposed, and upon the same being overruled, an appeal was taken to the Court of Appeals of the District of Columbia, where the decision below was affirmed. *Work et al. v. Read* (10 Fed. (2d) 637).

The Supreme Court of the District of Columbia thereupon entered a permanent injunction, restraining the Secretary of the Interior and the Commissioner of the General Land Office from enforcing—

* * * any or either of the certain rulings, holdings, or decisions mentioned and complained of in the plaintiff's aforesaid bill of complaint, to the extent of rejecting or cancelling the forest lieu selection of Henry T. Read, known in the General Land Office as Gainesville 016724, as the north half of lot one (1) and lot two (2), section nineteen (19), township fifty-three (53) south, range forty-two (42) east, Tallahassee Meridian, Florida; and shall not issue a patent to the said William H. Gleason, his heirs or assigns, for said land or any part thereof, and that they and both of them shall from henceforth give full legal force and effect to the said location of the said Henry T. Read of said land.

A further appeal to the Court of Appeals of the District of Columbia was filed on the ground that said final decree enlarged and modified the original decree. By decision of November 7, 1927, *Work et al. v. Read* (23 Fed. (2d) 139), the Court of Appeals held that the final decree is in substantial conformity with the original decree as affirmed by the decision of December 7, 1925, *supra*. Further (p. 141)—

* * * It was clear at the time of the former adjudication that there were no contesting claims to this land in the Land Department, subject to consideration under the public land law. After the mandate of this court went down, time was accorded the department, at its own request, to make additional showing, if any such claims existed. No showing was made; hence the final decree. As we said in the former case, we repeat now, the discretion of the Secretary is exhausted and there is nothing left for him to do but to issue a patent to the plaintiff as required by law.

A petition for rehearing was filed wherein it was stated that, since the decision of the court adjudging the land to be public land of the United States, other claims in addition to the Read selection had been made for the land in dispute, the disposition of which involved the determination of questions of fact, exclusively within the jurisdiction of the Land Department, and that such claims had not been advanced in defense of the pending action for the reason that the courts were without jurisdiction with respect thereto prior to a determination thereof by the Land Department, and the petition concluded as follows:

It may well be said, therefore, that rights may exist in the public lands solely within the cognizance of the Land Department, a consideration of which may be precluded unless the decision of the court be modified.

The court in the following *per curiam opinion*, November 26, 1927, *Work et al. v. Read* (23 Fed. (2d) 139, 141), denied the petition for rehearing—

Per Curiam. A petition for rehearing has been filed in this case on the ground that this court is without jurisdiction to direct the entry of a decree requiring the Secretary of the Interior to issue a patent for public lands while the legal title to the lands remains in the United States. The decree in this case does not direct the Secretary to issue a patent for the lands in question. It commands him "To give full legal force and effect to plaintiff's selection." This is based upon the admission of the averments of the bill sustaining the conclusion that, from the admitted facts, plaintiff was entitled to an order restraining the Secretary from cancelling his selection for the purpose of issuing a supplemental patent to Gleason, his heirs or assigns.

True, we said in our opinion, after considering the sweeping admissions in this case, that "the discretion of the Secretary is exhausted, and there is nothing left for him to do but to issue a patent to the plaintiff, as required by law." This statement, however, as the decree itself, is based upon the record. There is nothing in the decree which estops the Secretary from exercising lawful discretion in the further consideration of plaintiff's selection, should there be information in the possession of the department, not disclosed in the present record, that would justify such action. The decree speaks for itself and merely restrains the Secretary from using the Gleason entry as a basis for cancelling the selection. Of course, the opinion and decree deal only with matters appearing in the record, in which, it may be suggested, the Government, by electing to stand on its motion to dismiss the bill, a course for which the court is not responsible, quite effectively conceded itself out of court.

The petition is denied.

Thereupon the entire matter was submitted to the Solicitor General with a request for an opinion as to the necessity of applying to the Supreme Court of the United States for a writ of certiorari, and also as to whether the decision of the Court of Appeals leaves the department of the Interior free to function in considering and disposing of all applications for rights or claims in or to the land in-

volved, including the application of Read, but excluding from consideration all title or claims in or to the land based on the William H. Gleason homestead entry and the patent issued thereon.

Under date of December 1, 1927, the Solicitor General advised this department as follows:

I am satisfied that no application to the Supreme Court of the United States for certiorari need be made. I construe the order of November 26, 1927, and what has been said in it to mean that the Secretary of the Interior is free to consider and dispose of all applications for rights or claims in or to the land involved, excluding those based on the Gleason homestead entry and the patent issued thereon.

The Court of Appeals of the District in its last statement makes it very clear that it construes the decrees of the Supreme Court of the District, which it has affirmed, as meaning this and nothing more. I am satisfied that the Secretary would not be in contempt of the decree entered in the Supreme Court of the District if he proceeds accordingly.

In view thereof it now becomes the duty of the department to proceed with the determination of the various claims to the tract in controversy in the light of the court's adjudication that the land in dispute is public land of the United States, and in this consideration all claim of title, right, or interest in the tract based upon the patent issued to William H. Gleason under his homestead entry will be excluded from consideration.

Before proceeding with consideration of the several claims made to this land it should be said that this is the first consideration of the matter in the light of an understanding that the land involved is not to be regarded as land accreting to the patented homestead of William H. Gleason, but rather as land in place at the time of the original survey of the township in 1845, and as a consequence that the survey of 1845 was but a partial and not a final survey of the township.

The tract in dispute, it is stated, is generally known by real estate brokers and business men of Miami as "the Wayne tract." It is located on the west shore of Biscayne Bay, approximately three miles north of the business district of the city of Miami, and since 1920 has been within the corporate limits of that city.

The original plat of survey, approved in 1845, showed only two lots in fractional Sec. 19, T. 53 S., R. 42 E., T. M., lot 1 containing 79.62 acres, and lot 2, 85.22 acres. A further survey of the township was made in 1874, the plat thereof being approved and filed in 1875. By the later survey, Sec. 19 was divided into seven lots, numbered 1 to 7, containing 337.76 acres. Lots 3, 4, 6, and 7 of the survey of 1875 correspond roughly with lots 1 and 2 of the survey of 1845.

Lot 5 was selected by the State of Florida under its swamp-land grant, and patent to the State issued on May 4, 1885.

On June 4, 1884, the State of Florida selected lots 1 and 2 (plat of 1875) as swamp land. The selection was finally rejected on April 15, 1887, on the ground that the said lots were not swamp lands on September 28, 1850, but were covered by the waters of Biscayne Bay.

Edward C. Pent, on January 18, 1890, applied to make homestead entry for lot 2 (plat of 1875), which the local officers rejected on the ground of conflict with the Gleason entry and patent. The Commissioner of the General Land Office, on appeal, reversed the action of the local officers, and the application was allowed. The entry was commuted, cash certificate issuing January 26, 1891. On February 25, 1891, W. H. H. Gleason, claiming said lot 2 as purchaser under the patent to William H. Gleason, appealed from the action allowing Pent's entry. By decision of April 12, 1892 (14 L. D. 375), the department held that title to the lot had passed under the patented homestead entry of William H. Gleason, and the cancellation of Pent's entry was directed. A motion for review was denied September 12, 1892 (15 L. D. 286). Pent's entry was thereupon canceled. No portion of the commutation price of the land has been repaid.

The Supreme Court of the State of Florida (39 So. 1031) held that a purchaser under the Gleason homestead patent took no title to lot 5, which, as before stated, had been patented to the State as swamp land, and the decision was affirmed by the Supreme Court of the United States on May 29, 1905 (*Gleason v. White*, 199 U. S. 54).

The present controversy arose when, on June 19, 1920, Henry T. Read applied to select lots 1 and 2 (plat of 1875) and other lands under the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36), in lieu of SE $\frac{1}{4}$ Sec. 27, T. 1 S., R. 5 E., B. H. M., South Dakota, within the limits of a national forest.

On September 20, 1920, the State of Florida filed indemnity school land selection for said lots 1 and 2, and also a protest against the selection of Read on the ground of noncompliance with the regulations.

On January 4, 1921, Francis S. Whitten filed a protest against Read's selection as to said lots 1 and 2, alleging failure of compliance with the regulations and also that he was a *bona fide* purchaser for value of a portion of the land.

On August 2, 1921, there was filed on behalf of the State of Florida by attorneys resident in Washington a petition for the reinstatement of the swamp-land selection of lots 1 and 2 (survey of

1875), and the State's selecting agent under the school grant then protested against the reinstatement of the swamp-land selection.

The departmental decisions (hereinbefore referred to) of August 30, 1922 (49 L. D. 253), October 26, 1922 (49 L. D. 260), and August 27, 1923 (50 L. D. 10), followed.

After the date of the last departmental decision, and during the pendency of the court proceedings, Francis S. Whitten filed a petition for the exercise of supervisory authority, alleging that he is possessed of the title to lot 2 from Pent; that he is the owner and assignee of the swamp-land rights of the State of Florida in the north half of lot 1, and further that long prior to June 19, 1920, he had expended large sums in the planning of the development of this tract as a high-class residential subdivision, on which final plans had been perfected and approved, and that he was in actual possession of lot 2 and the north half of lot 1, with a large force of workmen making improvements thereon on June 19, 1920, the date when Read's selection was filed. It is further alleged that the south half of lot 1 is, and for some years has been, in the possession of one Charles Deering and his assignees, and had been for years occupied and used in the propagation of tropical plants and fruits.

If, as alleged, Whitten was in actual possession of the north half of lot 1 and of lot 2 on June 19, 1920, under color of title and claim of right, the tract can not be regarded as "vacant public land subject to homestead entry," and was not, therefore, subject to selection by Read, and, in the absence of a prior valid adverse claim, Whitten should be accorded a reasonable time (in connection with Deering's assignees as to the south half of lot 1) within which to perfect his occupancy, under the rule announced in *Burtis v. State of Kansas et al.* (34 L. D. 304). Whitten has not abandoned his prior contentions that both Pent's entry and the State's swamp-land selection should be reinstated and patented.

Ordinarily an order would be entered entertaining the petition of Whitten, to afford Read and the State of Florida an opportunity to be heard; but the circumstances are unusual, and counsel for Read has already been served with a copy of a printed memorandum filed on behalf of Whitten. In order that the department may be fully informed in the premises and full opportunity be accorded to all claimants to make such showing as is desired, the usual practice will be waived, and the case remanded with directions that a hearing be ordered, testimony to be submitted before a qualified officer located at Miami, Florida, or in that vicinity, after at least twenty days' notice to the representatives of the State of Florida, Whitten, Deering, and Read.

The costs of the hearing will be apportioned in accordance with the second sentence of Rule 53 of the Rules of Practice (51 L. D. 547).

For the purpose of fixing the order of procedure, Whitten will be treated as plaintiff and Read as defendant, and all others as interveners.

The evidence will be confined to the following:

1. Was the tract shown on the plat of 1875 as lots 1 and 2 of said Sec. 19 of such character on September 28, 1850, as to pass to the State of Florida under the swamp-land grant, and is Whitten possessed of the rights of the State under the swamp-land grant?

2. Is Whitten possessed of the rights of Pent in lot 2 under his commuted homestead entry?

3. Was Whitten in actual possession of the tract on June 19, 1920? If, so, under what color of title or claim of right, if any?

The register will render a decision on the evidence submitted, and thereafter the proceedings will follow the Rules of Practice.

All prior departmental decisions in the premises are hereby recalled and vacated.

Prior decisions vacated.

WHITTEN ET AL. v. READ¹

Decided August 11, 1931

PUBLIC LANDS—LAND DEPARTMENT—SECRETARY OF THE INTERIOR—JURISDICTION—PRACTICE.

The statutes defining the authority and duties of the officers of the Land Department clearly contemplate that so long as the legal title remains in the Government the lands are public within the meaning of those statutes, the proceedings before the department are administrative in their nature, and the laws under which such lands are claimed, or being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior.

LAND DEPARTMENT—JURISDICTION—SECRETARY OF THE INTERIOR—SWAMP LAND.

The functions of the Land Department in the matter of the character of land subject to the swamp-land grant are quasi-judicial, and the sole duty of the Secretary, while the title is in the United States, is to pronounce a decision upon the rights of the State.

SWAMP LAND—HEARING—SECRETARY OF THE INTERIOR—VESTED RIGHTS—EQUITABLE TITLE—RES JUDICATA.

The final act of the Secretary of the Interior in a proceeding, after hearing had, to determine whether or not land is swampy in character within the purview of the swamp-land grant fixes the rights of the parties and creates a right of property in the land in question which neither the Secretary himself, nor his successor in office, can revoke or take away.

¹ See decision on motion for rehearing, p. 447.

SWAMP LAND—SECRETARY OF THE INTERIOR—JURISDICTION—RES JUDICATA.

The lack of power of the Secretary of the Interior to proceed further after having determined the character of lands pursuant to the provisions of the swamp-land grant is not based on the doctrine of *res judicata*, but on loss of jurisdiction over the *res* by the passing of title.

SWAMP LAND—COMMISSIONER OF THE GENERAL LAND OFFICE—EVIDENCE—RES JUDICATA.

The rule of *res judicata* is not applicable to a decision by the Commissioner of the General Land Office holding that land was not swampy in character when he had no facts before him other than the preliminary showing by the State that the land was swamp and inured to the State under the swamp-land act.

HOMESTEAD ENTRY—FOREST LIEU SELECTION—TRANSFER—TAXES—IMPROVEMENTS—POSSESSION—COLOR OF TITLE—NOTICE—RECORDS.

The county records showing a claim of title to land under mesne conveyance from a homesteader and payment of taxes by a successor in interest under the belief that he had title and the presence of improvements on the land are notice to a selector that the land was claimed and in actual possession of another under color of title and not, therefore, subject to selection.

COMMISSIONER OF THE GENERAL LAND OFFICE—REGISTER—JURISDICTION—PUBLIC LANDS.

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register of a local land office in the disposition of the public lands is not unlimited or an arbitrary power and it can not be exercised so as to deprive any person of land entered and paid for.

HOMESTEAD ENTRY—FINAL CERTIFICATE—PAYMENT—ERROR.

Where an entry, after the issuance of final certificate and payment of purchase price, was canceled for a reason afterwards demonstrated to be unsupported by the law and the facts, the land is not subject to a further disposal by the Government to anyone other than the homesteader.

EDWARDS, *Assistant Secretary*:

This case is before the department on appeals from a decision of the Commissioner of the General Land Office dated December 8, 1930, wherein he rejected forest lieu selection application 016724, filed by Henry T. Read, involving lots 1 and 2, Sec. 19 T. 53 S., R. 42 E., T. M., Florida, according to the plat of survey approved February 1, 1875, and conflicting school land indemnity selection applications 016857 and 018596, filed September 20, 1920, and February 23, 1924, respectively, by the State of Florida.

Lots 1 and 2 of Sec. 19, plat of 1875, adjoin the north and east line of the fractional section, on Biscayne Bay, within the city limits, as extended, of Miami. The fractional Sec. 19, containing 337.66 acres, plat of 1875, also comprises lots 3, 4, 5, 6 and 7, which lots nearly approximate lots 1 and 2, being all of fractional Sec. 19, containing 164.84 acres, on a plat of survey approved July 10, 1845.

The forest lieu selection application of Read is based on the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36), and the lieu land is the SE $\frac{1}{4}$ Sec. 27, T. 1 S., R. 5 E., B. H. M., South Dakota, within the limits of a national forest.

A patent issued June 24, 1878, to W. H. Gleason for lots 1 and 2 of Sec. 19, plat of 1845, containing 168.84 acres, under a homestead entry made April 4, 1870.

The State of Florida, January 31, 1884, filed swamp-land selection for lots 3, 4, 5, 6 and 7 of Sec. 19, plat of 1875, which selection was finally rejected August 2, 1885, as to all the lots, except lot 5, which was patented May 4, 1885, because found to be not swamp in character.

The State, June 4, 1884, filed a swamp-land selection for lots 1 and 2 of Sec. 19, plat of 1875. November 16, 1886, the selection was rejected by the General Land Office, holding that the land was not swamp at date of the granting act, September 28, 1850 (9 Stat. 519), as survey, represented by plat of 1845, showed that the land was, at time of survey, covered by the waters of Biscayne Bay and had no real existence, except as bottom of the bay. This decision became final April 15, 1887.

The local land officers rejected an application to make homestead entry filed January 18, 1890, by Edward C. Pent for lot 2, 40.50 acres, plat of 1875, because of conflict with the Gleason entry and patent, which action was reversed by the Commissioner, June 11, 1890, and the application allowed. Commutation proof was submitted and cash certificate issued January 26, 1891. W. H. H. Gleason, transferee of W. H. Gleason, February 25, 1891, appealed, and on April 12, 1892, *Gleason v. Pent* (14 L. D. 375), the department directed cancellation of the Pent entry, holding that Gleason had title to the lot. The department, September 12, 1892, *Gleason v. Pent* (15 L. D. 286), denied a motion for review. Pent's entry was canceled, but no part of the commutation price for the land paid by Pent has been returned.

The department, March 31, 1894, *Lewis W. Pierce* (18 L. D. 328), held that the case of *Gleason v. Pent*, *supra*, was decisive in the matter of the rejection of an application by Pierce to enter lot 1, plat of 1875.

A transferee, claiming under a deed from William H. Gleason, began an action to recover a part of lot 5 and other land, plat of 1875, in the circuit court of the Seventh Judicial Circuit of Florida in and for Dade County. The circuit court found for White as to lot 5 and the proceedings in the trial court were approved, without opinion, by the Supreme Court of the State. *Gleason v. White* (30

So. 1031). On error, the Supreme Court of the United States, May 29, 1905, *Gleason v. White* (199 U. S. 54), wherein is reproduced the pertinent parts of 1845 and 1875 plats, affirmed the judgment of the lower court, stating with respect to Gleason that (p. 62)—

* * * full justice is done if a patent to lands outside his lines as shown by the plat of 1845, is sustained, for he is still protected in the tract bounded by those lines and amounting to 164.84 acres. To give him twice that amount of land would be enabling him to profit by a mistake of the Government—a mistake of which he was cognizant.

The application for forest lieu selection of Read has a statement that Charles Deering occupied and improved the south part of lot 1, plat of 1875, and applicant agreed that, if patent issued to him, he would convey this part of lot 1 to Deering. The record contains a certified copy of a deed executed September 15, 1920, by J. Harrington Edwards, attorney in fact for Read, quitclaiming south part of lot 1 to Deering.

The State of Florida, September 25, 1920, protested the forest lieu selection of Read on the ground of noncompliance with the regulations. Whitten, January 4, 1921, also protested the forest lieu selection on the same ground and further that he was a *bona fide* purchaser for value, of a portion of the land, by mesne conveyances under the Gleason patent.

Resident counsel for Deering, August 2, 1921, filed a request for reinstatement of the old rejected State swamp-land selection. The State by its indemnity school land selecting agent protested the reinstatement of the swamp selection. The Commissioner, December 12, 1921, denied the request for reinstatement and rejected the forest lieu selection and the then pending indemnity school land selection, basing such action on the previous holdings that title to the land passed with the Gleason patent, and a construction placed on the decision of the Supreme Court in the case of *Gleason v. White, supra*, as supporting the action of the department in refusing to make further disposition of said tracts, when the court said (p. 60)—

* * * Here we have two conflicting official surveys and plats, and, by mistake of the Land Department, two patents have been issued, which, in a certain aspect of the surveys and plats, also conflict. It is one of those unfortunate mistakes that sometimes occur, and which necessarily throw confusion and doubt upon titles. Since it was discovered the Land Department has wisely refused to extend the confusion by further patents under the survey of 1875.

February 20, 1922, the attorney for Read filed a request, with consent of Whitten, that the forest lieu selection, except as to the involved land, be approved for patenting, and patent issued March 20, 1922.

Representations were made that Whitten claimed lot 2 and the north part of lot 1, plat of 1875, and Deering claimed the south part of lot 1, as transferees under the Gleason patent; that Deering made valuable improvements on the land; and that Whitten claimed equities as well as legal title, having paid \$75,000 in its purchase and having spent \$35,000 in improvements. The State school land indemnity selecting agent urged that the State had acquiesced in the adjudication rejecting the swamp-land selection more than 30 years before and that rejection became *res judicata* and should not be reopened. Read did not deny the purchase of the land by Whitten, but denied presence of improvements on the land at time of filing the forest lieu selection and he disputed the claim that the Gleason patent carried title to lots 1 and 2, plat of 1875.

The department, August 30, 1922, *Whitten et al. v. Read* (49 L. D. 253), held that the principle of *res judicata* applied with great force in this controversy and that the swamp-land claim should not be reopened; that the prior forest lieu selection, until disposed of, segregated the land so that it was not subject to subsequent selection; and that the question whether this land was disposed of by the issuance of the Gleason patent should not be reopened, as that was settled many years ago by three decisions and was *res judicata*. The department, October 6, 1922, *Whitten et al. v. Read* (49 L. D. 260), denied a motion for rehearing.

The department, August 27, 1923, *Whitten et al. v. Read*, on petition (50 L. D. 10), held that the swamp claim should not be revived or reinstated; that the language in the Supreme Court decision in the case of *Gleason v. White, supra*, could with propriety be confined to the scope of that case and to the situation disclosed in the record presented; that lots 1 and 2, plat of 1875, were not before the Supreme Court as the case came up, and direction was given for the issuance of a supplemental patent for said lots 1 and 2, plat of 1875, to run in favor of the original patentee, William H. Gleason, heirs or assigns, so as to inure to the benefit of the remote grantees holding under said Gleason.

Read filed a bill in equity in the Supreme Court of the District of Columbia to restrain the Secretary of the Interior and the Commissioner from rejecting or canceling the forest lieu selection, from issuing a supplemental patent to William H. Gleason, and requiring that full force and effect be given the selection, excluding from consideration any title alleged to be in Gleason, his heirs or assigns. On appeal from a decree granting the injunction, the Court of Appeals of the District of Columbia, December 7, 1925, *Work et al. v. Read* (10 Fed. (2d) 637), affirmed the lower court, and with refer-

ence to the case of *Gleason v. White*, *supra*, the court stated (p. 639)—

* * * A careful reading of the opinion discloses that the mistake referred to was the issuance of the Gleason patent under the survey of 1845, instead of the survey of 1875, and the refusal of the department to "extend the confusion by further patents under the survey of 1875" refers unquestionably to further patents in the way of attempting to correct the mistake made in following the 1845 survey when the Gleason patent was issued.

* * * * *

It will be observed that this decision completely defines Gleason's rights, and disposes of all further contention as to his title extending beyond the limits of lots 1 and 2, 1845 survey, or lots 3, 4, 6 and 7, 1875 survey. The balance of the land in section 19 remained government land, and it was so recognized by the Supreme Court in sustaining the patent to the State of Florida for lot 5. The status, therefore, of lots 1 and 2, 1875 survey, was settled by the Supreme Court in its decision, and no longer remains an open question.

April 1, 1926, counsel on behalf of Trustees of the Internal Improvement Fund in a petition called attention to the previous departmental decision as to the swamp character of the land, referred to the decision of the Court of Appeals of the District of Columbia as a repudiation of the plat of 1845 as a final survey of the township, urged that the only survey for disposal purposes was that of 1875 in view of which fact the swamp land grant had never received proper consideration, and alleged that the State's rights to the land as swamp can not be defeated by failure or refusal of the department to make proper identification.

A writ of injunction issued November 19, 1926, out of the Supreme Court of the District of Columbia, restraining the Secretary of the Interior and the Commissioner in that they—

* * * do not enforce any or either of the certain rulings, holdings or decisions mentioned and complained of in the aforesaid bill of complaint to the extent of rejecting or canceling the forest lieu selection of Henry T. Read, known in the General Land Office as Gainesville 016724, as to the north half of lot one (1) and lot two (2) Section nineteen (19), Township Fifty-three (53) South, Range Forty-two (42) East, Tallahassee Meridian, Florida, and do not issue a patent to the said William H. Gleason, his heirs or assigns, for said land or any part thereof, and * * * from henceforth give full legal force and effect to the said selection of said Henry T. Read of said land. * * *

The case was again before the Court of Appeals of the District of Columbia on the former appeal, which the court affirmed, November 7, 1927, *Work et al. v. Read* (23 Fed. (2d) 139), and the court, November 26, 1927, denied a petition for rehearing (*Id.*).

On a further appeal, the Court of Appeals of the District of Columbia, April 1, 1929, *Read v. Work* (32 Fed. (2d) 413), affirmed the order, remanded the cause, and stated—

The only issue adjudicated up to the present time is that title to the land did not pass to Gleason under his patent, and that the land is still public land of the United States. When the Secretary threatened to cancel plaintiff's selection, he was proceeding under the misapprehension that the title was in Gleason, and that it was not public land; hence the mere admission in his original answer that the land was unoccupied at the time plaintiff filed his entry, we think, would not justify the holding that he is foreclosed from further investigation of plaintiff's right to enter the land under the public land laws. This question has not been passed upon by the Department, and until the Secretary has exercised his administrative discretion, either by approval or disapproval, the lawful course of procedure in the Department is beyond the jurisdiction of this court to control. With the issue of the Gleason title determined, and the further determination that it is public land, the whole question is thrown open for investigation as if the misapprehension in the Department which led to this litigation had not occurred.

The court, April 12, 1929, granted a motion to stay mandate. The Supreme Court of the United States, October 21, 1929, *Read v. Wilbur* (280 U. S. 570), denied a petition for a writ of certiorari.

Francis S. Whitten, later than the last departmental decision and while the court proceedings were pending, petitioned for the exercise of supervisory authority, representing that he was possessor of the title of Pent to lot 2 and owner and assignee of the swamp-land rights of the State in the north part of lot 1; that he, long prior to June 19, 1920, expended large sums in planning, final plans being perfected and approved, the development of the tract as a high-class residential subdivision; that he had actual possession, on June 19, 1920, date of filing selection by Read, of tracts with a large force of workmen making improvements thereon; and that the south part of lot 1 was, and for some prior years, in possession of Charles Deering and assigns, who for years had occupied and used the land for propagation of tropical plants and fruits.

The department, January 4, 1928 (53 I. D. 447), remanded the case, recalled and vacated all prior departmental decisions in the premises, and ordered a hearing. This order was amended, January 21, 1928, by a direction that the evidence at the hearing be confined to the following:

1. Were the tracts shown on the plat of 1875 as lots 1 and 2 of said Sec. 19, or either of them, of such character on September 28, 1850, as to pass title thereto to the State of Florida under the swamp-land grant? Who is now possessed of the rights of the State of Florida, if any, under the swamp-land grant?
2. Who is now possessed of Pent's rights, if any, under the commuted homestead-entry?
3. Were these lots vacant land subject to homestead entry on June 19, 1920, the date the Read application was filed?
4. Is Whitten or his assigns entitled to a preferred right to make entry for lot 2? Is Whitten or his assigns (as to the north part) and Deering or his

assigns (as to the south part) entitled to preferred right to make entry for lot 1?

March 12, 1928, hearing was held and the claimants were present or represented by counsel, with exception of Read, whose attorney appeared specially, protested against the order for hearing and declined to present testimony.

The register, October 15, 1928, found that lot 1, plat of 1875, was swamp; that the transferees of the Charles Deering estate and The Sirocco Company were possessed of the swamp-land rights of the State; that Whitten and assigns were possessed of Pent's rights; that lots 1 and 2, plat of 1875, were not vacant land subject to homestead entry on June 19, 1920; and that Whitten and his assigns were entitled to a preference right of entry for lot 2, in event that the land is subject to entry, and the assigns of Whitten and the Deering estate have superior rights to lot 1, if the swamp-land claims were not reinstated. The register recommended that the Pent homestead entry be reinstated and patent issue thereon.

The Commissioner referred to the purchase of the north part of lot 1 and lot 2, plat of 1875, for a large sum by Whitten, who regarded the land as a single unit or subdivision, and stated that expenditure of money and labor on a part of the land applied to the whole tract, and that the expenditure by Whitten and assigns in the belief that the land was privately owned gave rise to equities antedating the filing of the conflicting applications. The Commissioner held that Pent's entry, regularly canceled, could not be reinstated, but present record title owners of the greater part of lot 2 should be protected as against a mere paper applicant and he allowed them to apply for the land under applicable public land law. A request for a supplemental survey and plat of lot 1 and the assignment of a new lot number to the Deering claim was denied. The Commissioner, on the question of incompleteness of the forest lieu selection, ruled that noncompliance with governing regulations has the effect of postponing the vesting of title between the United States and the selector only, and not as between selector and third parties, and as to latter their rights would be determined primarily by conditions existing at date of filing selections and first then in right continues so until default at least. The Commissioner disposed of the interrogations by concluding that lot 1, plat of 1875, was swamp; that lot 2, plat of 1875, was not swamp; that Marion D. McCormick and Barbara D. Danielson, grantees of Charles Deering and The Sirocco Company, successor in interest to Francis S. Whitten, were possessed of the rights of the State to lot 1, under the swamp-land grant; that no evidence was presented showing any conveyance by the State of lot 2, under

the swamp-land grant; that The Sirocco Company, successor in interest of Whitten, was possessed of the greater part of Pent's rights under the commuted homestead entry for lot 2; that the lots were not vacant land subject to entry on June 19, 1920; that Whitten and assigns were entitled to a preferred right of entry for lot 2; and that Whitten and assigns and Deering and assigns were not entitled to a preferred right of entry for lot 1.

Read and the State filed appeals and counsel for the parties, except Deering, appeared at an oral argument. The appeal and participation in oral argument by Read's counsel are considered as constituting a general appearance. Counsel for the estate of Charles Deering, deceased, renews request for a supplemental plat.

The State urges that the Pent matter is *res judicata*; that Read's application did not segregate the land as it was incomplete; that Read was entitled to a patent on his former selection; that the north part of lot 1 was unoccupied at time selection was filed; and that improvements on the north part of lot 1, plat of 1875, were located on sovereign land between high and low water. Read argues that Whitten must abide by original position with regard to the swamp character of the land; that the prairie land is not swamp; that the Commissioner found no occupancy of lot 2 on June 19, 1920; that there was no occupancy of the north part of lot 1 on said date; that the Pent entry was canceled after notice; and that the forest lieu selection is *res judicata* as to validity.

Francis S. Whitten, one of the parties, testified that the east end of the property, amount of land he did not know, was low and swampy.

Charles Haddock, civil engineer, stated that he saw two or three acres cultivated; that there was evidence of a tomato patch and remains of vegetable patches; that he classed the land as easily saturated marl; and that a mangrove swamp of 7 acres was on the shore line of the bay.

George S. Reid, real estate, testified that the front of the property was a low mangrove swamp, extending back to marl land covered with high spots where palmettos grew; that marl was not swamp and was tillable during a normal season; that a number of negroes were allowed to cultivate part of the land; that at the edge of the pine land and for about three or five hundred feet was a good lot of marl prairie land fine for cropping during fairly good weather when it was not too rainy; and that the land sloped generally to the bay and water would run off quickly.

W. H. H. Gleason, a resident of Eau Gallie, Florida, gave some rather vague and indefinite testimony regarding cultivation on both lots.

T. W. Palmer, real estate, testified that approximately 30 or 40 acres of tomatoes were planted in 1908 on the prairie land; that he imagined that the cultivated part was on the low land of lot 1 and on the Crane tract on the north; that there were 5 acres in mangrove; and that a roadway was thrown up going down to the bay.

L. C. Glenn, geologist, testified that he made 37 borings, 14 on the north line of lot 1, 4 on the west line, 8 on a line drawn approximately east of the south line of lot 2 extended to the bay, 1 on the shore and 8 on a line run from the center of the north part of lot 1 extending toward shore, and from conditions disclosed by borings lot 1 was swamp land; that a few acres in the northwest corner of lot 1 might be cultivated; that an examination of the south part of lot 1, after canals and other improvements were made, indicated its swamp character; that the general surface elevation above mean high tide is very flat and swamp vegetation grows practically over it; that the borings showed peat and soft clay; that vegetation consisted of mangrove in front, dead and down trees showing age of more than one hundred years by ring counts; back of the mangrove was some buttonwood, an area of saw grass and scattered clumps of saw palmetto. A map accompanying the report of Glenn, known as Whitten's exhibit No. 16, shows, at a point east of center of the south line of lot 2, the eastern edge of level upland running across the lot intersecting the north line at a point west of the northeast corner; that the eastern edge of the upland slope and the eastern edge of pine timber starts a short distance west of the southeast corner of the lot and crosses near the center of the east line of the lot and touches the north line of lot 1 a short distance east of the northeast corner of lot 2; that the approximate eastern edge of open savannah lies wholly on the west half of the north part of lot 1; and that a road enters the west half of the north part of lot 1 and runs south past a small cultivated area.

L. L. Janes, agricultural statistician, testified that lot 1 was low lying area adjacent to the bay; that a mangrove forest is on the eastern part, west of which is a narrow strip of grassy prairie, then a section running north and south covered with saw palmetto and west of this area is an open grassy prairie extending eastward to the west side of lot 1 and into the southeast part of lot 2; and in the northwest corner of lot 1 is a small upland area with a scattering stand of pine and saw palmetto, but he stated that he made only a casual examination of the south part of lot 1.

James M. Morrison, foreman of the Deering estate, testified that the south part of lot 1 was as much as half covered in mangrove and buttonwood; that it was low wet ground; that the object of canals

placed on the Deering land was to fill the land high enough so that vegetation and ornamental plants could be grown; that about 3½ acres of tomatoes were grown by ridging on the north part in the west central portion; that the north part of lot 1 is swamp; that the north half of the north part of lot 1 runs into edge of pine land; that 33 acres were in the south part of lot 1; that mangrove was between low and high tide; and that prairie on the south part was swamp before fill.

Paul F. Matthaus, in employ of the Deering estate, testified that the south part of lot 1 was very low, swampy land with saw grass, saw palmettos, mangroves and buttonwood; that before fill it was low ground; that about half was covered with mangrove; that at high tide a good portion of the land was covered with water; and that 3½ to 4 acres were cultivated to tomatoes in the north part.

Medlin S. Mishler, a resident of the State since December 1, 1899, testified that the south part of lot 1, outside of mangrove, was practically all covered with saw grass, weeds and marsh; that it would not have been possible to have cultivated successful crops on any part of the south part of lot 1 without artificial drainage or building up of the land; and that he made no examination of the north part of lot 1.

A. R. Richardson, chief field agent for the Trustees of Internal Improvement Fund, testified that lot 1 was swamp, with the exception of a small area in the northwest corner; and he stated that lot was filled in at date of his examination.

James Donn, a resident of the State since 1912, testified that no part of lot 1 could be cultivated without artificial drainage; and that he was on the north part of lot 1 after fill.

O. O. Matthaus, a resident of Dade County 42 years, testified that lot 1 was low prairie, lower than the pine land.

W. D. Hatch, boat captain, resident in Miami 14 years, stated that he went on the land June 19, 1920, his examination consisting of circling the land without going over the entire area, and he expressed no definite opinion as to the character of the land.

J. A. Pent, a resident of Dade County 49 years, testified that the land in the north part of lot 1 was dry to the mangrove swamp on the shore; that he hauled wood in a dump cart from the bay until fill work began; that 30 acres of tomatoes were planted on lot 1 in 1908 or 1909; that he and one Thrift had 2 acres in tomatoes one season; that T. B. Moore farmed a strip one year; that one Jerry Rain or Devane had 30 acres in tomatoes on the land; that on the upper edge of lot 1 are a few pine trees; that the land in the north part of lot 1 was never considered swamp and the south part of lot 1 was a little higher, but same as the north part, prairie land.

Frank W. Picot, a resident of Miami since 1911, stated that mangroves were on the low land on the north part of lot 1 and to the west was prairie land, containing palmettos and pine, which was higher than the prairie; that the land sloped from the pine land to marshy land on the bay; and that farming was west of the low land.

A. J. Sands, a resident of Miami 35 years, testified that on the north part of lot 1 there was palmetto land, some prairie and mangrove; that beyond the mangrove it was high and not swamp; that it was farmed with good crops all the way to the mangrove; and that tomatoes, acreage not known, were raised on the land by ridging.

W. M. Mettair, a resident of Dade County 56 years, testified that the land on the north part of lot 1 was mangrove, palmetto and pine land; that the land west of the mangrove was called prairie and was farmed; that he saw crops on the land, but did not know the time when or the acreage; that prize crops of tomatoes were raised there; and that he passed through the land but did not know what was done in any particular year.

George L. McDonald, a resident of Dade County 59 years, stated that the land in the north part of lot 1 was mangrove, marl and pine woods; that 8 acres were in mangrove; that he never knew what areas were in each class of land; that he never considered the land swamp and he believed the majority of acreage could be farmed without drainage; that the land beyond the pine woods gets lower; that Edward C. Pent raised tomatoes for home use; and that he saw grade stakes after they were put in.

J. J. Soar, a resident of Dade County since 1892, testified as to the character of the land in the north part of lot 1, but he was confused and evidently had been talking about lot 2 and regarded lot 1 as the Deering claim. He stated that more than half of the south part of lot 1 was mangrove; that dirt from the canals on that part of the lot was used to fill low places so that it could be cultivated; and that the majority of the acreage could be cultivated without artificial drainage.

A. C. Richards, a resident of Dade County 53 years, stated that the land in the north part of lot 1 was pine, a strip of saw grass and mangrove; that low land came up to high pine land; and that he never saw any cultivation.

Charles R. Pierce, attorney for Read, testified that he only saw the south part of lot 1 after filling and he believed that lot 1 outside of mangrove was cultivable and not swampy.

V. H. Soar, a resident of Dade County 14 years, stated that the north part of lot 1 was composed of mangrove fringe, prairie and pine land; that the land back of the mangrove was marl and not

swampy; that he never saw crops planted on the north part of lot 1, but he believed that all but a small area could be cultivated; that the mangrove widened on the south part of lot 1 and covered one-third of the area; and that when he arrived at the land the south part of lot 1 was being cleared and filled.

R. L. Stewart, a resident of Dade County 23 years, stated that the north part of lot 1 was pine land, savannah, palmetto and mangrove land; that the growth on the land was mangrove and buttonwood, palmetto, saw grass, myrtle, high grass and pine; that he found a cultivated field, but did not know the location or the area; that the meander line on the plat followed inside of a mangrove area of about 11 acres; that lot 1 was not swamp; that he knew nothing of the south part of lot 1; and that his examination of the land was made a week before date of hearing.

John M. Sutton, who stated that he was holder of a scrip assignment of the Read selection, testified that the greater part of lot 1 was marl land, cultivable land in 1850 and the land could raise crops usual to the locality without artificial drainage and that he saw the south part of lot 1 after fill.

Dr. John C. Gifford, a resident of Florida 27 years, testified that he did not know about the character of the land in 1850, but that the land with saw palmettos was high land and a little piece in the corner of the north part of lot 1 was high pine land; that the land could be cultivated without artificial drainage, but his recollection was vague as to the south part of lot 1; that he examined the land a week before the date of hearing.

J. W. Spivey, a resident of Dade County 33 years, testified that a man named Green cultivated, but did not know where, an unknown number of acres in 1899; that the mangrove was swamp; that there were pine trees on the land beyond the prairie; and that the character of the south part of lot 1 was the same as the north part.

John P. B. Ellis, civil engineer, stated that the fill was begun on the south part lot 1 before he arrived and that he had not examined the north part of lot 1.

Section 2479, United States Revised Statutes, provides in part—

To enable the several States (but not including the States of Kansas, Nebraska, and Nevada) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the twenty-eighth day of September A. D. eighteen hundred and fifty, are granted and belong to the several States respectively, in which said lands are situated.

Section 2481, United States Revised Statutes, is as follows:

In making out lists and plats of the lands aforesaid all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included

in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

The field notes of the survey, on which the plat of 1875 is based, with respect to the north line of section 19, adjoining which the involved land lies, state that the land was second rate, rocky pine, savannah and marsh.

The parties have regarded lot 1, plat of 1875, as consisting of two parts. This is a single lot and the character of the land of the entire area of the lot is the controlling factor in the matter of the swamp character of the land at the date of the granting act. The witnesses who definitely testified relative to the entire lot 1, of conditions existing on the ground before filling began, were James M. Morrison and Paul F. Matthaues for Whitten *et al.*, and J. A. Pent, J. J. Soar and J. W. Spivey, for defendants. Glenn and Richardson, for plaintiffs, testified as to the entire lot, but they knew nothing of the lot before the fill; O. O. Matthaues testified only as to the north part of the lot; Mishler testified as to the south part of the lot before fill; and Donn testified as to the north part of the lot after fill and the south part of lot 1 before fill. The testimony of Whitten, Haddock, Reid and Palmer, for plaintiffs, was general as to the character of the land. V. H. Soar, Pierce, Sutton and Ellis, for defendants, testified as to the south part of lot 1 after fill, and they and rest of defendant's witnesses testified concerning the north part of the lot. The testimony was in agreement as to the nonswamp character of lot 2, plat of 1875.

Weighing all the evidence submitted, the department holds that it appears by a fair preponderance of the evidence that the greater part of lot 1, plate 1875, was swamp in character at the date of the granting act, September 28, 1850 (9 Stat. 519).

In the case of *Guaranty Savings Bank v. Bladow* (176 U. S. 448, 457), the court said:

The character of the proceeding before the department must be kept in mind. It is not like a proceeding in court. It is administrative in its nature, and when the proceedings are conducted in accordance with the provisions of law creating the department and giving it jurisdiction, they may be upheld, and the decisions of the officers supported when not made arbitrarily and without evidence.

A consideration of the decisions in the cases of *Knight v. United States Land Association* (142 U. S., 161, 177, 178, 181); *United States v. Schurz* (102 U. S. 378, 402); *New Orleans v. Paine* (147 U. S. 261, 266); and *Michigan Land and Lumber Company v. Rust* (168 U. S. 589), "interpreting the statutes defining the authority and duties of the officers of the Land Department, clearly demonstrates that so long as the legal title remains in the government the lands are public within the meaning of those statutes and the

laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior." *Parcher v. Gillen* (26 L. D. 34). See also *Aspen Consolidated Mining Company v. Williams* (27 L. D. 1) and *Morrow et al. v. State of Oregon et al.* (28 L. D. 390).

Furthermore, the functions of the Land Department are quasi-judicial and the sole duty of the Secretary of the Interior, while the title is in the United States, in the matter of the swamp character of the land, *ex necessitate* is to pronounce a decision upon the rights of the State. "The final act in such proceeding fixes the rights of the parties and creates a right of property in the thing, or *res*, subject of decision, which the Secretary himself, or his successor, can not revoke or take away. *Moore v. Robbins*, 96 U. S. 530, 534; *United States v. Schurz*, 102 U. S. 378, 402; *United States v. Stone*, 2 Wall. 525, 555; *United States v. Minor*, 114 U. S. 233." The lack of power, as will be seen from these decisions, of the department "to proceed further is not based on the doctrine of *res judicata*, but on loss of jurisdiction over the *res* by passing of title." *Ernest B. Gates* (41 L. D. 384).

The Commissioner, November 16, 1886, decided that lot 1, plat of 1875, was not swamp in character, apparently with no facts before him other than the preliminary showing by the State that the land was swamp and inured to the State under the swamp-land act. The presentation of evidence at the hearing now enables the department for the first time to determine the character of the land.

In prior refusals to revive or to reinstate the swamp-land claim of the State, the cases of *Whitten et al. v. Read*, *supra*, in support of the theory that the swamp-land claim was *res judicata*, cite the cases of *J. C. Lea* (10 L. D. 652); *Hyde et al. v. Warren et al.*, on review (15 L. D. 415); *Mee v. Hughart et al.* (23 L. D. 455); *Lacey v. Grondorf et al.* (38 L. D. 553); *Nelson Gunn et al.* (44 L. D. 486); *Honey Lake Valley Company et al.* (48 L. D. 192); and *Moran v. Horsky* (178 U. S. 205).

The case at bar is not regarded as coming within the principles governing the departmental decisions cited as applying the rule of *res judicata*, namely, vested rights, *J. C. Lea*, *supra*; facts previously fully presented, *Hyde et al. v. Warren et al.*, *supra*; construction of law later held to be erroneous, *Mee v. Hughart et al.*, *supra*; construing law and lawful disposition of land, *Lacey v. Grondorf et al.*, *supra*; agreement in violation of law, *Nelson Gunn et al.*, *supra*; intervening valid claim, *Honey Lake Valley Company et al.*, *supra*; and lawful disposition of land, *Moran v. Horsky*, *supra*.

The testimony of the witnesses and the admission of the forest lieu selector established the fact of the presence of improvements on the

south part of lot 1, plat of 1875, placed there prior to June 19, 1920, by Charles Deering. The evidence indicates that as early as June, 1919, elevation markers were placed on the north and south lines of lot 2, plat of 1875; that in May, 1920, grade stakes were also placed on north and south lines of said lot; that a sign, bearing a notice that the land was for sale, was placed on the land in May or June, 1919, at the west entrance to the property, and the sign remained there until some time in 1921; that Whitten and his predecessors, claiming title to part of the land under mesne conveyance from Pent, the homesteader, paid taxes on the land under the belief that they had title. Under these circumstances, the department is of the opinion that the conflicting forest lieu selection and the indemnity school land selections are invalid, since the county records and the presence of the improvements on the lot in question were notice to the selectors that the land was claimed and was in actual possession of another under color of title; and that the possession of Whitten of lot 2 is deemed sufficient to have prevented selection of the lot on June 19, 1920. *Jones v. Arthur* (28 L. D. 235); *Burtis v. Kansas* (34 L. D. 304); *Atherton v. Fowler* (96 U. S. 513); *Lyle v. Patterson* (228 U. S. 211); *Krueger v. United States* (246 U. S. 69); *Denee v. Ankeny* (246 U. S. 208).

Pent was allowed to make homestead entry for lot 2, plat of 1875, to submit final proof, against which no adverse action was taken, and to receive final certificate, after payment of the purchase price, which has been retained by the Government. On a protest and appeal by William H. H. Gleason, the cash entry was canceled on the ground that Gleason, transferee of patentee, was entitled to the land as accretion to the area described in the Gleason patent, *Gleason v. Pent*, *supra*.

The entry, however, after the issuance of final certificate, was only subject to the jurisdiction of the Land Department for the purpose of determining whether the land was subject to entry at date thereof, or whether the entryman was qualified to make entry and had complied with the requirements of law under which the entry was made. *Charles W. Pelham* (39 L. D. 201.)

In the case of *Cornelius v. Kessel* (128 U. S. 456), the court stated (p. 461)—

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices, in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly

impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.

While the Land Department passed upon the question whether the land was subject to disposition in the departmental decision canceling the Pent cash entry, the action, as has been shown to a demonstration, was unsupported by the law and the facts.

The department is also of the opinion that the homesteader, Pent, acquired such a title to lot 2, plat of 1875, as would prevent a further disposal of the land by the Government to anyone other than Pent. *Carroll v. Stafford* (3 How. 440) and *Witherspoon v. Duncan* (4 Wall. 210).

The representations made by counsel for the estate of Charles Deering warrant favorable consideration of the request for a supplemental plat.

The matters herein considered are regarded as decisive of any other questions presented.

The Commissioner's decision is modified to agree with the foregoing and the case is remanded with a direction that the State may receive patent to lot 1, plat of 1875, when appropriate application therefor is filed; that Pent's canceled cash entry will be reinstated and patent issued thereon; and that a supplemental plat will be prepared showing the south part of lot 1, plat of 1875, as a separate lot, to which will be assigned a new lot number.

Modified and remanded.

WHITTEN ET AL. v. READ (ON REHEARING)

Decided December 22, 1931

HOMESTEAD ENTRY—FINAL CERTIFICATE—PAYMENT—ERROR—IMPROVEMENTS—EQUITY.

Departmental holding of August 11, 1931 (53 I. D. 453), that where an entry, after the issuance of final certificate and payment of purchase price, was canceled for a reason afterwards demonstrated to be unsupported by the law and the facts, the land is not subject to a further disposal by the Government to anyone other than the homesteader, extended to include one who is entitled to equitable relief by reason of having placed improvements on the land and was the holder of the greater portion of the outstanding vested interest of the homesteader.

EDWARDS, *Assistant Secretary*:

The department, August 11, 1931 (53 I. D. 453), had before it a conflicting forest lieu selection and two school-land indemnity selection applications for lots 1 and 2 of Sec. 19, T. 53 S., R. 42 E., T. M., Florida, according to a plat of survey of 1875, and held that lot 1 was swamp in character at date of granting act, September 28, 1850 (9 Stat. 519); that the conflicting forest lieu selection and the indemnity school land selections were invalid; that the possession of Whitten of lot 2 is deemed sufficient to have prevented selection of the lot on June 19, 1920, date of Henry T. Read's application; and that the canceled homestead entry of Edward C. Pent would be reinstated and patent issued thereon for lot 2, containing 40.50 acres. The decision became final as to lot 1 and as to lot 2 so far as it related to Read's forest lieu selection and the State indemnity selections, by failure of Read and of the State to take any action after due notice.

Resident counsel for Francis S. Whitten filed a motion for rehearing and presented an oral argument, urging that Whitten be awarded a preference right to purchase lot 2.

The department is of the opinion, after careful consideration of the entire record, that in equity and good conscience Whitten should be allowed to perfect title to said lot 2 in the exercise of a recognized preference right.

Movent presents a post office money order for \$7.05, fee and commissions, and a sufficient valid scrip to take the land based on unused 40.50 acres of a recertified right of William M. Hazelgrove for 122.50 acres, which, with the certificate of recertification, duly assigned, passed through mesne conveyance to Mary T. Breen, who assigned 40.50 acres thereof on October 26, 1931, to Whitten.

The governing regulations in the matter of filing formal soldiers' additional homestead application, posting, publication, and submission of nonmineral affidavit, are dispensed with and the Commissioner will direct the local office to place the entry of record by assigning a serial number thereto, to issue final certificate in the name of Francis S. Whitten, and to transmit same by special letter, whereupon patent will issue.

Modified to agree with the foregoing the departmental decision is adhered to and the case is remanded for appropriate action.

Modified and remanded.

TAX EXEMPT SELECTIONS—FIVE CIVILIZED TRIBES

Opinion, September 4, 1931

INDIAN LANDS—ALLOTMENT—SELECTION—TAXATION—FIVE CIVILIZED TRIBES.

Lands allotted as surplus to a full-blood Cherokee Indian the restrictions against which had been removed for competency by the Secretary of the Interior under authority of the act of April 21, 1904, do not come within the nontaxable provisions of section 4 of the act of May 10, 1928.

INDIAN LANDS—ALLOTMENT—SELECTION—TAXATION—RESTRICTIONS AGAINST ALIENATION—FIVE CIVILIZED TRIBES.

Section 4 of the act of May 10, 1928, which limits the nontaxable lands of each member of the Five Civilized Tribes, including the Cherokee Nation, from and after April 26, 1931, to 160 acres, contemplated that restricted lands only should be selected and designated as tax exempt, and no authority exists for including in such selection or designation any lands not subject to restrictions against alienation.

INDIAN LANDS—ALLOTMENT—SELECTION—RESTRICTIONS AGAINST ALIENATION—FIVE CIVILIZED TRIBES.

Section 19 of the act of April 26, 1906, which placed restrictions against alienation of lands allotted to full-blood Indians of the Cherokee Nation for a certain stated period unless sooner removed by act of Congress, and the act of May 10, 1928, which continued them did not reimpose restrictions upon competent Indians of that tribe which had been removed by the Secretary of the Interior under authority of the act of April 21, 1904.

GRAVES, *Acting Solicitor:*

You [Secretary of the Interior] have requested my opinion as to whether a 50-acre tract of land described as the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 2, T. 26 N., R. 22 E., and allotted as surplus to Betsy England, now Myers, a full-blood Cherokee Indian, may be designated as exempt from taxation under the provisions of section 4 of the act of May 10, 1928 (45 Stat. 495), amended May 24, 1928 (45 Stat. 733), reading—

That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *Provided further*, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be

recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

The foregoing provision limits the nontaxable lands of each member of the Five Civilized Tribes, including the Cherokee Nation, from and after April 26, 1931, to 160 acres, to be selected and designated as therein provided. But by the express provisions of the statute, restricted lands only may be selected and designated as tax exempt, and no authority exists for including in such selection and designation any lands not subject to restrictions against alienation.

From the record at hand it appears that on December 18, 1905, all the restrictions against alienation of the 50-acre tract here involved were removed by order of the Secretary of the Interior, issued under authority of the act of April 21, 1904 (33 Stat. 189, 204), after an application therefor had been made by the allottee and the Secretary had found that she was competent and capable of managing her affairs free from Federal supervision. It is urged, however, that the restrictions so removed were reimposed by section 19 of the act of April 26, 1906 (34 Stat. 137), and continued in force by the acts of May 27, 1908 (35 Stat. 312), and May 10, 1928, *supra*. Section 19 of the act of 1906 reads—

That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress.

The facts and circumstances inducing the enactment of the foregoing provision are well stated by the Supreme Court of Oklahoma in *Brown v. Miller* (215 Pac. 748). It may not be amiss to briefly restate them here. The lands belonging to the Five Civilized Tribes were allotted under the provisions of agreements negotiated with the several tribes and confirmed by Congress. These agreements, so far as material, provided for the allotment to each member of a specified quantity of land, to be designated as a homestead and other land known as surplus. Restrictions against the alienation of both classes of land were imposed for definite periods, varying in different agreements. The periods of restrictions so fixed, particularly as to the surplus lands, were short, and at the time of the passage of the act of 1906 had expired in a number of instances

and were about to expire in a great many others. Congress was cognizant of the fact that the full-blood members of these tribes were, in the great majority of cases, incompetent and in need of further protection without which their lands, from which the restrictions were passing by operation of law, that is, by expiration of the periods of restriction fixed in the allotment agreements, would rapidly be disposed of at grossly inadequate prices. To extend the needed protection to these incompetent full-bloods, section 19 of the act of 1906 was enacted and the clear purpose and intent of that section as reflected by the conditions then confronting Congress, was to extend the periods of restriction then about to expire and reimpose those that had expired by operation of law. Congress was not concerned with the competent Indians whose restrictions for that reason had been removed by the Secretary under authority of the prior enactment of 1904. They were not regarded as in need of Federal supervision, and it would have required clear language to include them in the reimposition of restrictions. That they were not in fact included was expressly decided in *United States v. Smith* (266 Fed. 740). There, as here, the Secretary of the Interior had removed the restrictions from the land of a full-blood allottee prior to the passage of the act of 1906, and after that enactment the lands were conveyed by the allottee. The court held that the act of 1906 reimposed only these restrictions which had theretofore been removed from lands of this character by operation of law and that the statute did not nullify or suspend the act of the Secretary of the Interior in removing restrictions prior to the passage of the act. See also *Brown v. Miller, supra*.

The decision of the Supreme Court of the United States in *Brader v. James* (246 U. S. 88), relied upon in support of the claim that the restrictions were reimposed upon the lands under consideration by the act of 1906, is not in point, as the question of the effect of that act upon lands from which the restrictions had been removed by the Secretary of the Interior in the exercise of administrative authority conferred upon him by the law then in force was not before the court for decision. The question there was whether the restrictions which had expired by *operation of law* were reimposed by the act of 1906, and the views herein expressed are in entire harmony with the decision of the court upon that question.

It follows, therefore, that the 50-acre tract of land under consideration is free from restrictions and hence is not eligible to exemption from taxation under the provisions of the act of May 10, 1928, *supra*.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

THE CARTER OIL COMPANY¹*Decided September 11, 1931***OIL AND GAS LANDS—LEASE—COMPUTATION OF ROYALTY—REDUCTION OF ROYALTY.**

Separate royalty computations by the Secretary of the Interior for separate tracts within a leasehold, as a basis for royalty reduction, rather than computation for the leasehold as an entirety, where in the lease there was a definite recognized division of the premises into segregated tracts, is not repugnant to the terms of section 17 of the leasing act which conferred upon that official the authority to reduce the royalty on future production where the average daily production of any oil well shall not exceed 10 barrels per day.

EDWARDS, *Assistant Secretary*:

The Carter Oil Company has appealed from a decision of the Commissioner of the General Land Office of May 26, 1931, denying repayment of certain monies paid as royalty on oil and gas produced from Tract "B" included in the lease, Cheyenne 038014, issued to the company November 5, 1921.

Claim is made that the sum of \$2,441.30 was exacted "in excess of lawful requirements" within the meaning of the act of March 26, 1908 (35 Stat. 48), as amended by the acts of December 11, 1919 (41 Stat. 366), and June 27, 1930 (46 Stat. 822).

The lease designates the lands included therein as Tracts "D," "F," "H," and "B," all awarded under section 17 of the leasing act, the first three named to appellant and Tract "B" to the appellant and the Inland Oil & Refining Company, jointly. Another Tract "A" was also awarded jointly to appellant and the Inland Company. Pursuant to an operating agreement between these joint owners, Tract "A" was included in a lease to the Inland Company; Tract "B" included in the lease under consideration. The lease prescribed a flat royalty rate of $33\frac{1}{3}$ per cent and contained the provision that—such royalties, whether in value or kind, shall be subject to reduction whenever the average daily production of any oil well shall not exceed ten barrels per day, if in the judgment of the lessor the wells can not be successfully operated under the royalties fixed therein.

Section 17 of the leasing act provides that—

Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the well can not be successfully operated upon the royalty fixed in the lease.

Regulations of June 28, 1927, Circular No. 1127 (52 L. D. 175), pertinent to the question here presented, are as follows:

* * * applications for reduction of royalty in oil and gas leases where the daily production per well per day is ten barrels or less averaged over the

¹ See decision on motion for rehearing, p. 477.

leasehold as a whole for a continuous period of at least three months next preceding the date of application for reduction will be handled in the following manner:

* * * * *

2. Applications for reduction of royalty will be received for an entire leasehold or any part of the area thereof segregated for computation of royalties by the terms of the lease, by advertisement, bidding, and award though included in the same lease with other lands, or by approved assignment.

On November 11, 1926, appellant with other companies interested applied for reduction of royalty on all the four tracts. Supporting data as to average production, earnings and expenses, *et cetera*, were combined as to Tracts "D" and "F", alleged to be operated under one lease, and like data as to Tracts "B" and "H", were stated for each tract separately. On July 26, 1927, the department approved a letter of the Commissioner finding from data furnished by the Geological Survey that the average daily production per well on Tract "B" was still above ten barrels and denied relief as to that tract, "Under the policy outlined in the letter approved by you (The Secretary) March 29, 1927," but granted reduction as to Tracts "D," "F," and "H," effective August 1, 1927.

Subject to certain restrictions as to the extent of overriding royalties, the conditions governing the reduction were stated as follows:

(a) For each month that the average productivity of the lease is not more than ten barrels of oil per well per day, the royalty shall be 1 per cent for each barrel per well per day or fraction thereof.

(b) For each month that the average productivity of the lease is more than ten barrels of oil per well per day, the royalty shall be 12½ per cent and upward in accordance with the schedule of the standard lease form.

Another application was filed by appellant on March 9, 1928, for reduction of royalty on Tract "B", supported by data showing since the prior grant of reduction, the production of Tract "B" had fallen within the meaning of the regulations below ten barrels. On May 31, 1928, the department approved the reduction asked, subject to paragraphs (a) and (b), as above set forth, which became effective under the rules April 1, 1928.

It appears that computations of royalties due in accordance with the prescriptions of paragraphs (a) and (b) above stated, resulted in a showing at the end of October, 1928, that the company was entitled to a credit of \$795.57 for excess royalties paid on the entire leased premises. Revision of the account was, however, necessitated by a ruling of the Comptroller General of December 17, 1930, to the effect that there was no authority for rule "(b)"; that if the average daily production per well per day exceeded ten barrels, royalty charged must be the flat rate prescribed by the lease. The average productivity on Tract "B" for December, 1930, having

exceeded ten barrels, according to said ruling it became necessary to make a debit correction against the lessee amounting to \$811.08.

On the state of the account in his office, the Commissioner held in the decision appealed from that no payments were shown in excess of lawful requirements.

Appellant now for the first time contends that the Secretary is without authority to grant reductions of royalty on part of a leasehold and not on the entire lease; that it should have been averaged on the entire leased premises as a unit, and if that were done it would show an average productivity of less than ten barrels per day for the entire leasehold area, and he is entitled to a grant of reduction of royalties on the entire leasehold effective the first day of the calendar month following the filing of the completed application, which was December 1, 1926.

No merit is seen in these contentions. The pertinent part of the statute permitting reductions under conditions therein specified is silent as to the methods of computation that may be employed. This was a matter properly subject to regulations by the Secretary, which he is empowered to make under section 32 of the leasing act to carry out its purposes. The instructions approved March 29, 1927, which were applied in granting the reductions, state in section 2 thereof that—

Separate royalty computations are normally made (a) for separate leaseholds, (b) for separate tracts within a leasehold in case the lease so provides, as in case two or more tracts offered for sale are bid in by one party and included in one lease or parts of two or more leaseholds are included in a consolidated lease. * * * Computing royalty by individual wells is, however, wholly impracticable and computation on a leasehold basis is the general rule adopted in the department unless there has been a definite recognized division of the leasehold by the terms of the lease or by assignment.

The lease here in question falls under the description denominated "(b)" above set out, and in the lease there was a definite recognized division of the premises into segregated tracts.

The subsequent regulations of June 28, 1927, above quoted, did not abolish but perpetuated these provisions quoted. They are not repugnant to the terms of the act, but on the contrary, provide an equitable and practicable method of effecting its purpose. The contention that by reason of their application royalties were exacted in excess of those required by law, and therefore subject to repayment is without substantial basis.

The Commissioner's decision must be, and is hereby,

Affirmed.

THE CARTER OIL COMPANY (ON REHEARING)

Decided October 23, 1931

OIL AND GAS LANDS—LEASE—ROYALTY—COMPTROLLER GENERAL—LAND DEPARTMENT—SECRETARY OF THE INTERIOR.

A ruling by the Comptroller General that the Secretary of the Interior is without authority to change the royalty rates prescribed in an oil and gas lease is binding on the Land Department where the production exceeds 10 barrels per well per day.

EDWARDS, *Assistant Secretary*:

A motion for rehearing has been filed in the above-entitled case in which the department by decision of September 11, 1931 (53 I. D. 474), denied the application of The Carter Oil Company for repayment of certain moneys paid as royalty in the company's oil and gas lease, Cheyenne 038014.

The lease embraces lands designated as Tracts "B," "D," "F," and "H," and is at a flat royalty rate of $33\frac{1}{3}$ per cent. In November, 1926, the company applied for reduction of royalty, and this was granted as to Tracts "D," "F," and "H," but was refused as to Tract "B" because the production was not below 10 barrels per well per day on that land. One condition of the reduction was that for each month that the average productivity of the lease was more than 10 barrels of oil per well per day the royalty should be $12\frac{1}{2}$ per cent and upward in accordance with the schedule of the standard lease form.

Subsequently production of Tract "B" fell below 10 barrels per well per day and on application reduction was granted. Still later the Comptroller General ruled that there was no authority for changing the royalty rate from $33\frac{1}{3}$ per cent to $12\frac{1}{2}$ per cent and upward when production was more than 10 barrels per well per day, and this made revision of the account necessary.

In the motion for rehearing counsel for the company contend that there is merit in the argument on appeal that the production from the lease as a whole should be considered in the claim for reduction and not production from separate tracts; that there is nothing in the lease which authorizes the Secretary of the Interior to make the royalties on one portion different from those on another; that the Secretary should follow the reduction originally granted in changing the royalty from $33\frac{1}{3}$ per cent to sliding scale royalty rates when production exceeded 10 barrels per well per day; and that as the Secretary had authority originally to prescribe royalties he had authority to change from $33\frac{1}{3}$ per cent to $12\frac{1}{2}$ per cent and upward when conditions were found to justify a reduction.

The facts and the law were fully set forth and discussed in the decision complained of. The lease consists of the separate tracts described, in which different parties are interested.

In the application for reduction The Carter Oil Company showed that it held the entire interest in Tracts "D" and "F"; that it held an undivided one-half interest in Tract "H" and the Consolidated Royalty Oil Company the other one-half; and that it held an undivided one-half interest in Tract "B," the Continental Oil Company owning the other undivided one-half. The Consolidated Royalty Oil Company and the Continental Oil Company joined in the application.

Neither section 17 of the leasing act nor the lease itself is wholly clear as to the conditions under which royalty may be reduced. When reduction was asked and when it was granted in this case there were departmental regulations in force providing that applications for reduction of royalty could be received for an entire leasehold or any part of the area thereof segregated for computation of royalties by the terms of the lease, by advertisement, bidding, and award though included in the same lease with other lands, or by approved assignment. Inasmuch as there were different owners of the interests in Tract "B," Tract "H," and Tracts "D" and "F," there were in effect three different leases with the same flat royalty rate of $33\frac{1}{3}$ per cent. No provision or condition in the leases was necessary, in the opinion of the department, for the construction which was to be given section 17 of the leasing act in granting reduction of royalty. Reduction was granted in accordance with regulations in force and it was accepted. The department does not find that there was any departure from law and regulations thereunder in granting reduction of royalty as to Tracts "D," "F," and "H," but not as to Tract "B" when production from said Tract "B" did not fall below 10 barrels of oil per well per day.

The department is of the opinion that the ruling of the Comptroller General, hereinbefore referred to must be considered as governing on the question of reducing royalty when the average productivity is more than 10 barrels of oil per well per day.

No reason for vacating or modifying the decision of September 11, 1931, is seen and the motion for rehearing is accordingly

Denied.

KARL A. P. LOYNING

Decided September 11, 1931

**LAND DEPARTMENT—POWER OF REVIEW—EQUITABLE RIGHTS—RES JUDICATA—
HOMESTEAD ENTRY—OIL AND GAS LANDS—PATENT.**

While the Land Department, prior to the passing of the legal title to public land, has the power to make inquiry as to the equitable rights of a claimant thereto and to review or reverse any of its findings for cause, yet the existence of that power does not, in the absence of any application invoking the power to reconsider, impose a duty upon the department, after it has finally considered and adjudged the rights of a claimant, and that correctly at the time, to reopen the record upon its own volition with the view to ascertaining whether any change in the status of the land subsequently occurring has created a situation whereby the claimant might be granted additional rights.

EXCHANGE OF PATENT—HOMESTEAD ENTRY—OIL AND GAS LANDS—RESERVATION.

One obtaining patent to public land with oil and gas reservation to the United States, properly impressed in strict accordance with the status and condition of the land at the date his entry is approved for patenting, can not, after acceptance of the patent, be allowed to exchange the patent for one without such reservation on the ground that the land was restored from a petroleum reserve between the dates of the approval for, and issuance of patent.

EDWARDS, Assistant Secretary:

On May 20, 1931, the Commissioner of the General Land Office denied the application of Karl A. P. Loyning filed May 6, 1931, to have the patent issued for his combined homestead entries, Billings 08937 and 012484, with oil and gas reservation to the United States exchanged for a patent without such reservation.

On June 11, 1913, Loyning made second entry 08937 under the acts of February 19, 1909 (35 Stat. 639), and February 3, 1911 (36 Stat. 896), and on December 1, 1914, application for additional entry 012484, all for tracts in Sec. 23, T. 6 S., R. 21 E., M. P. M. That section, with other lands, was placed in Petroleum Reserve No. 40 by Executive order of December 6, 1915. Final proof on the combined entries was made September 8, 1916. In response to a notice in conformity with the then existing regulations (44 L. D. 32; 45 L. D. 77, 79), under the act of July 17, 1914 (38 Stat. 509), on October 7, 1916, Loyning filed an election to take patent with reservation of oil and gas. On October 17, 1916, final certificate issued bearing the notation: "Patent to contain the provisions, reservations, conditions and limitations of the act of July 17, 1914 (38 Stat. 509), as to oil and gas." On May 17, 1917, the entries were approved for patenting and patent issued accordingly June 8, 1917. Between the date of such approval and the date of the issuance of patent, i. e., May 22, 1917, the land entered with other land was released

from the petroleum reserve and restored to unrestricted entry. Briefly stated, applicant's contentions are as follows: that the status of the land at the date of patent governs in determining the character of the estate to be granted, and as the order of restoration preceded the date of the actual issuance of the patent, he was entitled to a patent without the mineral reservation, and, therefore, the issuance of the patent with such reservation was unauthorized by law and erroneous, and by reason thereof the department has power to take it back and issue to him an absolute patent. The delay in invoking the relief asked is attributed to lack of knowledge of the vacation of the petroleum reserve until investigation of the title recently in connection with a contemplated alienation of the land.

There can be no doubt that the mineral reservation under the law and regulations was properly impressed upon the entry. The applicant does not question it. At the date of final proof and at the date the entry was approved for patenting, the status and condition of the land was such that a patent without such reservation would have been unauthorized. While it is settled law that until the legal title passes to public land—in this case by the issuance of a patent—inquiry as to all equitable rights come within the cognizance of the Land Department; *Brown v. Hitchcock* (173 U. S. 473), and until the matter is closed by final action the proceedings of an officer of the department are as much open to review and reversal by himself, or his successor, as are the interlocutory decrees of a court open to review on final hearing. *Orleans v. Paine* (147 U. S. 261, 266); *Knight v. Lane* (228 U. S. 6, 13). Nevertheless, the existence of this power of review and reconsideration does not involve the consequence that it is the duty of the Land Department, after it has finally considered and adjudged the rights of the claimant, and that correctly, to again, of its own motion, reconsider the record with the view to ascertaining whether any change in the status of the land subsequently occurring has created a situation whereby the claimant might be granted additional rights in the absence of any application invoking the power to reconsider. Furthermore, the mere vacation of the petroleum withdrawal did not conclusively establish that the land was not valuable for oil and gas, nor of its own force annul the mineral reservation impressed upon the entry and thereby confer a vested right to an absolute patent on the entryman. Had the order of restoration been brought to the Commissioner's attention, he still had authority to inquire whether or not, under existing geological conditions, the reservation in the patent should be retained.

The circumstances under which the Land Department has authority to recall a patent and issue a new one in its stead to the same

person arose in *Le Roy v. Jamison et al.* (Fed. Cas. No. 8,271, 15 Fed. Cas. 373, 3 Saw. 369). The Supreme Court said in *United States v. Schurz* (102 U. S. 378, 399) that in the opinion in that case, "the subject is very fully and ably discussed by Mr. Justice Field."

Among other things, Justice Field said (p. 282)—

The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered, the transaction is closed; the title has passed, and any subsequent alteration of the instrument, or its destruction, can not affect the grantee's title. But if not accepted when tendered, the deed may be corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the facts that whilst the individual grantor is not restricted in his alterations, *the officers of the Government, acting under the law, can only, even by consent of the patentee, go behind the record to correct an error committed to his injury in disregard of rights secured to him by law.* [Italics supplied.]

And again speaking of the patentee in that case it is said (p. 282)—

* * * He asked what the law authorized him to have, and so far as the law is disregarded in the survey he stands free as to his acceptance of the result. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a reexamination of the survey as to the errors alleged.

The department perceives no ground for holding that the patentee before the patent was issued had secured a right to an unrestricted patent. Assuming that the character and status of the land was such that he could have upon application had his entry suitably amended to permit of its issuance, this was not done. The patentee received full title to the estate vested in him by law. The patent issued conforms exactly with the record upon which it is based, and the department is without further jurisdiction in the matter. *Caroline Coleman* (51 L. D. 63). Moreover it was accepted, and no objection raised until nearly 14 years after its issuance. The Commissioner's decision is

Affirmed.

ATLANTIC AND PACIFIC RAILROAD GRANT—WALAPAI INDIAN LANDS

Opinion, September 16, 1931

INDIAN LANDS—OCCUPANCY—PUBLIC LANDS.

While the United States, like the European nations who took possession of the North American continent, asserted dominion over and title to the lands occupied by the Indians, yet the Federal Government has, in case of actual occupancy regarded their rights as sacred and not to be taken from them without their consent and then only upon such consideration as may be agreed upon.

PUBLIC LANDS—INDIAN OCCUPANCY.

It has been the established policy of the Government, in dealing with unreserved lands actually occupied and improved by individual Indians prior to initiation of rights under the various public land laws, to appropriately protect the interests of such Indian occupants.

INDIAN LANDS—WALAPAI INDIANS—OCCUPANCY.

Evidence is lacking to show that, prior to the time of the removal of the Walapai Indians from northwestern Arizona to the reservation created for them on the lower Colorado River, there was such use and occupancy of the lands, subsequently embraced within the reservation, separate and apart from the vast area of the public domain, as to impress upon them the status of Indian lands.

INDIAN LANDS—PUBLIC LANDS—WALAPAI INDIANS—OCCUPANCY—WITHDRAWAL.

There being no prior treaty, act of Congress, or administrative order reserving lands for the Walapai Indians, it was within the power of Congress to cause their removal from the lands occupied by them to other lands reserved by Congress for their use and benefit, and upon their removal the lands which they had previously occupied became subject to disposition under the public land laws, unburdened with any title based upon aboriginal occupancy.

RAILROAD GRANT—INDIAN LANDS—WALAPAI INDIANS—OCCUPANCY—WITHDRAWAL.

The occupancy of the Walapai Indians on lands in Arizona granted to the Atlantic and Pacific Railroad Company by the act of July 27, 1866, having been extinguished by their removal to other lands reserved for them by Congress prior to the date of the grant, the grant attached free from any claim based on Indian occupancy, and the subsequent reservation created for their benefit after the definite location of the road had been fixed embracing lands within the grant did not affect the rights of the railroad company.

FINNEY, *Solicitor*:

The Assistant Commissioner, Office of Indian Affairs, has requested an opinion regarding the validity of the claim of the Santa Fe Pacific Railroad Company, as successor in interest of the Atlantic & Pacific Railroad Company, by virtue of the grant under the act of July 27, 1866 (14 Stat. 292), to the alternate or odd-numbered sections within the boundaries of the Walapai (Hualapai) Indian Reservation in Arizona, which was established by Executive order of January 4, 1883.

The following state of facts is quoted from the letter of the Assistant Commissioner:

The alternate or odd numbered sections of land therein are claimed by the Santa Fe Railroad Company, as successors in interest to the Atlantic & Pacific Railroad Company by virtue of a grant made to the latter company by the act of July 27, 1866 (14 Stat. 292), which grant attached on March 12, 1872, the date on which the map of definite location of the road was filed. Title to the even-numbered sections is retained by the Government for the benefit of the Indians.

To overcome the disadvantages of this "checkerboard" control of lands, the act of February 20, 1925 (43 Stat. 954), was passed, conferring authority for exchanges necessary to effect consolidation of the Indian and railroad controlled land. During 1930 our field men and representatives of the railroad company made an examination and appraisal of the entire reservation, and a division of the lands pursuant to the above act was tentatively agreed upon. Consummation has been withheld pending a compromise adjustment of litigation which was initiated in behalf of the Indians involving title to Peach Springs, located within the reservation. Judgment and decree in the case were entered July 7, 1931, in the District Court of the United States for the District of Arizona, effectually disposing of the suit (L-388 Prescott, copy of stipulation and decree herewith).

Upon termination of the suit the way appeared clear to proceed with the proposed division of lands and consolidation, as referred to above. However, in the meantime, the Senate Committee on Indian Affairs has formally requested that action be deferred in the matter until the committee has opportunity to further investigate the rights of the Indians; also it appears the view was informally expressed by members of the Sub-Committee of the Senate Committee on Indian Affairs during its recent trip through the Southwest that before active steps are actually taken toward effecting the division and consolidation, that the validity of the railroad title under the original granting Act of July 27, 1866, *supra*, be formally passed upon by the Attorney General.

The record discloses that the question now submitted and related questions have received the consideration of the department on a number of occasions during the past 12 years.

In so far as the immediate question is concerned, it first received careful consideration in 1919 when the Commissioner of the General Land Office by letter dated April 19 of that year, requested instructions concerning the survey of lands within the primary limits of the portion of the grant within the boundaries of this reservation. On April 26, 1919, the matter was submitted to the Commissioner of Indian Affairs with direction to report as to whether funds were available to cover the portion of the cost of the survey to be borne by the Government. On May 13, 1919, the Commissioner, in his reply, objected to the making of the survey and requested authority to prepare a letter to the Attorney General with the view to having steps taken through the courts to quiet any alleged claims of the Atlantic & Pacific Railroad Company and its successor in interest, the Santa Fe Pacific Railroad Company, to any land within the boundaries of the reservation on the ground that said lands were not within the grant to the railroad company; that they did not have the status of public lands within the meaning of the granting act; that they were subject to "other claims or rights", and that they were "reserved" from other disposition at that time owing to long-continued use and occupancy by the Indians. The record shows that the matter was carefully considered by the department, after which on October 2, 1919, the First Assistant Secretary advised the Com-

missioner of the General Land Office that the survey might properly proceed and that funds were available for paying the Government's share of the cost of the proposed survey.

In that letter it was stated—

Your letter was referred to the Commissioner of Indian Affairs for report, and in his reply of May 13, 1919, the position is taken that the lands in question were excepted from the railroad grant by reason of the prior use and occupancy of the Indians, notwithstanding the fact that the grant to the company and the definite location of the road were prior to the establishment of the Indian Reservation.

This matter has been given very careful consideration in connection with extensive memoranda subsequently prepared on the subject, and the conclusion reached that there is no such Indian claim as prevents the railroad grant from attaching to these lands; that the grant can be forfeited only by express Congressional action; that therefore the Executive order creating the Indian reservation did not deprive the railroad company of any rights to the lands; and that the claim of the railroad company can not be resisted on the ground of Indian use and occupancy prior to the grant. It has accordingly been determined that the survey of these lands may properly proceed.

Under date of October 20, 1919, the First Assistant Secretary made demand on the company to deposit in a proper United States depository the sum of \$30,000, determined to be sufficient to pay the cost of field and office work involved in surveying unsurveyed lands in the reservation, under penalty of proceedings for forfeiture of the grant in the event of default.

On December 27, 1920, the Commissioner of Indian Affairs requested review of the case, and on January 26, 1920, the First Assistant Secretary advised him that the matter had been reviewed and that the unanimous conclusion of the officers of the department was that "the railroad company has full, complete, and incontestable title to the odd-numbered sections in this reservation and embraced in the grant limits." It was further stated that attention should now be directed to the consideration of the question of consolidating the lands into two parcels, for the Indians and the railroad company, respectively.

The survey of the lands was completed and on September 28, 1922, plats of survey were transmitted to the Commissioner of Indian Affairs for his information, covering eight townships within the reservation.

Subsequent consideration designed to promote the welfare of the Indians led to the enactment of the act of February 20, 1925 (43 Stat. 954), authorizing exchanges of Government and privately owned lands in the reservation with a view to facilitating consolidation of railroad and Indian lands, respectively.

As stated in the Assistant Commissioner's letter, suit was subsequently instituted by the United States in the District Court of

the United States for the District of Arizona against the Atchison, Topeka & Santa Fe Railway Company on behalf of the Indians, involving title to Peach Springs, situated in Secs. 2 and 3, T. 23 N., R. 11 W., G. & S. R. M., within the boundaries of the reservation. That suit was terminated by stipulation entered into by counsel for the respective parties, and judgment and decree were duly entered July 7, 1931. On July 15, 1931, the Attorney General advised that his department was now closing its files with respect to this litigation.

It was decreed that the United States, for the use and benefit of the Walapai, or Hualapai, Indians, or tribe of Indians, owns absolute fee title to Secs. 2 and 3, subject only to the rights to be adjudged to the railway company to take and use water of Peach Springs, occurring in said sections, for railroad, domestic, and other uses and purposes, *et cetera*.

The First Assistant Secretary, on July 30, 1931, acknowledged receipt of the Attorney General's letter and requested advice as to the validity of the title of the railway company to the odd-numbered sections within the reservation.

It appears to be the intention to submit the matter formally for the opinion of the Attorney General, and request is now made as to my opinion of the validity of the railroad company's claim to the odd-numbered sections of land within the reservation under the granting act, and whether the Indians, through prior occupancy and possession of the lands, had a valid claim thereto which has never been extinguished. In effect, request is now made for a review of the departmental action heretofore taken.

The lands are claimed by the railroad company under the grant made by the act of July 27, 1866, *supra*, to the Atlantic & Pacific Railroad Company, of which the present claimant is successor in interest. The date of the definite location of the road was March 12, 1872. The Walapai, or Hualapai, Indian Reservation was established by Executive order of January 4, 1883. The order reads as follows:

EXECUTIVE MANSION, *January 4, 1883.*

It is hereby ordered that the following described tract of country, situated in the Territory of Arizona, be, and the same is hereby set aside and reserved for the use and occupancy of the Hualpai Indians, namely: Beginning at a point on the Colorado River five (5) miles eastward or Tinnakah Spring; thence south twenty (20) miles to crest of high mesa; thence south 40° east twenty-five (25) miles to a point of Music Mountains; thence east fifteen (15) miles; thence north 50° east thirty-five (35) miles; thence north thirty (30) miles to the Colorado River; thence along said river to the place of beginning, the southern boundary being at least two (2) miles south of Peach Spring, and the eastern boundary at least two (2) miles east of Pine Spring.

All bearings and distances being approximate.

(Signed.)

CHESTER A. ARTHUR.

As the grant to the company and the definite location of the road were prior to the establishment of the Indian reservation, the question submitted is dependent on whether or not the lands in question were excepted from the railroad grant by reason of prior use and occupancy of the Indians. In so far as the record shows there was no treaty, act of Congress, or order by administrative officers purporting to reserve these lands prior to the date of the Executive order of January 4, 1883, other than that dated July 8, 1881, issued by Major General Willcox, Department Commander, setting aside, subject to the approval of the President, the area which was afterwards included in the Executive order. It should also be stated that the record discloses no cession of lands from these Indians to the United States.

It appears from the reports of the Army officers and other sources that, at the time of the granting act, the Walpai Indians roamed the mountainous country of northwestern Arizona, including the lands afterwards embraced in the reservation. Efforts to place them under control met with vigorous resistance, but after operations covering several years, the Indians surrendered to the military authorities, and, in 1869, they were forcibly removed to a reservation on the lower Colorado River, created by act of Congress May 3, 1865 (13 Stat. 541, 559). The reservation was unsuited to their wants and many of them died of disease, and, in 1875, they fled from the reservation and became wanderers and fugitives in the desolate mountain regions where they formerly roamed, part of which were later embraced in the Walapai Reservation. In July, 1881, the local military commander, at the request of the Indians, recommended to the Department Commander the creation of a reservation for their benefit as soon as practicable, and as a result the military order referred to was issued by the Department Commander.

Various affidavits secured in accordance with stipulation of counsel in connection with the Peach Springs suit disclose some further information concerning the use of the waters of the springs on the reservation. It appears that, at the present time, there are only a few Indians on the reservation, most of them living at or near the Peach Springs station of the railway company. Most of them are living at the Walapai Indian School Reservation, a small reservation a few miles south, which was created on May 4, 1900, by President McKinley on lands conveyed by the railroad company.

Section 3 of the act of July 27, 1866, *supra*, under which the railroad company bases its claim, reads in part as follows:

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 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;

Section 2 of the act contains the following provision:

* * * The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

While the rights of the natives as occupants were generally respected by the European nations when they took possession of the American continent, they all asserted the ultimate dominion and title to be in themselves. *Johnson v. McIntosh* (8 Wheat. 543); *Hayt v. United States* (38 Ct. Cls. 455). The same principle has generally been followed in the policy of the United States with respect to the rights of Indians growing out of their occupancy of lands within its borders. It has been generally recognized, however, that this right may be extinguished by the Government, which holds the fee, leaving the fee unincumbered to pass to a grantee of the Government, but it has been regarded as sacred and something not to be taken from the Indians without their consent and then upon such consideration as may be agreed upon. *Leavenworth, Lawrence and Galveston Railroad Company v. United States* (92 U. S. 733), *Johnson v. McIntosh, supra*, *United States v. Lindahl* (221 Fed. 143), *Lone Wolf v. Hitchcock* (187 U. S. 553), *Minnesota v. Hitchcock* (185 U. S. 373, 385).

In the case of *Leavenworth, Lawrence and Galveston Railroad Company v. United States, supra*, it was held that where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same, is assured by treaty, a grant of them absolutely or *cum onere* by Congress to aid in the building of a railroad, violates an express stipulation, and a grant in general terms of "land," can not be construed to embrace them. This case involved a grant to the State of Kansas in aid of the construction of a railroad, and with respect to lands reserved for the Osage Indians, the court said (p. 741)—

* * * But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public

lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy.

The case of *Minnesota v. Hitchcock*, *supra*, involved lands claimed to be within a school grant to the State. The court decided in that case that the general scope of the legislation in these matters and the policy of the United States in respect to its public schools and also to the Indians sustained the contention that none of these Indian lands passed under the school grant to the State:

Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon (pp. 388-389).

Yet if it was necessary to determine the question we should have little doubt that this was a reservation within the accepted meaning of the term (p. 389).

* * * Of course, when the Indian tribe has been removed by treaty from one body of land to another the interest of the tribe in the land from which it has been removed ceases and the full obligation of the Government to the Indians is satisfied when the pecuniary or real estate consideration for the cession is secured to them. But in some instances, and this is one of them, the Indians have not been removed from one reservation to another, but the Government has proceeded upon the theory that the time has come when efforts shall be made to civilize and fit them for citizenship. Allotments are made in severalty, and something attempted more than provision for the material wants of the Indians. In construing provisions designed for their education and civilization as fully if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress (pp. 401-402).

In the case of *Northern Pacific Railway Company v. Wismer* (246 U. S. 283), it was held that lands opposite the line of the Northern Pacific Railway Company constituting an Indian reservation, when the line was definitely located, were not embraced in the grant of the odd-numbered sections made to the company by the act of July 2, 1864 (13 Stat. 365). On page 288, the court said—

That the reservation was in fact made and the lands exclusively devoted to the use of the Indians from the date of the agreement of August, 1877, is beyond controversy; that no objection was ever made by his superiors to the action taken by Colonel Watkins is equally clear, and to hold that, for want of a

formal approval by the Secretary of the Interior, all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them, even to the extent of protecting the reservation by military forces from intrusion, is without effect, would be to subordinate the realities of the situation to mere form, for the delay in the issuing of the formal Executive Order of the President under the circumstances can be attributed only to the exigencies of the public business;—by his representative, the Secretary of the Interior, he had approved the setting apart of the lands to the use of the Indians almost three years before.

The judgment of the Circuit Court of Appeals will be affirmed for the reason that the Spokane Indian Reservation was lawfully created prior to the filing of the plat of the line of the plaintiff company on October 4th, 1880.

The cases hereinbefore cited, wherein it was held that the particular grant involved did not attach, concerned lands which had been reserved for the use of Indians, pursuant to treaty obligations, acts of Congress, or by proper administrative authority.

With respect to unreserved lands, it has been the established policy of the Government, in dealing with unreserved lands actually occupied and improved by individual Indians, prior to initiation of rights under the various public land laws, to appropriately protect the interests of such individual holders.

The case of *Cramer et al. v. United States* (261 U. S. 219) held that lands definitely occupied by individual Indians were excepted from the Central Pacific grant of July 25, 1866 (14 Stat. 239), as lands "reserved * * * or otherwise disposed of", and that such possessory rights, though not recognized by any statute or other formal governmental action of the time, were protected by the settled policy of the Government towards the Indians:

* * * Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U. S. 517, 525; *Minnesota v. Hitchcock*, 185 U. S. 373, 385. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co. v. Eaton*, 183 U. S. 602, 609; *Hastings & Dakota R. R. Co. v. Whitney*, 132 U. S. 357, 366. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them (p. 227).

The court further stated that the rights of one who occupies part of a subdivision of public land without laying claim to or exercising dominion over the remainder, are confined to the part occupied.

It is quite clear that the question for decision in the *Cramer case* was not analogous to the one here presented. In that case the right of the Indian was based on occupancy of a specific tract and the improvement of same as an individual apart from any tribal relation. It is undoubtedly true that lands occupied by individual Walapais and improved by them prior to the date when the right of the railroad would otherwise attach, would be excluded from the grant. But there is no evidence of such individual occupancy present in this case as to any of the lands.

Nor was there at the time of the granting act or at the time of the date of definite location of the line, any existent reservation affecting the lands in question which had been set aside for their use by treaty, act of Congress or Executive order. In fact, at the date of definite location, there were no Indians inhabiting this region of the country. They were residing at that time on the reservation along the lower Colorado River, which had been created for them by act of Congress.

As a result of the conditions arising after their unauthorized return to this region, the reservation was created for their protection and welfare.

While the available information bearing upon the question of use and occupancy of the lands now embraced in the reservation prior to the time of the grant to the railroad company is meager and consists principally of the statements in the reports of the military authorities, it appears sufficient to support the conclusion of the department heretofore reached. There is nothing to show that, prior to the time of the removal of the Indians from northwestern Arizona to the reservation created for them on the lower Colorado, there was such use and occupancy of the lands subsequently embraced in the reservation, separate and apart from the vast area of the public domain, to impress upon them the status of Indian lands. In any event, the fee was in the United States, and it was within the power of Congress to transfer such lands without restriction, to terminate any right which they might have to further use and occupy the lands and to provide other lands for their use and occupancy. In my view, their removal to the reservation provided for their use by act of Congress under the circumstances disclosed by the reports, extinguished any right which they might have acquired to use and occupy any of these lands, and they became subject to disposition under the public land laws, unburdened with any title based on aboriginal occupancy.

Viewed in its most favorable light, the information does not, in my opinion, establish an Indian title growing out of use and occupancy of the area which would defeat the grant to the railroad company. The lands were unoccupied public lands of the United

States at the date of the definite location of the road on March 12, 1872, and, in consequence, the grant of the alternate or odd-numbered sections within that area attach as of that date. *United States v. Southern Pacific Railroad Company* (146 U. S. 570); *Southern Pacific Railroad Company v. United States* (183 U. S. 519). The rights of the Indians in lands within the boundaries of the reservation date from the Executive order of January 4, 1883, when the lands were set aside for their use and occupancy. The map of the definite location having been filed long prior to the creation of the reservation, it therefore appears that the views expressed in the letter of the First Assistant Secretary to the Commissioner of the General Land Office, dated October 2, 1919, to the effect that there was no such Indian claim as prevented the railroad grant from attaching to these lands, was correct. Furthermore, in subsequent legislation—act of February 20, 1925 (43 Stat. 954)—Congress gave tacit recognition to the rights of the railroad company to lands within the reservation under its grant when it authorized the Secretary to divide and consolidate the respective holdings of the Indians and private parties, in order that the Indian lands might be embraced in a large, compact body for their exclusive use and benefit.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

CHALLENGE TO VALIDITY OF MINING CLAIMS IN NATIONAL PARKS

Opinion, September 19, 1931

MINING CLAIM—NATIONAL PARKS—PUBLIC LANDS.

No distinction is to be made between valid mining locations in national parks and those on the unreserved public domain with respect to the acts required by the owners thereof to preserve their rights.

MINING CLAIM—ASSESSMENT WORK—NATIONAL PARKS.

The Government can not challenge the valid existence of mining claims situated within national parks by reason of defaults in the performance of annual assessment work.

MINING CLAIM—ABANDONMENT—DISCOVERY—MINERAL LANDS—NATIONAL PARKS.

There is doubt whether a departmental decision holding a mining claim in a national park has been abandoned has the same conclusive legal effect on the claimant's rights as an adjudication would have that it is void on the ground that the land was nonmineral in character or that there was a lack of discovery.

MINING CLAIM—MINERAL LANDS—DISCOVERY—EVIDENCE—NATIONAL PARKS—WITHDRAWAL.

Feeble showings of mineralization on a mining claim, some of them disclosed in underground workings, whether made before or after a reservation for a national park became effective, and occurring in thin films and seams, and showing on assay negligible values in gold, silver, and copper, are insufficient in themselves to establish a discovery that will save the claim from the operation of the withdrawal.

MINING CLAIM—MINERAL LANDS—EVIDENCE—EXPENDITURES—NATIONAL PARKS.

The fact that a mining claim is located at the bottom of a rugged and precipitous canyon, 50 miles from the nearest railroad point, and that the last 18 miles is over a poor and dangerous trail; that all supplies and mining tools must be conveyed from the canyon rim by pack animals, and that the mining work can not be duplicated for less than \$25 per linear foot, must be considered very material factors for a reasonably prudent person in determining whether the minerals will justify the expenditure and time in the hope of developing a paying mine.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion on the questions raised in a memorandum of August 3, 1931, from the Acting Director of the National Park Service: first, may the Government challenge the valid existence of mining claims situated in national parks by reason of default in the performance of assessment work; and second, may it challenge them on the ground of abandonment.

Though not explicitly limited in the memorandum, the correspondence accompanying the memorandum indicates that the question more particularly relates to mining claims validly initiated by location and discovery prior to the date of the establishment of the park and made for deposits other than those subject to operation of the general leasing act; the immediate problem appearing to be the legal status of metalliferous lodes in the Grand Canyon National Park, upon which defaults in the doing of annual assessment work can probably be proven.

The memorandum above mentioned quotes from a letter of July 2, 1931, from the Commissioner of the General Land Office to the Director of the National Park Service as follows:

The suggestion that the claims might be attacked in the event annual assessment work is not kept up, is not believed to be of any merit, in view of the decision of the Supreme Court in the *Krushnic case* (280 U. S. 306). It is plain from the court's opinion that departmental power to challenge the valid existence of the claim in default for nonperformance of annual assessment work and before its resumption must be deduced from the court's interpretation of the excepting clause in section 37 of the leasing act, which has no application to locations for deposits other than those named in that act. This department has so construed the decision.

and then proceeds to state—

It is our understanding that the departmental decision referred to is that dated July 7, 1930, to the Commissioner of the General Land Office, relative to procedure that should be taken against mining locations within the area of the Boulder Dam and reservoir project, withdrawn by Executive order in 1919, under the act of June 17, 1902 (32 Stat. 388).

It has occurred to us that there may be a distinction between the status of mining locations within this area and those within a national park created by an act of Congress, as lands within a national park have been permanently and definitely appropriated by the United States and put to a public useful purpose. Furthermore, by the act of January 26, 1931, Public 514—71st Congress, Congress specifically provided that "hereafter no permit, license, lease, or other authorization for the prospecting, developing, or utilization of the mineral resources within the * * * Grand Canyon National Park, Arizona, shall be granted or made."

The instructions of July 7, 1930 (53 I. D. 228), above referred to fully sustain the Commissioner's conclusions. The portions of the opinion of the Supreme Court quoted in those instructions, which are in line with previous views of the courts and this department, do not admit of any doubt as to meaning and need no repetition. No reason appears to the department why owners of valid mining locations in a national park are amenable to any different rule as to the doing of assessment work than they would be if their claims were in a reclamation project or even on the public domain. In well considered opinions of the Federal Courts it has been held that the rights of a locator of any mining claim within the boundaries of a forest reserve are substantially those of one who locates such claim on the public domain, and gives the locator the right of exclusive possession and enjoyment of all the surface of his location; that his rights of enjoyment, including the surface of his claims, are not qualified, nor can they be infringed upon by including the claims in a forest reserve. *Teller v. United States* (C. C. A.) (113 Fed. 273); *United States v. Rizzinelli* (D. C.) (182 Fed. 675); *United States v. Deasy* (D. C.) (24 Fed. (2d) 108, 111).

Moreover, the act (February 26, 1919, 40 Stat. 1175) establishing the Grand Canyon National Park, section 4 thereof (U. S. C., Title 16, Sec. 224), provides—

That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or *shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land.* [Italics supplied.]

Similar declarations are observed in the acts establishing other well-known national parks. It is, therefore, my opinion that no distinction can be made between valid locations in National Parks and on the public domain with respect to the acts required of the

owners thereof to preserve their rights. The act of January 26, 1931 (46 Stat. 1043), cited by the Park Service, has no bearing. Your first question, then, in so far as it relates to the mineral deposits subject to the act of February 25, 1920 (41 Stat. 437), or kindred leasing acts, must be answered in the negative.

With regard to the propriety of bringing proceedings against mining locations in the national parks on a charge of abandonment, certain settled principles of law should be premised. They are: (1) That abandonment is a question of intent and, necessarily, if not evidenced by some unequivocal positive acts, is more difficult to prove than mere omission to perform legal requirements of work and improvement, which leave tangible evidence of their performance, and (2), That lapse of time, absence from the ground, or failure to work the claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Lindley on Mines, Sec. 644 and cases cited. The last-stated rule would have all the more force as to locations within the parks, where, under the present state of the law—unfortunately detrimental to the National Park Service—the mining claimant's possessory rights are not placed in jeopardy of statutory forfeiture by his delinquencies in failing to work his claim, and from such delinquency indifference could not be inferred as to what became of his rights.

Furthermore, in the case of old and apparently abandoned claims, considerable labor of search and difficulty will probably be encountered in ascertaining who are holders at present of interests in the claims, as in many cases perhaps rights have passed not only by transfer but by the laws of descent; and in cases where the present holders of title were ascertained, the further task would arise to find their present addresses and make personal service on them, as service by publication on a charge other than to determine the mineral character of the land would be unauthorized. Instructions of July 7, 1930, *supra*.

But assuming that the difficulties of service and proof would be overcome, the practical advantages of a declaration of nullity of a claim by the department on grounds of abandonment may be doubted. In an opinion rendered by Assistant Attorney General Cobb to the Secretary July, 1911, presenting the same inquiry regarding old and apparently abandoned claims in the Glacier National Park, he said—

In the case of old locations which are at present apparently abandoned in fact, no work having been done and no evidence of claim, possession, or occupation now or for some time past being found, the necessity for adverse proceedings to declare such locations invalid is not entirely obvious. If claims are in truth dead and abandoned, the departmental declaration to that effect hardly adds weight to actual fact. Such dead claims will in no way embarrass or interfere with officials in administering the park. This office does not, as at

present advised, perceive the necessity for instituting proceedings against such claims, at least not until or unless someone undertakes to assert some claim or rights under such locations.

The Assistant Attorney General's statement to the effect that if a claim in fact is abandoned, a departmental declaration to that effect hardly adds weight to the actual fact would seem to imply that it would not have the conclusiveness in legal effect that a departmental decision would have adjudging a claim void because the land was nonmineral or that a discovery thereon had not been made. For a decision on the grounds last mentioned "is efficient and sufficient to extinguish absolutely, and forever, all force and effect said location presumably ever had, and to destroy such location and all evidence thereof for any purpose." *Cameron v. Bass* (19 Ariz. 246; 168 Pac. 645, 648). And obviously, if the decision of the department holding a claim abandoned had like legal effect, it would be an advantage to the Government to adjudge a claim abandoned and thereby shut out any possibility of claim of validity thereafter.

Departmental and court decisions rendered subsequently to this opinion are not necessarily in conflict therewith, as they involved only the question of departmental jurisdiction to adjudge claims void on the ground of nonmineral character or lack of discovery. See *Yard case* (38 L. D. 59); *Nichols-Smith case* (46 L. D. 20); *Lane v. Cameron* (45 App. D. C. 404); *Cameron v. United States* (252 U. S. 450).

There is, also, another fact to consider; that is, that a question of abandonment does not present the question of validity or invalidity of a location *ab initio*, but implies that it was valid, for rights can not be abandoned that never existed. There is room, therefore, for considerable doubt as to the conclusiveness of a departmental finding that a mining location was abandoned.

It is not believed, however, that this opinion should be concluded with mere inhibitions or declarations of inutility in resorting to the modes of attack proposed by the Park Service, if suggestions may be made pointing out wherein the Hermit claims, report on which seemingly inspired the inquiry, may be open to successful challenge.

The report of the mining engineer of the field service on these claims, accompanying the memorandum, has been carefully considered. While it reveals no lack of careful observation of the ground or lack of competency to judge correctly geological and mineralogical conditions, it does strongly suggest an imperfect conception of what constitutes a valid discovery within the rule adopted by the department and approved and applied by it and also by the Supreme Court in adjudging invalid claims in the Grand Canyon National Park.

The Supreme Court quoted as follows from the departmental decisions in the *Cameron case* holding the claims void (p. 457):

It is not pretended that the applicant has as yet actually disclosed any body of workable ore of commercial value; nor does the evidence reveal such indications and conditions as would warrant the belief or lead to the conclusion that valuable deposits are to be found, save, apparently, in the case of the Magician lode claim. With that possible exception, the probabilities of such deposits occurring are no stronger or more evident at the present time than upon the day the claims were located. The evidence wholly fails to show that there are veins or lodes carrying valuable and workable deposits of gold, silver, or copper, or any other minerals within the limits of the locations. Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities.

The Court further said (p. 459) that the reading of these decisions and not merely the excerpts to which defendant invited attention—makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. That is not a novel or mistaken test, but is one which the land department long has applied and the court has approved.

The department said in *Jefferson-Montana Copper Mines Company* (41 L. D. 320, 323, 324) that many factors would enter into what would be considered a mineral-bearing vein such as would justify efforts to develop a paying mine; viz:

The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts.

The mining engineer expressed the conclusion that a discovery had been made on each claim, but the facts stated in its support do not satisfy the department that his conclusion is justified. It seemingly proceeds on the theory that any feeble showings of mineralization, some of them disclosed in underground workings, whether made before or after the monument reserve took effect, on January 11, 1908, and occurring in thin films and seams, and showing on assay negligible values in gold, silver and copper, would constitute a discovery that would save the claim from the operation of the monument reserve, without consideration of other factors above enumerated.

On the Hermit claim he found visible copper carbonates and silicates in the drift and crosscut; this showed .42 per cent copper and a trace of gold and silver, and he said—

While this is not commercial ore and especially where situated, it does indicate that the ledge matter is a huge fissure or wide zone of shattering and that mineral-bearing solutions have had much territory in which to circu-

late. It would hardly be expected that much concentration would occur in a zone of this character until at least permanent water level had been reached in the mine workings. Oftentimes a zone of faulting or shearing, such as this, is so wide and porous that conditions under which the mineral-bearing solutions deposit their burden are much less favorable than in narrow fissures with impervious wall rocks.

Another sample southwest of the portal of the tunnel assayed traces of both gold and silver.

On Hermit No. 1 he said—

The location work itself is entirely in wash gravel, but the east side line of the claim comes within a few feet of the portal of the tunnel on the Hermit, and the same mineralized zone outcrops below the portal of the tunnel and near the side line of this claim. It is therefore considered valid as a discovery.

In this case it seems discovery is pronounced upon disclosures outside of the claim, which, under settled rules, does not constitute a discovery.

On Hermit No. 2 the engineer reports the finding only of copper carbonates and specks of copper sulphide in old, caved-in trenches and cuts, and on Hermit Nos. 3 and 4 the same feeble indications of mineralization found on Hermit Nos. 2 and 3. From these he concludes there is a discovery on each.

In another part of the report it is mentioned that the claims are at the bottom of a rugged and precipitous canyon, 50 miles from the nearest railroad point and that the last 18 miles of this distance is over a poor and dangerous canyon trail, and all supplies, mining tools, *et cetera*, must be taken from the canyon rim by pack animals; that the mining work could not be duplicated for less than \$25.00 a linear foot. These conditions are, manifestly, very material factors for a reasonably prudent person to consider in determining whether the minerals will justify the expenditure and time in the hope of developing a paying mine. In addition this report does not disclose, nor has it been brought to the attention of the department, that any showings of mineral as here disclosed have by further development ever resulted in the production of commercial ore on lands similarly situated in the same locality. On the contrary, it is well known to this department that a large number of locations in the canyon have been adjudged void because not made on land found to be mineral in character. The premises considered, I recommend that the report on the Hermit claims be referred to the chief of field division for further reconsideration and report in the light of this opinion, and for more definite information as to what there is known as to geological conditions, adjacent discoveries, and development and other indicia, that would induce a reasonably prudent person to expend his time and money in the hope of opening a paying mine

upon the disclosure of admittedly feeble mineralization stated in the report, and, secondly, if such disclosures are deemed sufficient on further consideration, whether they were known to exist either on the surface or in excavations at the date the monument reserve attached.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

FLOURNOY, JR. v. LOUGHRAN, ASSIGNEE

Decided September 20, 1931

HOMESTEAD ENTRY—FOREST LIEU SELECTION—OCCUPATION—POSSESSION—RELINQUISHMENT—LAND DEPARTMENT—PUBLIC LAND.

Where the Land Department has, in a controversy between a forest lieu selector and a homestead applicant, determined that the former had no equities by virtue of his claim and possession of the land, and adjudged the selection invalid and rejected it and allowed the homestead entry, the land, upon subsequent relinquishment of the homestead entry, becomes vacant, unappropriated public land, open to the first qualified applicant, not burdened with any asserted legal or equitable rights of the selector.

PUBLIC LAND—POSSESSION—PEACEFUL ADVERSE ENTRY.

A competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceful adverse entry upon it while it is in the possession of one who has no superior right to acquire the title or hold possession.

EDWARDS, *Assistant Secretary:*

This is an appeal by James P. Flournoy, jr., from a decision of the Commissioner of the General Land Office, dated July 25, 1931, wherein he denied Flournoy's application to reopen forest lieu selection, Baton Rouge 011270, made by James P. Flournoy, sr., filed for lots 3, 7, 8, NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 34, T. 18 N., R. 15 W., La. M., and rejected his protest against Soldiers' Additional application, G. L. O. 03256, for the aforesaid lot 8 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ filed April 15, 1931, by Patrick H. Loughran. Loughran has filed a motion to dismiss the appeal on the grounds that: (1) no specifications of error were filed with the appeal as required by Rule 80 of Practice (51 L. D. 547, 560), and (2) that the appeal is frivolous.

No paper-denominated "Specifications of Error" is filed with the appeal, nor are the grounds of appeal stated in clear and concise language in the form of specifications of error, and separately stated and numbered, as required by Rule 50. It seems however from the whole statement and argument the errors alleged can be fairly determined, and the department has in instances refused to dismiss ap-

peals where this can be done. See *Campbell v. Votaw* (9 L. D. 11), and recourse may be had to the briefs where the specifications are obscure (*Iowa R. R. Land Co.* (9 L. D. 370)). Furthermore, it hardly seems that the arguments are so clearly and palpably bad and indicative of bad faith on inspection as to require the dismissal of the appeal as frivolous. While a strict adherence to Rule 80 would require dismissal of the appeal, under the view which the department takes of its merits, the disposition of it need not rest on mere non-observance of rules of procedure.

Litigation of conflicting claims to the land in question has been protracted and has been made the subject of a number of administrative rulings and decisions. The material facts have been stated in those rulings and decisions and in the decision that is now assailed. Only those will be repeated which are deemed necessary to an understanding of the conclusions herein reached.

The tracts described are part of an area of public land bordering Cross Lake which on previously filed plats of survey was erroneously marked as within the meander lines of the lake, and left unsurveyed. Supplemental plat of survey of the area was approved August 17, 1925, and filed in the local office June 16, 1926. In the order of restoration to filing and entry, a ninety day period of preference right to soldiers under the act of January 21, 1922 (42 Stat. 358), was fixed from June 16, to September 14, 1926, and the period for simultaneous filing by soldiers and other preference right claimants, from May 17, to June 15, 1926. James P. Flournoy, sr., attorney in fact for Charles Hill, filed prematurely on May 3, 1926, and later refiled June 2, 1926, forest lieu selection 011270, for the four tracts above described. The filing was made, according to the evidence accepted by the department, by Flournoy, sr., as trustee for the benefit of his son, James P. Flournoy, jr. The latter filed homestead application 02006 for lot 6, February 16, 1929, alleging use and improvement thereof since 1924.

June 11, 1926, William P. Owen filed homestead application 011346 for lots 6, 7, 8, and NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 34, claiming a soldier's preference right under the act of January 21, 1922. May 19, 1927, Mollie Jackson filed homestead application for the same land claimed by Owen, alleging settlement rights and improvement initiated in 1898 and since maintained. The decision of April 30, 1930, adjudicating various conflicting claims to the area so restored to entry, upon the record including evidence taken at a hearing between the conflicting claimants, among other things held that Flournoy's forest lieu selection embraced incontiguous tracts, lot 6 lying between lots 3 and 7 as one body of land, and lot 8 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ as another; that Jackson had a superior right to lot 6 by virtue of her prior settlement; that Flournoy had no preference right by virtue of any

settlement that was cognizable under the homestead law, but that because of Flournoy's actual occupation and improvement of lots 3 and 7, they were not subject to the preferred right and entry of Owen, but that the evidence was insufficient to establish an equitable claim by Flournoy under the act of 1922, *supra*, to lot 8 and NW $\frac{1}{4}$ SW $\frac{1}{4}$. Accordingly, Flournoy's forest lieu selection was rejected as to the two last named tracts, his homestead application rejected as to lot 6, and his selection was allowed to remain intact as to lots 3 and 7. Owen's application was allowed as to lot 8 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ and rejected as to the remaining lands applied for. Repeated efforts by Flournoy to have his claim further considered were denied by the department on motion for rehearing July 16, 1930, and petitions to reopen case of September 19, 1930, and February 2, 1931, in the last petition it being stated that "The department is convinced that the merits of the controversy were correctly determined."

Action was taken on the several applications in accordance with the department's decision, and in due course Jackson obtained patent for lot 6, Flournoy obtained patent to lots 3 and 7, Owen's entry was allowed September 30, 1930, as to lot 8 and NW $\frac{1}{4}$ SW $\frac{1}{4}$, but it was relinquished and canceled April 15, 1931, and on the same date Loughran filed his soldier's additional application heretofore mentioned, which he now states was made as trustee for Owen.

Examination of the showings, urging reopening of the selection and the sustaining of the protest, discloses that they are based on contentions not distinctly formulated but which appear to be as follows:

(1) That protestant, while the lands were unsurveyed and before they would have become subject to any soldiers' preference right under the act of January 21, 1922, initiated an inceptive right by settlement with a view to homestead entry, which by continued physical possession and occupation has been maintained, and constitutes a superior right to acquire the title to the land under the act above mentioned.

(2) That by such continued physical possession and occupation, evidence by enclosure and signs to keep out, even though invalid against existing entry, protestant's rights attach *eo instante* upon the relinquishment of Owen's entry.

(3) That such actual physical possession, under the doctrine of *Atherton v. Fowler* (96 U. S. 513), rendered the land not subject to homestead entry by Owen, and now precludes the allowance of Loughran's application.

Recourse to the record in the former proceedings clearly reveals that protestant made and insisted on contentions substantially as those above numbered 1 and 3 which did not prevail with the department, and that he is now seeking to revive those same issues as

to the same subject matter and as it now appears between the same parties. The questions so formulated are *res judicata*, and will not be further considered. As to the contention that his rights would attach by virtue of physical possession and occupation of the land maintained during the life of the entry of Owen, on the relinquishment of that entry, it has no merit. It is not pretended that he has established a settlement on the land with a view to acquiring title under the homestead law, subsequent to the award to Owen, and his asserted rights based on a settlement claim theretofore have been finally determined of no validity. The doctrine in *Moss v. Dowman* (176 U. S. 413, 421) that—

Whenever a homestead has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead by lapse of time or relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of land has a prior right to perfect the title thereto.

has no application.

His forest lieu selection was finally rejected, and upon that rejection his right thereunder ended, and he can make no claim thereafter in good faith to possession of the land based upon such selection. Maintenance of the enclosure and possession after its final rejection was not in good faith, but wrongful.

The doctrine in *Atherton v. Fowler* can not be strained to protect the possession of protestant from a lawful application.

The facts shown involve no question of forcible intrusion upon land in the possession of one who has no right to either possession or title in order to acquire an inceptive right to entry, nor, if Loughran's application is allowed, is a resort to forcible or fraudulent entry necessary to obtain possession; he would have appropriate remedy based on the granting thereof in the courts. *Knapp v. Alexander-Edgar Lumber Company* (237 U. S. 162). For other cases see Public Lands, 50 C. J., section 90 and notes.

Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceful adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold possession. Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry under the acts of Congress by a competent locator. *Thallman v. Thomas* (111 Fed. 277), *United States v. Hurli-*
man (51 L. D. 258), and cases there cited.

Upon the filing of Owen's relinquishment the land became vacant, unappropriated public land subject to appropriation by any competent locator or entryman under applicable law, and not burdened with any asserted legal or equitable rights of the protestant. The decision of the Commissioner is accordingly

Affirmed.

**TAXATION OF MINERAL PRODUCTION FROM RESTRICTED LANDS
OF MEMBERS OF FIVE CIVILIZED TRIBES**

Opinion, September 22, 1931

**INDIAN LANDS—ALLOTMENT—MINERAL LANDS—OIL AND GAS LANDS—EXEMPTION
FROM TAXATION—FIVE CIVILIZED TRIBES.**

All of the lands allotted to the members of the Five Civilized Tribes, made nontaxable by the provisions of the agreements under which the allotments were made, continue to be exempt in the hands of the Indian allottees from all forms of State taxation during the period specified in such agreements, irrespective of subsequent legislation by Congress purporting to subject them to taxation, including section 3 of the act of May 10, 1928.

**INDIAN LANDS—ALLOTMENT—RESTRICTIONS AGAINST ALIENATION—EXEMPTION
FROM TAXATION—VESTED RIGHTS.**

Restrictions against alienation of Indian allotments by reason of which the lands were exempted from taxation did not constitute a vested property right but were in the nature of personal disabilities to be continued or discontinued at the will of Congress.

INDIAN LANDS—ALLOTMENT—TAXATION.

Where no vested right of immunity from taxation of lands allotted to Indians has attached, legislation authorizing the taxation of such lands does not invade the rights of the Indians and is a proper exercise of the plenary power of Congress with respect to them.

INDIAN LANDS—ALLOTMENT—MINERAL LANDS—OIL AND GAS LANDS—TAXATION—FIVE CIVILIZED TRIBES.

Section 3 of the act of May 10, 1928, is not in conflict with section 4 of that act, as amended by the act of May 24, 1928, but those two sections, when construed together, contemplate that all minerals produced from lands of the Five Civilized Tribes, whether restricted or unrestricted, shall be subject to both State and Federal taxation, the immunity from taxation extended by section 4 operating to withdraw not exceeding 160 acres in the aggregate of restricted land selected by the Indian owner as provided in that section from other forms of taxation.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to the right of the State of Oklahoma under section 3 of the act of May 10, 1928 (45 Stat. 495), to tax the royalty interests of members of the Five Civilized Tribes in the oil and gas produced from their restricted lands. Said section 3 reads—

That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes of Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds

held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

The above provision of law is free from ambiguity. In so far as it was within the power of Congress to so provide, the plain effect is to subject to both Federal and State taxation on and after April 26, 1931, all minerals produced from the restricted lands of members of the Five Civilized Tribes, including the royalty interests of the Indian owners. Bearing in mind, however, that it is beyond the power even of Congress to invade or impair vested rights, it becomes important, in determining whether the statute is effective to accomplish its plainly expressed purpose, to consider the rights of these Indians with regard to the taxability of their lands under prior legislation and treaties negotiated with them.

The Five Civilized Tribes embrace the Choctaws, the Chickasaws, the Cherokees, the Creeks, and the Seminoles. Each of these tribes originally owned in common extensive areas of land in what is now the State of Oklahoma, which lands were allotted in severalty to the enrolled members of the tribes through agreements negotiated by a commission created for that purpose. (See sections 15 and 16, act of March 3, 1893, 27 Stat. 612, 645.) Separate agreements were negotiated with each tribe but all were substantially the same in general outline and purpose, and provided in the main for relinquishment by the members of all claims to tribal property, in consideration of which they were to receive allotments of land in severalty subject to certain specified conditions.

Part of the lands so allotted to each member was to be designated as a homestead and the remainder surplus. Exemption from taxation in varying degrees was granted as to certain lands in each agreement. The original Choctaw and Chickasaw agreement (section 29 of the act of June 28, 1898, 30 Stat. 495, 507, as modified by the act of July 1, 1902, 32 Stat. 641), provided that "all the lands allotted shall be nontaxable while the title remains in the original allottee but not to exceed 21 years from date of patent." Section 13 of the Cherokee agreement set forth in the act of July 1, 1902 (32 Stat. 716), declared that "during the time said homesaid is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him." Section 7 of the original Creek agreement (act of March 3, 1901, 31 Stat. 861, 863), and section 16 of the supplemental agreement (act of June 30, 1902, 32 Stat. 500), provided that the lands allotted as homestead "should remain nontaxable" for 21 years from the date of the deed therefor. The original Seminole agreement ratified by the act of July 1, 1898 (30 Stat. 567, 568), provided that each allottee

should designate one tract of 40 acres "which shall by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity."

The grant of nontaxable land to the Choctaws and Chickasaws thus extended to both the homestead and surplus allotments, but the nontaxable grant in the case of the Creeks, the Cherokees and the Seminoles was confined to the homestead allotment, no provision being contained in the agreements with these three tribes for the exemption of the surplus allotments from taxation. In addition to the provision for tax exemption, however, each agreement imposed restrictions against the alienation of the allotted lands, both homestead and surplus, the effect of which was to withdraw the lands from State taxation during the period of restrictions. See *Carpenter v. Shaw* (280 U. S. 363, 366), *United States v. Rickert* (188 U. S. 432), *United States v. Shock* (187 Fed. 870).

The periods of restriction fixed in the allotment agreements were not identical, but were subsequently made uniform by the acts of April 26, 1906 (34 Stat. 137) and May 27, 1908 (35 Stat. 312). The periods of restriction as fixed by these acts would have expired in the absence of further legislation by Congress on April 26, 1931. By reason of these restrictions against alienation, all of these lands, including the surplus allotments of the Cherokees, the Creeks and the Seminoles, were exempt from taxation for a period co-extensive with the period of restrictions against alienation in addition to the specific provisions contained in the allotment agreements for the nontaxability of specified lands for stated periods.

For the purpose of this opinion, therefore, the lands of these Indians must be divided into two classes. First, those lands to which an exemption from taxation has attached by the express provisions of the allotment agreements, and second, those lands to which the exemption from taxation attached, not by virtue of a grant of nontaxable land made by the original allotment agreement, but as an incident of the restrictions against alienation.

As to the lands embraced in the first class, the Supreme Court of the United States in *Choate v. Trapp* (224 U. S. 665), has held, with respect to the grant of nontaxable land made by the Choctaw and Chickasaw agreement hereinbefore referred to, that such grant conferred upon the allottees property rights within the protection of the fifth amendment to the Federal Constitution and hence not subject to repeal or impairment by later congressional legislation. To the same effect is *Gleason v. Wood* (224 U. S. 679), involving Choctaw lands; *English v. Richardson* (224 U. S. 680), involving Creek lands; and *Carpenter v. Shaw*, *supra*.

In the *Carpenter v. Shaw* case, decided January 6, 1930, the State of Oklahoma had undertaken under section 9814, Compiled Oklahoma Statutes of 1921, to impose a tax of three per cent upon the gross value of the royalty interests of certain Choctaw Indians of less than half blood in oil and gas produced from lands granted to them as nontaxable under the original allotment agreement. The restrictions against alienation had been removed by the act of May 27, 1908, *supra*, with the declaration that such lands should thereupon become subject to taxation. In addition to this, section 3 of the act under consideration had expressly provided for the taxation by the State of such royalty interests. Notwithstanding all this, the Supreme Court held that the tax sought to be imposed was not a tax on oil and gas severed from the realty, but was a tax upon the right reserved in the Indians as lessors and owners of the fee and was forbidden by the tax exemption provision contained in the allotment agreement. In so holding the Court said (p. 367)—

Whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now, since it may not be narrowed by any subsequently declared intention of Congress. *Choate v. Trapp, supra*. Having in mind the obvious purpose of the Atoka Agreement to protect the Indians from the burden of taxation with respect to their allotments and this applicable principle of construction, we think the provision that "the lands allotted shall be non-taxable while the title remains in the allottees" can not be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership.

Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. *Choctaw Gulf R. Co. v. Harrison, supra; Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227. We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. The tax is imposed on the "royalty interest . . . except such interests of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States" and is made "a lien on such interest." It is in lieu of all other taxes "upon any property rights attached to or inherent in the right" to the specified minerals and "upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land."

It sufficiently appears, were that controlling, that numerous decisions of the Oklahoma courts since the Atoka agreement have treated the royalty interest of the lessor as a right attached and incident to his ownership or reversionary interest in the land. *Barnes v. Keys*, 36 Okla. 6; *Strawn v. Brady*, 84 Okla. 66; *Harris v. Brady*, 136 Okla. 274; compare *Rich v. Doneghey*, 71 Okla. 204, and see *Parker v. Riley*, 250 U. S. 66. But even if this did not appear to be

the case, an interest commonly so regarded and practically so associated with the use and enjoyment of the allotted lands could not, under the rule of liberal construction rightly invoked by the petitioners, be deemed excluded from the benefits of the exemption granted by section 29.

Upon the principle stated and applied in the foregoing decisions, I am clearly of the opinion that all of the lands allotted to the members of the Five Civilized Tribes, made nontaxable by the provisions of the agreements under which the allotments were made, continue to be exempt in the hands of the Indian allottees from all forms of State taxation during the period provided for in such agreements, irrespective of subsequent legislation by Congress purporting to subject them to taxation, including section 3 of the act of May 10, 1928.

As to the lands embraced in the second class, that is, those exempt from taxation as an incident of the restrictions against alienation, it is to be observed that at the time of the passage of the act of May 10, 1928, the restrictions and likewise the exemption from taxation would have terminated on April 26, 1931. Thereafter the lands would have been freely alienable, and likewise subject to taxation in the absence of some provision to the contrary by Congress. The restrictions against alienation by reason of which this class of lands was protected from taxation, did not constitute a vested property right but were in the nature of personal disabilities to be continued or dropped at the will of Congress. As stated by the Supreme Court in *Choate v. Trapp*, *supra*, "the right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability."

By section one of the act under consideration Congress did extend the restrictions against alienation for an additional period of 25 years, but in so doing that body saw fit to depart from its usual policy of relieving the lands from taxation by declaring in section three that all mineral production from the lands, including the royalty interests of the Indian owners, should be subject to State and Federal taxation. In so far as the lands to which no vested right of immunity from taxation has attached are concerned, the legislation providing for the tax invaded no right of the Indians and was unquestionably a proper exercise of the plenary power possessed by Congress over the subject matter. See in this connection opinion of the Attorney General rendered November 4, 1921 (33 Ops. Atty. Gen. 60), upholding the validity of section 5 of the act of March 3, 1921 (41 Stat. 1249, 1251), authorizing the State of Oklahoma to tax the oil and gas production from Osage Indian lands, including the royalty interest of the Osage Tribe. In my opinion, therefore, the royalty interests of the Indians in the oil and gas produced from this class of lands became subject to taxation

by the State of Oklahoma under the provisions of section 3 of the act of May 10, 1928, on and after April 26, 1931.

A further question arising out of an apparent conflict between sections 3 and 4 of the act of May 10, 1928, remains to be considered. The latter section as amended by the act of May 24, 1928 (45 Stat. 733), reads—

That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands; *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *Provided further*, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

In section 3 Congress provided without qualification that all minerals produced from the restricted lands of these Indians should be subject to both State and Federal taxation. Section 4 declares that on and after April 26, 1931, all of such restricted lands, exclusive of 160 acres to be selected and designated by each Indian as therein provided shall be subject to taxation by the State of Oklahoma in accordance with the laws of that State and in all respects as unrestricted and other lands. As to the 160 acres so selected and designated, it was declared also without qualification that the same was to remain exempt from taxation "while the title remains in the Indian designated in such approved and recorded certificate or in any full-blood heir or devisee of the land." Under this latter provision, standing alone, it is clear that the designated 160-acre tract would be protected from the mineral production tax as well as other forms of taxation. To so hold, however, is to reduce to mere surplusage the provisions of section 3 relating to the mineral production tax, inasmuch as the only lands remaining upon which that section could

operate would be those in excess of the designated 160 acres, the taxation of which for all purposes, including the mineral production tax, was expressly provided for in section 4. No further provision for the taxation of the excess lands was necessary and hence it is obvious that section 3 was designated to accomplish some further purpose. That purpose, I think, was to subject to taxation on and after April 26, 1931, the mineral production from all of the restricted lands of these Indians, including the 160 acres designated under the provisions of section 4 above. In enacting said section 4, particularly the clause exempting designated lands from taxation, Congress doubtless had in mind the granting of an exemption from what is commonly known as land or real estate taxes as distinguished from a mineral tax such as provided for in section 3. Under this view, which harmonizes the two sections and gives effect to both and is thus in accord with well established rules of statutory construction (see 25 R. C. L., section 247, page 1006, and cases there cited), the lands designated as tax exempt under the provisions of section 4 above would be exempt from all forms of State taxation exclusive of the mineral production tax, to which production tax they would be subject save where protected therefrom by the doctrine announced in *Choate v. Trapp*, and *Carpenter v. Shaw*, *supra*.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

GEORGE W. HARRIS (ON REHEARING)

Decided October 7, 1931

POTASH LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—EASEMENTS—STATUTES.

The purpose of the provision in section 29 of the leasing act requiring the insertion in permits and leases of a reservation of such easements as may be necessary or appropriate to the working of the permitted or leased lands for the deposits described in that act is to enable the Government to permit exploration, development, and mining of other kinds of minerals than that claimed by the first permittee or lessee.

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

Section 4 of the act of February 7, 1927, gives authority to the Secretary of the Interior to issue a potash permit or lease to run concurrently with an oil or gas lease issued under the act of February 25, 1920, for the same lands.

EDWARDS, *Assistant Secretary:*

In the above-entitled case the department by decision of September 11, 1931, in affirmance of a decision by the Commissioner of

the General Land Office, held for rejection a potash prospecting permit application, Las Cruces 043613, to the extent of conflict with an oil and gas lease under the leasing act of February 25, 1920 (41 Stat. 437). On more mature consideration of the matter, the department is convinced that said case should be reconsidered and same has been, therefore, reviewed upon the department's own motion.

In the decision of September 11, 1931, it was held that an application for a potash permit must be rejected as to land embraced in an oil and gas lease unless the lessee should consent to the granting of a permit, but it is quite apparent that the lessee would be in a position and would be tempted to demand an unreasonable price for his consent, preventing development of other mineral resources.

Section 29 of the leasing act and paragraph 3 of the oil and gas regulations (47 L. D. 437, 438) were quoted and the department's opinion of August 17, 1925 (51 L. D. 180), and the case of *I. A. Smoot* (52 L. D. 44), were cited in the decision under review. In the opinion of 1925 it was stated—

It is not specifically provided in said act (the leasing act of February 25, 1920), that permits to prospect for different minerals enumerated therein may be granted to run concurrently, but inasmuch as the purpose of the act is to promote the mining of such minerals on public lands, the Department has determined that it has authority to grant concurrently permits to prospect for coal and oil and gas upon the same area; likewise, sodium and oil and gas prospecting permits.

* * * * *

Upon mature consideration the Department is of the opinion that if an applicant for a potassium prospecting permit shall waive any and all rights to a patent conferred by the act of October 2, 1917, with respect to the area applied for, he may be granted a permit covering land which is already embraced in an oil and gas prospecting permit. * * * If he has waived his right to a patent, there seems to be no reason why the Government may not have prospecting permittees or lessees under the two acts upon the same land at the same time.

It is clear that Congress adopted the views of the department in said opinion in the passage of the act of February 7, 1927 (44 Stat. 1057), in section 5 of which the general provisions of sections 1 and 26 to 38, inclusive, of the act of February 25, 1920, are made applicable to permits and leases under said act of 1927, "the first and thirty-seventh sections thereof being amended to include deposits of potassium."

Section 4 of the act of February 7, 1927, which was quoted in part in the decision under review, provides that prospecting permits or leases may be issued under the provisions of said act for deposits of potassium in public lands, also containing deposits of coal or other minerals, "on conditions that such other deposits be reserved to the United States for disposal under appropriate laws."

Said section 4 is readily subject to the construction that deposits, other than potash, reserved to the United States may be disposed of under appropriate laws while the lands containing the potash and the other deposits are embraced in a potash lease or permit.

Section 29 of the leasing act is capable of a far broader construction than was given thereto in the decision under review. There is reserved to the Secretary of the Interior in any permit or lease the right to permit such easements as may be necessary or appropriate to the working of the leased or permitted lands for the deposits described in the act, and the Secretary may also reserve to the United States the right to lease, sell, or otherwise dispose of the surface of land embraced in a lease, in so far as the surface is not necessary for the lessee's mining operations.

A permittee or lessee is not in need of any easement in connection with land for which he has been given the only permit or lease. The provisions of the section apply to those who wish to explore for, develop, and mine other minerals described in the act than the mineral claimed by the first permittee or lessee.

The provisions of said section 29 are made a part of every oil and gas lease in section 3(a) and (b) of the standard form. Every permittee or lessee under the leasing act is charged with knowledge, from the provisions of the act and from the regulations thereunder, that the Secretary of the Interior has the legal right and has made proper reservation to grant permits or leases for the development and mining of other minerals.

From a careful consideration of the general leasing act and of the act of February 7, 1927, *supra*, it seems clear that the intent of Congress under said leasing acts was to encourage and permit the development of the various minerals contained in a given tract of land to be carried on at the same time by the same or different parties under the various provisions of the leasing acts, particularly applicable to the resource sought to be extracted and marketed. This is, and has been, common practice in the case of leases upon privately-owned lands, and Congress evidently intended to permit the same practice in connection with Government leaseholds. This was the practice of the department prior to the decision of September 11, 1931, and was clearly in the public interest, contributing as it did to the unhampered development of needed minerals. Such conclusion in this case also harmonizes with the intent of Congress which, in addition to the act mentioned, passed on June 25, 1926 (44 Stat. 768), another act designed to encourage the discovery and development of potash deposits and is in furtherance of the purpose of the department in including these and other lands in a potash reserve on March 11, 1926.

Paragraph 3 of the regulations approved March 11, 1920 (41 L. D. 437, 438), provides—

Permits or leases for other materials.—The granting of a permit or lease for the development or production of oil or gas will not preclude other permits or leases of the same land for the mining of other minerals, under this act, with suitable stipulations for such joint operation, to the end that the full development of the mineral resources may be secured, nor will it necessarily preclude the allowance of applicable entries, locations, or selections of the lands included therein with a reservation of the mineral deposits to the United States.

The words “joint operation” as used in said regulations, evidently mean concurrent operation and have been so regarded and construed since the said regulation was issued.

The said decision is hereby vacated, and the Commissioner’s decision is reversed. In the absence of any objection other than the oil and gas lease covering a portion of the land applied for, a potash prospecting permit will be granted to Harris.

RIGHTS OF WAY FOR POWER PURPOSES—PAYMENT OF RENTALS— PRIOR INSTRUCTIONS MODIFIED

INSTRUCTIONS

[Circular No. 1260]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 16, 1931.

REGISTERS, DISTRICT LAND OFFICES:

Payments for use of Interior Department lands required by circulars dated January 6, 1913 (41 L. D. 454), and March 1, 1913 (41 L. D. 532), to be made to the Secretary of the Interior will hereafter be made to the register of the land office through which the filing is made, as will also any other rentals or compensation for like permits. If the payment involves the allowance or extension of a permit the amount will be held unearned until notice is received of the allowance or extension by the Secretary, otherwise the amounts will be applied currently. The moneys when earned will take the title “6240-Power Permits,” followed by the date of the act.

The circulars mentioned, and any other instructions inconsistent herewith, are hereby modified accordingly.

THOS. C. HAVELL,
Acting Commissioner.

Approved:
JOHN H. EDWARDS,
Assistant Secretary.

MURVALE OIL COMPANY

Decided October 19, 1931

ROYALTY—WORDS AND PHRASES.

The term "royalty" means a share of the product or profit reserved by an owner for permitting another to use his property. *Hill v. Roberts* (284 S. W. 246).

OIL AND GAS LANDS—LEASE—ROYALTY AND RENTALS—WORDS AND PHRASES.

The phrase "rental paid for any one year to be credited against the royalties as they accrue for that year", contained in sections 14 and 17 of the leasing act, may be construed as meaning "credited against the Government's share as it arises or grows for that year."

OIL AND GAS LANDS—LEASE—ROYALTY.

The royalty to which the Government is entitled under an oil and gas lease is to be ascertained as it arises each month or part of month within the year but settlement therefor in money value may be deferred until the fifteenth of the following calendar month except that rental paid for one lease year shall not be credited against royalty which arose in another year.

EDWARDS, *Assistant Secretary*:

Oil and gas lease, Sacramento 019395, was granted as of August 24, 1920, to the Murvale Oil Company for 1160 acres in T. 32 S., R. 24 E., M. D. M., California.

On June 13, 1931, the Commissioner of the General Land Office addressed a letter to the register at Sacramento as follows:

The account with oil and gas lease 019395 shows \$292.07 royalty accrued from August 1 to 23, 1930, for which payment does not appear to have been made. The annual rental for \$1160 paid for the year beginning August 24 takes care of the royalty accrued on and since that date but not of the royalty that accrued before that date.

Demand payment and in due time make report.

On June 25, 1931, a letter from the secretary of the lessee company was received in the General Land Office, in which it was stated that the demanded sum of \$292.07 was being paid under protest. It was further stated—

We respectfully submit that provisions of the lease fully justify the practice which has heretofore prevailed with the acquiescence of the department, that is, of crediting on monthly royalties paid in any one year, the annual rental also paid in that year. The lease provides that cash royalty shall be due and payable on the 15th of each calendar month following the calendar month in which the production is had and that the annual rental is to be credited on the royalty for the year for which rental has been paid. It would appear that cash royalty for production had during any part of the month of August, 1930, did not accrue until September 15th following and in that situation we are wholly justified in crediting the rental paid for the year beginning August 24th, 1930, upon the royalty which did not become payable until the following month.

Again, nothing in the lease appears to justify the splitting of monthly royalties into weekly estimated obligations as the present recent ruling requires. On the contrary, statements of production are made by calendar month, not by weeks or days, and computations of royalty are based upon an average daily production for such calendar month. The calendar month is obviously the least divisible unit of royalty computations, so that considered as a monthly unit production for the month, say of August, 1930, is as much a part of the year commencing August 24th, 1930, as of the year commencing August 1st, 1930, or on any other day in that month.

In view of the provisions of the lease and the practice followed and acquiesced in for many years we respectfully request that the payment hereby tendered be refunded to us.

The leasing act provides for "the annual payment in advance of a rental of \$1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year."

In section 2(c) of the lease under consideration the lessee agrees, "To pay to the lessor in advance, beginning with the date of the execution of this lease, a rental of one dollar per acre per annum during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year. * * * When paid in value, such royalties shall be due and payable monthly on the 15th of each calendar month following the calendar month in which produced."

It does not appear from the record that there has been any change in practice. It is shown that in December, 1922, the Commissioner denied an application by the secretary of the lessee company for refund of the amount of royalty paid in excess of lawful requirements for the years from July, 1921, to July, 1922, and from July, 1922, to July, 1923. He said—

The records of this office show that rental for the year from July, 1921, to July, 1922, was paid July 30, 1921, and deducted from the amount of royalty due for the month of June, 1922, paid August 4, 1922, and that rental for the year from July, 1922, to July, 1923, was paid August 4, 1922, and deducted from the amount of royalty due for the month of August, 1922, paid September 5, 1922.

It is also shown that in November, 1927, the Commissioner wrote to the Director of the Geological Survey as follows:

In order that the correct amount of royalty may be charged against the rental for the year ending August 24, 1927, on oil and gas lease Sacramento 019395, please have a supplemental report submitted, showing the royalty that accrued from August 1-23, 1927.

The record shows that a similar letter for the year 1930 was written February 9, 1930.

"Accrue" means to arise or spring as a growth or result; to arise in due course; to grow; to occur; to increase; to augment; to come by

way of increase; to grow or to be added to; to be added as increase, profit or damage; especially as the produce of money lent.

In the past tense "accrued" is used in the sense of due and payable; vested and existed.

In the participial form "accruing" means resulting; arising; augmenting; become due and payable; inchoate, in process of maturing; that which will or may, at a future time, ripen into a vested right, an available demand or an existing cause of action (1 C. J. 732).

The word "royalty" is defined as "a share of the product or profit reserved by the owner for permitting another to use the property." Webster's New International Dictionary; *Hill v. Roberts* (Texas) (284 S. W. 246).

The language of the statute (act February 25, 1920, sec. 17), "the rental paid for any one year to be credited against the royalties as they accrue for that year," may be construed as meaning credited against the *Government's share as it arises or grows for that year*.

It is clear that such was the construction given by the department in prescribing, "the rental so paid for any one year to be credited on the royalty for that year." The Government's share is ascertained as it arises each month or part of month within the year but settlement therefor in money value may be deferred until the 15th of the following calendar month, on condition that rental paid for one year shall not be credited against royalty which arose in another year.

The Commissioner's ruling is sustained.

Affirmed.

DELEGATION OF AUTHORITY TO APPROVE SALES OF LANDS ON SAN CARLOS RECLAMATION PROJECT

Opinion, October 20, 1931

AGENTS--DELEGATION OF MINISTERIAL DUTIES.

The general rule that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, is not authorized to entrust the performance of his duties to another without the consent of his principal, is subject to the exception that he may delegate to another the execution of acts that are solely clerical, mechanical, or ministerial in their nature after he has exercised his discretion and determined the propriety of the act.

SECRETARY OF THE INTERIOR--AGENTS.

In carrying out the laws of Congress relating to his department the Secretary of the Interior is the administrative agent, and the ordinary rules of agency apply forcefully to him.

SECRETARY OF THE INTERIOR—DELEGATION OF AUTHORITY—SAN CARLOS RECLAMATION PROJECT—APPRAISAL—PURCHASE PRICE.

The duty imposed upon the Secretary of the Interior by section 4 of the act of June 7, 1924, to approve the appraisal and purchase price of any tract of land on the San Carlos reclamation project sold prior to the time when more than one-half of the construction charge remains unpaid, can not be delegated to another, but that officer may delegate to a subordinate a mere ministerial or clerical act involved in the approval of the sale.

FINNEY, *Solicitor*:

Upon a recommendation of the Commissioner of Indian Affairs you [Secretary of the Interior] have requested my opinion relative to the right of the Secretary of the Interior to delegate to a subordinate in the field certain action required under section 4 of the act of June 7, 1924 (43 Stat. 475, 476). For convenience the law in question is quoted as follows:

That no part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and, in form approved by the Secretary of the Interior, shall have been properly executed by a district organized under State law, embracing the lands in public or private ownership irrigable under the project, and the execution thereof shall have been confirmed by decree of a court of competent jurisdiction, which contract, among other things, shall contain an appraisal approved by the Secretary of the Interior, showing the present actual bona fide value of all such irrigable lands fixed without reference to the proposed construction of said San Carlos Dam, and shall provide that until one-half the construction charges against said lands shall have been fully paid, no sale of any such lands shall be valid unless and until the purchase price involved in such sale is approved by the Secretary of the Interior, and shall also provide that upon proof of fraudulent representation as to the true consideration involved in any such sale, the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sale; and all public lands irrigable under the project shall be entered subject to the conditions of this section which shall be applied thereto.

The question requiring decision involves similar laws connected with the Kittitas project in the State of Washington under construction by the Bureau of Reclamation, pursuant to the act of June 17, 1902 (32 Stat. 388), the Vale, Owyhee and Baker projects in Oregon, and the Sun River project in Montana.

The act of June 7, 1924, *supra*, appropriated \$5,500,000 for the construction of Coolidge Dam in the canyon of the Gila River near San Carlos, Arizona. One of the provisions of the act required an appraisal of all land to be irrigated from the water stored and that "until one-half the construction charges against said land have been fully paid, no sale of any such lands shall be valid unless and until the purchase price involved in such sale is approved by the Secretary of the Interior."

An employee of the field, Office of the Commissioner of Indian Affairs, has recommended that the chief clerk and special disbursing agent on the San Carlos project be given authority to approve the purchase price involved in the land sales made on the project, and the question arises whether the Secretary of the Interior can delegate the authority given to him by Congress to a subordinate living in the vicinity of the land.

The general rule is, that an agent in whom is imposed trust or confidence, or who is required to exercise discretion or judgment may not entrust the performance of his duties to another without the consent of his principal, and since nearly all acts of agency involve discretion, the one clothed with authority to act for a principal must ordinarily perform the act himself and can not without the principal's consent, delegate it to another; or as is frequently stated, an agent can not delegate powers calling for the exercise of discretion, skill or judgment, or to do acts that are not merely clerical, mechanical or ministerial in their nature. It has been held that an agent appointed to lease or sell real estate can not delegate such authority. Where an agent is employed to do acts which do not call for the exercise of judgment or discretion or where he has exercised his discretion and determined upon the propriety of the act, he may delegate to a subagent the execution of the merely mechanical, clerical or ministerial acts involving no judgment or discretion.

In carrying out the law of Congress the Secretary of the Interior is the administrative agent, and the ordinary rules of agency apply forcefully to him. The relation of an agent to his principal is ordinarily that of a fiduciary, and as such it is his duty in all dealings concerning or affecting the subject matter to act with the utmost good faith and loyalty for the furtherance and advancement of the interest of his principal.

Where authority has been delegated by Congress to the head of a department or to some assistant, the courts and the Comptroller General have held strictly to the necessity of direct authority being exercised by the officer who receives the grant. *Hajdamacha v. Karnuth* (23 Fed. (2d) 956, 958); *Midland Oil Company v. Turner* (179 Fed. 74, 76).

There is a line of cases regarding the appointment and discharge of employees which hold in effect, that the power to appoint and remove being discretionary in character, such authority being vested in the head of a department, it can not be delegated (26 Comp. Dec. 444); *Burnap v. United States* (252 U. S. 512); 4 Comp. Gen. 675. In the case of *Low Kwai v. Backus* (229 Fed. 481), it is said that where the statute provides that if the Secretary of Commerce and Labor is satisfied that an alien is subject to deportation,

he shall cause such alien to be taken into custody, etc., held that under the statute it is the Secretary who must be satisfied that the alien is subject to deportation, and where the Secretary apparently was not satisfied of such fact, he had no authority to authorize the Commissioner of Immigration to satisfy himself on this point and thus decide the question committed by Congress to the Secretary. *Harris v. San Diego Flume Company* (25 Pac. 758).

On March 13, 1928, the Assistant Secretary had under consideration the authority vested in the Secretary of the Interior pursuant to section 4 of the act of March 15, 1894 (28 Stat. 286, 312). This act provides—

SEC. 4. * * * the Commissioner of Indian Affairs is authorized to advertise in the spring of each year for bids, and enter into contracts, subject to the approval of the Secretary of the Interior, for goods and supplies for the Indian Service required for the ensuing fiscal year * * *.

The Assistant Secretary decided that the language used in the statute did not appear to be susceptible of the construction that such approval by the Secretary or an officer authorized to act in his stead can be waived or delegated to another, and that advance authority to enter into contracts under the law would not meet its requirement. It was also decided that to give validity to such contract it must be approved by the Secretary or an officer designated by him under authority of law to perform such duty. The duty thus imposed can not be otherwise delegated (4 Comp. Gen. 675).

It is my opinion that the Secretary of the Interior can not delegate to anyone the approval of the purchase price involved in a sale of land on the San Carlos project, Arizona, as provided in the act of June 7, 1924, *supra*.

There are some decided cases that point to a method of simplifying the action to be taken under the act. The difficulty encountered in administration is no reason for evading the law. It must be concluded that some delay will occur in making a report and transmitting it to the Secretary of the Interior, but expeditious action should be expected.

In the case reported in 19 Comp. Dec. 628, it is said that the head of a department may, in writing, authorize advertisement in general terms and at the same time direct some subordinate official to select the medium for the same (13 Comp. Dec. 446; 18 Comp. Dec. 531; 2 Comp. Gen. 459). The case in 19 Comp. Dec. 628, had under consideration Sec. 3828, Revised Statutes, which is the act of June 15, 1870 (16 Stat. 308). This statute inhibited the publication of any advertisement or notice in any newspaper whatever except in pursuance of a written authority for such publication from the head of such department. The decisions under this statute indicate that if the action required by the statute relative to the San

Carlos project can be reduced to mechanical, clerical or ministerial acts by a field officer, there can be no legal objection to his designation to perform such acts. In the law first quoted, the important grant of power by Congress to the Secretary is the approval of the purchase price involved in the sale of land on the project prior to the time when more than one-half of the construction charge remains unpaid. If a plan can be devised whereby the Secretary of the Interior can exercise his judgment and discretion in a general way, and fix a maximum price for lands of similar quality, it is believed that approval could be given by the field employee to all sales of land made at a price equal to or less than the maximum designated.

On the San Carlos project the lands prior to cultivation and improvement were similar in character and quality. The cost of a Government water right (the construction charge) will be equal for each acre, so it might be assumed that a maximum price could be fixed on appropriate appraisal duly approved by the Secretary of the Interior. Authority could then be delegated to a field agent to approve all sales where the consideration for the transfer did not exceed the price fixed in such approved appraisal.

The judgment and discretion reposed in the Secretary of the Interior by the act of Congress must be exercised by him, but he can delegate to another the ministerial or clerical act involved in approving the sale of the land.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

**COAL LANDS—ACTION UPON PROOF—RULE 7 OF CIRCULAR NO. 276,
AMENDED**

INSTRUCTIONS

[Circular No. 1261]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 28, 1931.

REGISTERS, UNITED STATES LAND OFFICES:

Rule 7 of the circular of April 24, 1907 (35 L. D. 681, 682), amended October 30, 1913, Circular No. 276 (42 L. D. 474), is hereby amended so as to read—

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

When returned notice by chief of field division or other officer protests the validity of the entry, the register will nevertheless promptly examine the proof and if found defective on its face take action thereon. At the same time he advises the claimant of the adverse action taken he will inform him that the chief of field division (or other officer) has requested that final certificate be withheld until field investigation has been made and report submitted; that if the defect is not cured, or an appeal filed, within the time allowed the proof will be rejected and the case closed; and that if the defect is cured further action must await the report of the chief of field division. Where the proof is sufficient on its face the register will forward all papers to this office without action and advise entryman that action is being withheld pending field investigation, using Form 4-190. The chief of field division is to be advised of all action taken by the register and by the claimant and furnished with copy of the proof submitted, together with copy of requirements by the register and of any additional showing made by the entryman.

In mineral applications for patent, if the proof is found regular, certificate should issue even though a protest may have been filed but the claimant should be advised that patent will be withheld by the General Land Office pending a report by the chief of field division upon the bona fides of the claim.

THOS. C. HAVELL,
Acting Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

SARAH MALEWIND, ALIAS TATEBDOKA

Decided November 7, 1931

INDIANS—WILLS—FRAUD—REOPENING—STATUTES OF LIMITATION—SECRETARY OF THE INTERIOR.

The limitation in section 2 of the act of February 14, 1913, precluding the Secretary of the Interior from reopening after the expiration of one year after the death of an Indian testator a case in which he had approved a will made by such Indian, relates exclusively to fraud, and does not prevent him from reopening a case on other grounds such as failure of the examiner to conduct properly the hearing or to correct an error independent of the fraud.

INDIANS—WILLS—FRAUD—REOPENING—EVIDENCE—STATUTES OF LIMITATION.

Where an Indian will case is reopened after the limitation in section 2 of the act of February 14, 1913, has run, the testimony must be considered in connection with the record made up at the original hearing, and evidence introduced, having for its object to prove fraud *per se*, is inadmissible and must be eliminated.

INDIANS—WILLS—DEVISEES—WITNESSES—EVIDENCE—REHEARING.

Failure of a devisee and of a devisee's witnesses, on the advice of attorney, to appear and testify at a rehearing in an Indian will case, is not to be

taken as any kind of admission, nor does it affect the fair presumption that by testifying the beneficiary under the will might have strengthened his case.

UNDUE INFLUENCE—FRAUD—WILLS—EVIDENCE.

As a general rule undue influence and fraud, as applied to wills, are practically synonymous terms, and the evidence designed to show the former differs but slightly, if at all, from the proof required to support the latter.

UNDUE INFLUENCE—WILLS—EVIDENCE—WORDS AND PHRASES.

Proof of undue influence necessary to destroy the validity of a will, must establish a fraudulent influence controlling the mind of the testator so as to induce him to make a will which he would not have otherwise made, but the mere influence of affection, attachment, or gratitude will not suffice.

WILLS—UNDUE INFLUENCE—FRAUD—EVIDENCE.

Where the question of mental competency of a testator is not raised, the fact that the will, on its face, is one that could very reasonably be expected to have been made by a person mentally competent and under such circumstances as surrounded the testator at the time the instrument was executed, is a strong factor to be considered in connection with any charge of fraud or undue influence.

First Assistant Secretary Dixon to the Commissioner of Indian Affairs:

You [Commissioner of Indian Affairs] are advised that the records submitted in the matter of the estate of Sarah Malewind or Sarah Tatebdoka, deceased member and allottee of the Yankton Sioux Tribe of Indians in South Dakota, including testimony taken at rehearings recently held, has received mature consideration.

The allottee died in May, 1923, having executed a will in April of that year, leaving the bulk of her estate to Julia Jandron. A hearing was had on the will in 1924 and the will was approved by the department in 1925. Thereafter, the matter was reconsidered and passed upon several times, particularly in regard to a petition to reopen and remand the case to the field for further hearing, the department adhering to its former action. The petition was filed by Joseph Nimrod, a beneficiary under the will, and Adam Hero, claiming to be next of kin, and heirs at law of Sarah Malewind or Sarah Tatebdoka. Their allegation was that the proceedings leading up to the approval of the will were irregular under the regulations of the department, with the result that the will was submitted by the examiner of inheritance on an incomplete record.

In the meantime suit was instituted in the courts of the District of Columbia by those claiming to be heirs at law, and seeking to prevent the Secretary of the Interior from distributing the estate in accordance with the terms of the approved will. The case was finally taken to the District Court of Appeals. *Nimrod v. Jandron* (24 Fed. (2d) 613).

The act of February 14, 1913 (37 Stat. 678), which relates to the disposition by Indians of their property by will in section 2 thereof authorizes the Secretary of the Interior to reopen cases of approved wills, as follows:

* * * That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located.

It was contended, in behalf of the appellee in the above case, that under this provision the Secretary is without authority to cancel his approval of a will for any reason except for fraud and then only within one year after the death of the testator. However, in construing that provision the Court of Appeals took the following position (p. 616):

The limitation in the statute relates exclusively to fraud, and, being a statute of limitations, it should be strictly construed, and under no circumstances should its scope be enlarged beyond the strict limitation of the language employed. The object of the rehearing sought in the present case is not based upon fraud. It is based upon the failure of the examiner to properly conduct the hearing in the manner required by the statute and by the regulations. It is alleged that it was through this error of the examiner, which did not appear in the record, that the Secretary was mistakenly led into the approval of the will. The object of the rehearing, therefore, is not based upon any averment of fraud, but solely upon the question of whether or not, after the mistake of the examiner is corrected and further testimony taken, the approval entered by the Secretary shall stand or fail.

* * * It is to correct this error, independent of any question of fraud, that it is sought to reopen the case and bring to the attention of the Commissioner and the Secretary a full and complete record upon which it may be determined whether the will should be approved or disapproved.

It will be observed, from the statute and the regulations, that the Secretary is given wide jurisdiction in the control and management of these restricted Indian estates. We think there can be no doubt of the power of the Secretary to grant a rehearing in this case. * * * His action was based upon a record not prepared in conformity with his regulations, and hence not forming a proper basis for a decision.

We are therefore of the opinion that, inasmuch as fraud is not the basis upon which the reopening of the case is sought, it is clearly within the jurisdiction of the Secretary to set aside his order of approval and remand the case for the taking of further testimony in order that he may have before him a complete record upon which to base his final decision.

In other words, the court, while holding that the limitation in section 2 of the act of February 14, 1913, as to the time within which the Secretary may cancel the approval of an Indian's will relates exclusively to fraud, and being a statute of limitation must be strictly

construed, nevertheless was of opinion that, considering the Secretary's jurisdiction over Indian restricted estates, and in view of the regulations, he has authority to set aside the approval of a will on grounds other than fraud and to grant a rehearing more than one year after the testator's death.

It being made to appear that the examiner of inheritance prior to the submission of the will of Sarah Malewind or Sarah Tatebdoka had failed to take further testimony apparently available at the original hearing, because he was already convinced that the will ought to be disapproved, and the action thereon by the department being for this reason regarded as having been taken upon an incomplete record, it was concluded upon reconsideration to remand the case for the taking of further testimony on the ground of the alleged irregularity. Thereupon appropriate instructions were given the examiner of inheritance, among other things, that notices should be mailed to all interested parties, including the attorneys representing the claimants, Nimrod and Hero, as well as the attorneys for Julia Jandron, the principal beneficiary under the approved will. He was further instructed to consider the decision approving the will in order to familiarize himself with the reasons for such approval. The examiner's attention was also called to the letter of a Dr. Keeling who attended the deceased allottee during her last illness, and he was directed to take the doctor's testimony, which was not done at the original hearing. A hearing was held accordingly. It also appears that a supplemental rehearing was subsequently directed to be held for the purpose of procuring the testimony of one Hugh M. Jones, based upon the contents of two letters he had written with reference to the case. The testimony of Jones and others was accordingly taken, appropriate notices having previously been given to all interested parties. The record of the supplemental rehearing was not received in the department until about the first of April, 1931.

The record shows that Julia Jandron, on the advice of her attorneys, did not appear and testify at either of the rehearsings. This, however, it may be said, did not relieve the examiner of the duty, acting for the Government in its capacity of guardian for the estates of deceased allottees, of endeavoring to procure her testimony and that of her former witnesses in any proper manner that object might be accomplished. Also the fact that she failed to appear at the rehearsings, under the circumstances, is not to be taken as any kind of admission on her part, nor does it affect the fair presumption that by testifying she might have strengthened her case. No particular protests have been lodged against the other beneficiaries under the will of Sarah Malewind, the objection against approval of the will being chiefly directed against Julia Jandron as principal beneficiary.

It must be borne in mind, as previously indicated herein, that this case was not reopened for the purpose of obtaining further evidence of fraud in connection with the execution of the will in question, but solely on the ground of an alleged irregularity of procedure. Any such purpose is clearly forestalled by the statute which limits the power of the Secretary to reopen the case of an approved will to one year after the death of the testator. As stated by the court, the object of the rehearing sought was not based on fraud but on the failure of the examiner to properly conduct the hearing in the manner required by the regulations, the complaint being as stated, that this resulted in the submission by him of an incomplete record. It follows, therefore, that testimony introduced at the hearings, having for its object to prove fraud *per se*, on the part of Julia Jandron or other beneficiaries, was inadmissible and properly ought to be eliminated from consideration.

Furthermore, the testimony offered at the rehearings must be considered in connection with the record made up at the original hearing, and the question thus directly arises as to what testimony introduced at such rehearings ought to be considered and what ought to be excluded in view of the statute.

In order to determine what material distinction, if any exists between fraud and undue influence as particularly alleged against Julia Jandron it will be helpful to consider the decisions of the courts which lay down well established principles on the subject. Among many other cases are the following wherein the courts have held—

Undue influence is a species of fraud. *Pickler v. Wise* (132 N. W. 815, 817).

Undue influence is either a species of fraud or a kind of duress. In either case it comes in for the same consideration as fraud in general. *Heath v. Capital Savings Bank & Trust Company* (64 A. 1127).

The procuring of the execution of a will by undue influence partakes of the nature of fraud, or imports at least a constructive fraud on testator. *Whitcomb v. Whitcomb* (91 N. E. 210).

Undue influence is a species of fraud and in probate law is an unlawful coercion which destroys the free agency of a testator, and substitutes for his free and disposing mind some will other than his own. *In re Campbell's Will* (136 N. Y. S. 1086, 1104).

Undue influence is unlawful "coercion," which is an artificial state, whereby the testator is deprived of his free will by fraud or any other unlawful means. *In re Van Ness' Will* (139 N. Y. S. 485, 492).

"Undue influence," to destroy the validity of a will, must be a fraudulent influence controlling the mind of the testator, so as to induce him to make a will which he would not have otherwise made; a substitution of the mind of the person exercising the influence for the mind of the testator. *In re Mueller's Will* (86 S. E. 719).

Undue influence, invalidating a will, being a species of fraud, and importing coercion, compulsion, and overreaching of a vicious kind, must be proved precisely or inferentially by irresistible inferences, as the law never infers crime or delict when any other construction is possible. *In re Schmidt's Will* (139 N. Y. S. 464, 484).

"Fraud" and "undue influence" are not strictly speaking, synonymous, though undue influence has been classified as either a species of fraud or a kind of duress, and in either instance is treated as fraud in general. *Peacock v. DuBois* (105 So. 321, 322).

Mere opportunity to exercise undue influence or a disposition to exercise it is insufficient to establish it. Mere suggestion, advice, or opportunity is insufficient to establish undue influence, unless it appears that the will of the testator was rendered subservient to the will of the person exercising the influence. *Wackman v. Wiegold* (212 N. W. 122, 123).

Mere general influence, not brought to bear on the testamentary act, is not undue influence; but, in order to constitute undue influence, it must be used directly to procure the will, and must amount to coercion, destroying the free agency of the testator. Mere suspicion that undue influence was brought to bear is not sufficient to justify the setting aside of the will. *Gleason v. Jones* (192 Pac. 203, 207).

Kind treatment and even reasonable solicitation do not constitute "undue influence." *In re Sturtevant's Estate* (180 Pac. 595, 597).

The "undue influence" which is objectionable in the eye of the law and justifies setting aside a gift must be tantamount to force or fear; the influence of affection, attachment or gratitude not being sufficient to avoid the gift. *Barron v. Reardon* (113 A. 283, 285).

Mere general influence, by a beneficiary in the affairs of life or method of living at the time of the execution of a will by a testator is not "undue influence" in the contemplation of Rev. Codes 1921, Sec. 7483. *Hale v. Smith* (237 Pac. 214, 216).

The foregoing shows that as a general rule undue influence and fraud are equivalent as applied to wills. The terms are practically synonymous, so that evidence designed to show undue influence differs but slightly, if at all, from the proof required to support an allegation of fraud.

As this case was reopened solely for the purpose of correcting an alleged irregularity, the results of the rehearings must be judged

accordingly. In other words, as previously stated herein, testimony bearing on the question of fraud must be eliminated as being inadmissible, and consideration given only to such testimony as relates to matters other than fraud. The testimony taken at the rehearings was largely but not wholly directed to the undue influence alleged to have been exerted by Julia Jandron over Sarah Malewind in order to induce the latter to execute a will in the former's favor. Practically no attempt was made to show to what extent, if any, the claim of protestants against the will may have been injuriously affected by failure to take the alleged available evidence at the time the original hearing was closed by the examiner of inheritance, nor in what manner, if any, material witnesses were improperly deprived of an opportunity to testify at that hearing.

During the long period that has elapsed since the will of Sarah Malewind was made in 1923, and its approval by the department in 1925, many features have been injected into the controversy; they are more or less irrelevant and immaterial but nevertheless having a tendency to lead away from the main issue and real merits of the case. In order, therefore, to get back to the real situation it is worth while to restate briefly some of the principal facts and circumstances connected with the execution of the will.

The nearest relatives of Sarah Malewind were two first cousins, to whom her estate would have descended in the absence of a will, and one of whom, Joseph Nimrod, is a beneficiary thereunder. First, she bequeathed to Julia Jandron, 60 acres of her original allotment and 80 acres of her deceased husband's allotment; second, to Joseph Nimrod, a first cousin, 20 acres of her individual allotment; third, to the Yankton Presbyterian Church of Greenwood, South Dakota, 19.60 acres of her individual allotment; fourth, after providing for funeral expenses and the erection of a monument at her grave, she bequeathed all of her money on deposit with the superintendent of the Yankton Agency, to the following persons and in the following proportions:

Julia Jandron.....	seven-ninths.
Joseph Nimrod.....	one-ninth.
Yankton Presbyterian Church of Greenwood.....	one-ninth.

She also bequeathed to these three beneficiaries, in the same proportions, all of her inherited interests; fifth, to Julia Jandron all of her personal property not mentioned above.

No particular issue is involved as to the mental competency of Sarah Malewind to make a will. It appears that she was ill some four or five months prior to her death—her illness at first being pneumonia and later an abscess developed that finally caused her

death. On its face the will is one that could very reasonably be expected to have been made by a person mentally competent, and under such circumstances as surrounded Sarah Malewind at the time the instrument was executed. As stated, her nearest relatives or the next of kin were two first cousins, one of whom is provided for in the will, and neither of whom, as it appears, particularly cared for her. In an affidavit executed on the same date as the will, she gave her reasons for disposing of her property in the manner she did, saying among other things, that she had made her home with Julia Jandron who had taken good care of her. She was a member of the Presbyterian Church, and prior to the time the will was made, expressed the desire to leave the church some of her property. The testimony of Dr. Keeling, taken at the rehearings, but confirms the statements in his letter, to the consideration of which objection had previously been made. The same is true of the testimony of Hugh M. Jones, though testimony was at the same time introduced in an endeavor to show that his reputation for truth and veracity was not good. The main testimony relied upon at the original hearing, from which it would be possible to infer undue influence and fraud on the part of Julia Jandron, were the statements by a number of witnesses that efforts were made by her to keep Sarah Malewind apart from her relatives and friends, which was assumed by the witnesses to mean that Julia Jandron was endeavoring to prevent any interference with her plans. Various explanations were given as to Julia Jandron's seeming unwillingness to permit the relatives and friends of Sarah Malewind to see and talk to her, among others, that the latter was very ill and that it was necessary for her physician and the persons taking care of her, to see that she be kept as quiet as possible. In any event, the testimony taken and offered at the rehearings throws no new light on this important phase of the case.

The testimony taken at the rehearings held in this case can not fairly be regarded as other than merely cumulative of that already of record, so that no valid reason is seen for changing the action heretofore taken in this matter, even though consideration were given to testimony offered at the hearings relating to undue influence and fraud, and especially is this true when such testimony is considered in connection with the statutory limitation placed upon the Secretary's authority to reopen Indian will cases after the expiration of the period prescribed.

The former action of the department in approving the will of Sarah Malewind or Sarah Tatebdoka will be adhered to, the case hereby is closed and your office will proceed to distribute the estate in accordance with the terms of said will without further delay.

SARAH MALEWIND, ALIAS TATEBDOKA

Motion for rehearing of departmental decision of November 7, 1931 (53 I. D. 519), denied by First Assistant Secretary Dixon, December 4, 1931.

**CENTRAL PACIFIC RAILWAY COMPANY, SUCCESSOR IN INTEREST
OF MODOC NORTHERN RAILWAY COMPANY**

Decided November 13, 1931

**RAILROAD RIGHT OF WAY—MAP OF DEFINITE LOCATION—CONSTRUCTED PORTION
OF ROAD—STATUTES.**

Section 1 of the act of March 3, 1875, protects the rights of a railroad company in the right of way over which its line has been actually constructed while section 4 thereof gives the company, upon approval of its map of definite location, the benefit of the act as of the date of the filing of the map in advance of actual construction.

**RAILROAD RIGHT OF WAY—OVERLAP—CONSTRUCTED PORTION OF ROAD—VESTED
RIGHTS—RELINQUISHMENT.**

Where a prior railroad right of way grant, which is in part overlapped by the constructed line of road of the grantee's successor in interest, is relinquished, the relinquishment does not impair any rights of the successor company acquired through actual construction of its road as to the lands in conflict.

**RAILROAD RIGHT OF WAY—RELINQUISHMENT—OVERLAP—VESTED RIGHTS—
COURTS.**

The Land Department may accept a qualified relinquishment of a railroad right of way grant and leave for future judicial determination questions as to its rights thereunder as against a patentee or other claimant under the public land laws, where the railroad company declines to tender an unqualified relinquishment including the portion of the former grant to the extent of the overlap covered by the right of way subsequently applied for and upon which its line has actually been constructed on the ground that its rights would be prejudiced thereby.

EDWARDS, Assistant Secretary:

The Central Pacific Railway Company, successor in interest of the Modoc Northern Railway Company, has appealed from decisions of the Commissioner of the General Land Office, dated June 5, 1931, and July 24, 1931, respectively, declining to accept a qualified relinquishment of the grant shown upon the map filed by the Modoc Northern Railway Company and approved January 16, 1911 (Sacramento 015704), involving a section of road 25.637 miles in length, extending from a point on the boundary line between the States of Oregon and California (on north line of Sec. 13, T. 48 N., R. 5 E., M. D. M.), and following a general southeasterly direction to an intersection with the north boundary line of the Modoc National

Forest (on south line Sec. 15, T. 44 N., R. 6 E.) in California. The exception reads as follows:

Excepting, however, from the foregoing relinquishment any overlap of said right of way with right of way acquired for the constructed line of the Central Pacific Railway Company between Klamath Falls, Oregon, and Alturas, California, in the NW $\frac{1}{4}$ and S $\frac{1}{2}$ of Sec. 17, the E $\frac{1}{2}$ of Sec. 20, and the NW $\frac{1}{4}$ Sec. 28, all in T. 45 N., R. 6 E., M. D. M., right of way for constructing road being identified by Sacramento serial 023329 filed September 27, 1928, approved July 1, 1929; proof of construction accepted March 27, 1930.

On February 24, 1922, notice was directed, allowing the grantee 30 days within which to file proof of construction or to relinquish the grant or to show cause why suit should not be instituted to procure judicial forfeiture thereof. On March 16, 1922, the Central Pacific Railway Company, as successor in interest, filed application for extension of time for a period of five years within which to construct the road. Certified copy of a deed, dated February 29, 1912, wherein the Modoc Northern Railway Company transferred its rights to the Central Pacific Railway Company, was subsequently filed with the record. Action was suspended until July 1, 1923, and, in accordance with subsequent requests, the company was allowed until January 1, 1931, within which to make suitable showing.

On May 16, 1931, the company filed a relinquishment of the grant in question. The relinquishment was accepted as to certain sections of the line, but the action appealed from was taken with respect to the above-described section because of the exception noted.

The record shows that on September 27, 1928, the Central Pacific Railway Company filed its application for right of way for its line of road, Sacramento 023329, extending from a point in Sec. 14, T. 44 N., R. 6 E., M. D. M., to a point in Sec. 31, T. 47 N., R. 6 E., M. D. M. The map filed with the application was approved by the Assistant Secretary on July 1, 1929.

Proof of construction, filed with the application on March 7, 1930, states that construction was commenced on June 14, 1927, and completed on July 3, 1929, and that the constructed railroad conforms to the map and field notes which received the approval of the Assistant Secretary on July 1, 1929.

There appears to be an overlap of the right of way approved January 16, 1911, to the Modoc Northern Railway Company, and that approved July 1, 1929, to the Central Pacific Railway Company. The subdivisions in which this overlap occurs are referred to in the exception to the relinquishment.

The Commissioner held that the rights of the company with respect to the area in the overlap date from the filing of its map of definite location on September 27, 1928, and not from January 16, 1911, the date of the approval of the map of its predecessor in

interest. Appellant insists that the requirement of an absolute relinquishment of the former right of way will endanger the company's rights to the area of the right of way opposite the line of the constructed road with respect to which the company's rights had been earned by construction.

The Commissioner expressed the opinion that any rights which the company had earned by construction date from the time of the construction of the line of road over each legal subdivision affected, citing *Jamestown & Northern Railroad Company v. Jones* (177 U. S. 125).

Section 1 of the act of March 3, 1875 (18 Stat. 482), reads as follows:

That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each 10 miles of its road. (U. S. C., title 43, sec. 934.)

Section 4 provides—

That any railroad company desiring to secure the benefits of this Act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. (U. S. C., title 43, sec. 937.)

In the case of *Jamestown & Northern Railroad Company v. Jones*, *supra*, in construing the above sections of the act, the court quoted with approval from the decision of this department in *Dakota Central Railroad Company v. Downey* (8 L. D. 115), as follows (p. 119):

It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right of way.

The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, *in anticipation* of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to "the central line of said road;" which only means—without the fourth section—a *constructed* road.

It seems clear that the rights of the company in the right of way over which the line has been actually constructed are safeguarded under the provisions of section 1, and that the rights gained through the filing of its application 023329, and map submitted therewith, which has been approved, are governed by the provisions of section 4 of the act. As pointed out in the decision quoted, the approval of the map would have the effect of giving the company the benefit of the act as of the date of filing thereof in advance of actual construction.

As a result of actions heretofore taken in the department, there are two conflicting grants to the extent of the overlap. The line on which the road has been constructed and which conforms to that shown upon the map approved with the application of the Central Pacific Railway Company, deviates from that approved to its predecessor in interest, but in a few legal subdivisions there is an apparent overlap, part of the area being embraced in the new right of way alone, and another part in the conflicting area. The decision in the case of *Taggart v. Great Northern Railway Company* (211 Fed. 288), cited by appellant, is not believed applicable to this case because of essential differences in the facts and questions involved.

The Commissioner found that the latter application, under the circumstances, was not amendatory of the former, and decided that no rights under the former could be recognized with respect to the area in conflict. It does not appear from the record that the subsequent application was submitted as amendatory of the approved grant to the predecessor in interest, but even though the facts warranted a contrary conclusion, as urged by the appellant, attention is directed to paragraph 9 of regulations approved May 21, 1909 (37 L. D. 787), which states that where an amended survey and amended definite location are submitted, the company must file a relinquishment under seal of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

Appellant requests that the decisions be reversed and that the record be remanded with instructions to accept the relinquishment as tendered, reserving to the Central Pacific Railway Company the

right of way secured for the construction of its line of road across the tracts described in the reservation in its said relinquishment.

It is suggested that the questions involved concern matters essentially for judicial determination. It is clear that, in the event the railway company declines to submit an absolute relinquishment of the former right of way with respect to the area in conflict, the grant to that extent could be set aside only by decree of court after due proceedings.

It seems clear that a relinquishment as required by the Commissioner, involving the former grant alone, which was subject to forfeiture under the terms of this act, would not impair any rights acquired under the company's application 023329 or through actual construction as shown by the proof submitted therewith, and under the facts of the case, the requirement appears to be reasonable.

However, should the company still insist that its rights would be prejudiced through compliance with the Commissioner's requirement and decline to submit unqualified relinquishment, the relinquishment as tendered may be accepted, leaving the question as to whether the company acquired any rights as to the area in conflict under the grant to its predecessor, for judicial determination at such time as it may affirmatively assert rights thereunder as against a patentee or claimant under the public land laws of the lands affected thereby.

The decisions appealed from are modified in accordance with the views above expressed.

Modified.

COEUR D'ALENE CRESCENT MINING COMPANY

Decided November 13, 1931

WITHDRAWAL—MINERAL LANDS—STATUTES.

The act of August 24, 1912, which amended section 2 of the act of June 25, 1910, is remedial and should be liberally construed to effect its purpose, and nothing therein indicates any intention to curtail the metalliferous miner's rights that could be exercised by him on the public domain.

MILL SITE—MINING CLAIM—WITHDRAWAL—POWER SITE.

The right granted by section 2337, Revised Statutes, to a mining claimant to locate a mill site on nonmineral land is incident to the right to make mineral entry, and such location, so far as applicable to metalliferous minerals, does not come within the prohibition of a temporary withdrawal for power-site purposes under the act of June 25, 1910, as amended by the act of August 24, 1912.

MILL SITE—MINING CLAIM—APPLICATION—EVIDENCE—PATENT.

Where a part of a mill site is contiguous to the end line of a lode claim the formal and usual proofs of nonmineral character which accompany the mill-site application will not suffice to permit entry and patent of that

part of the mill site contiguous to such end line, but it must be shown that the lode or vein does not extend into any part of the ground covered by the mill site.

MINING CLAIM—WITHDRAWAL—POWER SITE—FEDERAL POWER COMMISSION.

A valid mining claim can not be located on lands previously reserved for power sites under the Federal Water Power Act of June 10, 1920, until a determination by the Federal Power Commission that the value of the land will not be injured or destroyed for the purposes of power development by such location.

WATER POWER—WITHDRAWAL—MINERAL LANDS—FEDERAL WATER POWER ACT—STATUTES.

The Federal Water Power Act of June 10, 1920, is inconsistent with the act of June 25, 1910, as amended, which left open without restriction in withdrawals thereunder the appropriation of the land under the mining laws so far as they apply to metalliferous minerals and to the extent of such inconsistency by section 29 of the former act the latter act was repealed.

EDWARDS, Assistant Secretary:

The Coeur d'Alene Crescent Mining Company has appealed from decisions of the Commissioner of the General Land Office dated July 9, 1931, and September 2, 1931, wherein its mineral entry, Coeur d'Alene 018196, was held for cancellation as to the land embraced in the Chesterfield lode and Evolution Millsite claims, but which accorded the company the privilege to apply to have the land restored from a prior power-site withdrawal, for which provision is made under section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and regulations thereunder. (Circular No. 729, 47 L. D. 595.)

The record shows that amended location of the Evolution Millsite was made by appellant April 17, 1914, as owner of the Yellow Pine and Evolution lode claims for mining and milling the ores to be extracted therefrom. The lode claims mentioned are included in the application for patent. According to the plat, M. S. 3202B, the mill site, irregular in outline, is contiguous to a side line of the South Fork lode and both a side and an end line of the Yellow Pine lode. The company has submitted affidavits to the effect that the Evolution Millsite is an amendment of a mill site location, certified copy of location notice of which is presented, showing the date of location as March 9, 1886; that it was five acres in extent, rectangular in form and made for the Golden Eagle lode, another claim included in the application for patent. Claimant also refers to an item in the abstract of title, showing conveyance of such mill site to the company's grantors January 19, 1901, in connection with the Golden Eagle and Evolution lodes. Averments under oath are made that the original mill site has been used long prior to, at the time, and

ever since the power-site withdrawal for mining and milling purposes.

The Chesterfield lode claim was located January 1, 1921.

That portion of Sec. 11, embracing the Evolution Millsite and that portion of Sec. 12, embracing the Chesterfield lode claim, in T. 48 N., R. 3 E., are included in Temporary Power Site Withdrawal No. 102 made January 17, 1910, which was continued by Executive order of July 2, 1910, made under the act of June 25, 1910 (36 Stat. 847).

The Commissioner held the amended mill site invalid because it was made after the power-site withdrawal. After consideration of the additional showings as to the original mill site, he held in his letter of September 2, 1931, that the amended mill site took in new ground within the withdrawal and to that extent it was invalid. He also held that the company acquired no rights by location of the Chesterfield lode, because it was likewise in said withdrawal and, "Section 24 of the Federal Water Power Act, * * * provides that lands within a power project and subject to the provisions of said act shall be reserved from entry, location or other disposal under the laws of the United States unless otherwise directed by the Commission or otherwise by Congress."

Pertinent provisions of section 2 of the act of June 25, 1910, *supra*, read—

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.

By the act of August 24, 1912 (37 Stat. 497), the last line of the sentence above quoted was amended to read, after the word "to", as follows: "metalliferous minerals".

Section 2337 (U. S. C. Title 30, Sec. 42), Revised Statutes, enacted as section 15 of the act of May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States", provides as follows:

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

The question is presented whether the mill site location as amended, made by the proprietor of a vein or lode, is a location under the mining laws of the United States, "so far as the same apply to metalliferous minerals", and therefore not within the prohibitions of the withdrawal made under the act of June 25, 1910, as amended by the act of August 24, 1912.

In *Alaska Copper Company* (32 L. D. 128), in speaking of the first clause of section 2337, Revised Statutes, the department said (pp. 129, 131)—

* * * Its manifest purpose is to permit the proprietor of a lode mining claim to acquire a small tract of noncontiguous, nonmineral land as directly auxiliary to the prosecution of active mining operations upon his lode claim, or for the erection of quartz mills or reduction works for the treatment of the ore produced from such operation. * * * The logical inference is that the mill site provision is intended solely to subserve a recognized practical necessity. * * *

* * * A mill site is required to be used or occupied distinctly and explicitly for *mining* and *milling* purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode—

In *Hartman v. Smith* (7 Mont. 19; 14 Pac. 648), the court said (p. 651)—

* * * The above section 2337 of the statute, by requiring the mill-site to be included in the application for patent for the vein or lode, and that the same preliminary steps, as to survey and notice, shall be had, as are applicable to veins or lodes, and that it shall be paid for at the same rate per acre as the mining claim, and may be patented with the vein or lode to which it is an appurtenant, recognizes the mill-site as a mining possession. The location of the mill-site, perfected according to law, like that of a quartz lode mining claim, operates as a grant by the United States of the present and exclusive possession of all the surface ground included within its limits.

In *James W. Nicol* (44 L. D. 197), the department in holding that the act of June 4, 1887 (30 Stat. 11, 35, 36), confers the right to locate and purchase a mill site under the mining laws of the United States within a national forest, quoted this provision of that statute—

It is not the purpose or intent of these provisions or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes * * * Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations * * * and any mineral lands in any forest reservation which have been or may be shown to be such and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto shall continue to be subject to such location and entry notwithstanding any provisions herein contained.

and stated as follows (p. 198):

The act of May 10, 1872, carried forward in the Revised Statutes, had as its purpose, as set forth in its title, "To promote the development of the mining resources of the United States." The mill site provision, quoted above, from section 2337, Revised Statutes, is an essential part of the present system of mining laws. A mill site claim may be embraced in the same application for patent and be patented with the vein or lode in connection with which it is used. Such application is subject to the same requirements as to survey and notice as are applicable to veins and lodes; payment is made at the same rate as for the lode claim; and, further, a location of a mill site must be made in the same manner as a mineral claim. (Rico Townsite, 1 L. D., 556.)

The purpose and intent of the act of June 4, 1897, was to promote the mineral development of the public lands within national forests. The mineral lands were made subject to entry under the existing mining laws of the United States. As an element of the mineral development of said lands, it is necessary that the lode locator, or entryman, should be permitted to have the ancillary right of locating and purchasing a mill site. The right to locate a mill site is one granted by the existing mining laws, and is an incident under the facts in this case to the right to make mineral entry. By necessary implication, therefore, the act of June 4, 1897, *supra*, conferred the right to locate or purchase a mill site in connection with a lode claim within a national forest. The Department also understands that the practice of the General Land Office, previous to the decision here in question, has been in harmony with the above view, and similar mill sites have been patented.

No reason is perceived why the same necessary implications do not follow from the language of the act of 1912, *supra*. No reasonable doubt can be entertained that a necessity exists in many cases for suitable ground nonmineral in character appurtenant to a metalliferous miner's claim for mill-site purposes, without which the lodes could not be properly and successfully worked. The language of the act of 1912 above quoted indicates no purpose to curtail the metalliferous miner's rights that undoubtedly he could exercise on the public domain. It has been repeatedly held that section 2 of the act is remedial, and should be liberally construed to effect its purpose. *United States v. Standard Oil Company* (265 Fed. 751); *Consolidated Mutual Oil Company v. United States* (245 Fed. 521); *United States v. Rock Oil Company* (257 Fed. 331).

It is true that a precedent exists for the Commissioner's action in the unreported departmental decision of July 9, 1920, in the case of *Henry Bolthoff* (D. 27912) wherein was affirmed the decision of the Commissioner of September 28, 1914, holding that a tract located as a mill site on June 1, 1911, was not subject to such location by reason of a temporary power-site withdrawal made by Executive order of July 2, 1910. But the department's decision states no ground for attributing such force to the withdrawal, and the Commissioner's decision appears to be based on the ground that mill sites, though sold under the mining law are disposed of as nonmineral land, the assumption being thereby made that the act of August

24, 1912, *supra*, excepted from the power of withdrawal there given only metalliferous mineral lands. If it had been the intention of Congress to exclude only metalliferous mineral lands then it would seem that the acts of July 25, 1910, and August 24, 1912, would have used the words "all metalliferous mineral lands" instead of "all lands", but since the latter act leaves open to the operation of the mining laws "all lands" so far as the same apply to metalliferous minerals, and section 2337, Revised Statutes, is a mining law of the United States, and applies to the mining and milling of metalliferous minerals, and does not apply to anything else, it necessarily follows that Temporary Power Site Withdrawal No. 102 did not bar the exercise of rights under section 2337 of the Mining Act. Amended Evolution Millsite is not, therefore, affected by such withdrawal.

It appears, however, that a part of this mill site is contiguous to the end line of the Yellow Pine lode. The formal and usual proofs of nonmineral character, which accompany the application do not suffice to permit entry and patent of that part of the mill site contiguous to such end line. It must be clearly shown that the lode or vein along which the Yellow Pine Mining location is laid, either terminates before the end abutting upon the mill site would otherwise be reached, or that it departs from the side line of the mining claim, and the ground embraced in such adjoining mill site is nonmineral in character. Proof of this character must be supplied before the entry for the mill site ground may be permitted to stand. *Montana-Illinois Copper Mining Company* (42 L. D. 434.)

It remains to consider the correctness of the Commissioner's action in holding that the land in the Chesterfield lode claim is subject to the operation of section 24 of the Federal Water Power Act.

Section 24 reads as follows:

That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The

United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or flings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained. [Italics supplied.]

As the record does not disclose that the land within this claim is embraced in any proposed project under the Federal Water Power Act, the first sentence above italicized has no application. The land however, is within the description of land "heretofore * * * reserved * * * as power sites," and therefore the determination of the Federal Power Commission that the value of the land "will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws," is a necessary prerequisite to the exercise of authority by the Secretary, declaring such lands open to such forms of disposition with the reservations provided in section 24. In this respect the Federal Water Power Act is inconsistent with the act of June 25, 1910, as amended, which left open without restriction in withdrawals made thereunder, the appropriation of the land under the mining laws so far as the same applied to metalliferous minerals, and to the extent of such inconsistency by section 29 of the former, the latter is repealed. The instructions relative to section 24 of the Federal Water Power Act of November 20, 1920, Circular No. 729 (47 L. D. 595), accordingly, provide (p. 597)—

You will further observe that, while the act of June 25, 1910 (36 Stat. 847), allows metalliferous mineral explorations and applications based thereon, the act of June 10, 1920, makes no exceptions.

Therefore, in future, any mineral application or location, based upon discoveries made subsequent to June 10, 1920, which is in conflict with lands reserved or classified as power sites, should be rejected by you, subject to appeal.

The Commissioner, therefore, properly held that the applicant acquired no rights by location of the Chesterfield claim, and was right in advising him that he may apply for restoration of the land under the provisions of section 24 of the Federal Water Power Act. His action to this extent is affirmed. With respect to the Evolution Millsite, the cancellation *pro tanto* as to the land therein on the same ground is regarded as untenable. The decision on the case of *Henry Bolthoff* is not considered sound and will not be followed. The action of the Commissioner as to the mill site is modified to the

extent that if applicant shall file the additional proof herein indicated as to the nonmineral character of that part of the mill site contiguous to the end line of the Yellow Pine lode claim, the entry will be permitted to stand as to the mill site and may be passed to patent, all else being regular.

Affirmed in part and modified in part.

COEUR D'ALENE CRESCENT MINING COMPANY

Motion for rehearing of departmental decision of November 13, 1931 (53 I. D. 531), denied and case remanded to the General Land Office by Assistant Secretary Edwards, January 7, 1932.

MINERAL RESERVATIONS IN TRUST PATENTS FOR ALLOTMENTS TO FORT PECK AND UNCOMPAHGRE UTE INDIANS

Instructions, November 13, 1931

UNCOMPAHGRE UTE INDIAN LANDS—ALLOTMENT—MINERAL LANDS.

The acts of June 15, 1880, August 15, 1894, and June 7, 1897, which contained provisions for the allotment of lands to the Uncompahgre Utes in the State of Utah, did not exclude from allotment those mineral lands that were adaptable to agricultural and grazing purposes.

FORT PECK INDIAN LANDS—ALLOTMENT—MINERAL LANDS.

Neither the general allotment act of February 8, 1887, nor the act of May 30, 1908, which authorized allotments on the surplus lands of the Fort Peck Indian Reservation, excludes mineral lands from allotment.

FORT PECK INDIAN LANDS—ALLOTMENT—MINERAL LANDS—OIL AND GAS LANDS—RESERVATIONS.

The setting aside of land in the field as an allotment and its listing on the completed schedule is such a disposition of the land as to remove it from the class of "undisposed of" land as that term is used in the act of March 3, 1927, which reserved to the Fort Peck Indians the oil and gas in the tribal lands undisposed of at the date of the act.

FORT PECK INDIAN LANDS—ALLOTMENT—APPLICATION—MINERAL LANDS—OIL AND GAS LANDS—RESERVATIONS—TRUST PATENT.

The act of March 3, 1927, which reserved to the Fort Peck Indians the oil and gas in the tribal lands undisposed of at the date of the act, does not require that a reservation be inserted in a trust patent issued for an allotment where the allotment application was pending, though unperfected on that date.

UNCOMPAHGRE UTE INDIAN LANDS—ALLOTMENT—MINERAL LANDS—OIL SHALE LANDS—RESERVATIONS—TRUST PATENT.

A mineral reservation under the act of July 17, 1914, will not be required in trust patents to be issued for Uncompahgre Ute Indian allotments pending April 15, 1930, the date of the Executive order withdrawing oil shale deposits and lands containing them.

First Assistant Secretary Dixon to the Commissioner of the General Land Office:

This letter relates to the questions presented (1) in your [Commissioner of the General Land Office] memorandum of February 7, 1931, attached to a letter (3033-31) from the Commissioner of Indian Affairs of January 26, 1931, and (2) in departmental memorandum of December 5, 1930, transmitted to you with instructions disagreeing with your proposed letter, without date, "K" 1391771, to the Commissioner of Indian Affairs.

These questions are, respectively—

(1) Whether in view of the provision in the act of March 3, 1927 (44 Stat. 1401), specifically reserving to the Indians having tribal rights on the Fort Peck reservation, the oil and gas in the lands "*undisposed of on the date of the act,*" [italics supplied], trust patent to be issued on allotment No. 1511 to Charles Martin No. 2 should contain such reservation.

(2) Whether, in view of the Executive order of April 15, 1930, temporarily withdrawing, subject to valid existing rights, oil shale deposits and the lands containing them owned by the United States from lease or other disposal, trust patents to be issued Uncompahgre Ute allotments Nos. 400 and 372 located on oil shale lands should contain mineral reservations under the act of July 17, 1914 (38 Stat. 409).

As it appears in your memorandum of February 7, 1931, that the conclusion reached in the departmental memorandum of December 5, 1930, that the two Uncompahgre-Ute allotments there considered should contain oil and gas reservation under the act of July 17, 1914, is regarded as a precedent for a like reservation as to the Fort Peck allotment, grounds for that conclusion have been given further consideration and will here be first discussed.

Uncompahgre Ute schedule containing allotments Nos. 372 and 400 was approved by the department July 7, 1905. Both of these were made on the Uncompahgre Ute adjacent to the Uintah reservation. The plat of survey on which No. 400 appears was approved May 16, 1906. Allotment No. 372 was adjusted to survey by order of November 23, 1914; part of it was in conflict with a desert entry, which was canceled as to the land in conflict November 30, 1918. These lands were classified by the Geological Survey as valuable for oil shale. No trust patent on either allotment has been issued. By Executive order of April 15, 1930—

Subject to valid existing rights the deposits of oil shale, and the lands containing such deposits owned by the United States, be, and the same are hereby temporarily withdrawn from lease or other disposal and reserved for the purpose of investigation, examination and classification. [Italics supplied.]

In departmental memorandum of December 5, 1930, the position was taken, that mineral lands were not subject to allotment under the act authorizing them; that these lands being valuable for oil shale were withdrawn by the order of April 15, 1930, and no valid

right existed in the Indian thereto on said date, and that in order to recognize the claims under these allotments, an Executive order should be obtained eliminating the land involved from the withdrawal, whereupon trust patents could be issued, with reservation of oil shale under the act of July 17, 1914. Action was taken in accordance with these views to the extent that an Executive order was obtained eliminating the land from the withdrawal order, with a view to the issuance of patent with oil shale reservation. The conclusion that a valid allotment could not be made of mineral land was based upon the view that the word "agricultural" as it occurs in the joint resolution of June 19, 1902 (32 Stat. 744), under which it was said that the allotment was made, was used in contradistinction to the word "mineral." The pertinent part of this act reads—

All allotments hereafter made to Uncompahgre Indians of lands in the Uintah Indian Reservation shall be confined to agricultural lands which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more.

The act goes on to provide that the Uncompahgres who take up land on the Uintah shall enjoy the grazing rights on the lands set apart for that purpose in common with the other Indians.

It may be questioned whether this act has any application at all, for these allotments though made by Uncompahgres are not on lands in the Uintah reservation, but I understand that it is the practice of the Indian Office to regard the act as applying to the adjacent Uncompahgre land.

Decision of that question is not important for the acts that unquestionably apply to these Uncompahgre lands confine allotments to "agricultural" land.

Provision for allotments to Uncompahgres in the State of Utah is made in the act of June 15, 1880 (21 Stat. 199-205), providing for a ratification of the agreement with the confederated bands of Ute Indians, and in the acts of August 15, 1894 (28 Stat. 286, 337), and June 7, 1897 (30 Stat. 62, 87).

The act of 1880 provides that (p. 200)—

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

Thereafter follow provisions as to character and quantity of land to be allotted, so much agricultural, so much grazing.

Section 20 of the act of August 15, 1894, provides for the appointment of three commissioners to allot agricultural lands in severalty to the Uncompahgre Ute Indians within their said reservation and

to report to the Secretary of the Interior what portions of said reservation are unsuited, or will not be required for allotments, which portions so reported were by proclamation to be restored to the public domain. Section 21 of said act provides, *inter alia*, that the remainder of the lands upon approval of the allotments shall be open to entry "under the homestead and *mineral laws* of the United States" [italics supplied] with certain restrictions as to asphaltum, gilsonite or like substances.

This act left the reservation intact until the Indians were allotted homes and the allotments were approved by the Secretary which had not been accomplished by June 7, 1897, when Congress recognized that the contemplated allotments had not up to that time been completed and declared the reservation should cease April 1, 1898, and "all lands not theretofore allotted in severalty" should be open to location and entry "excepting therefrom all lands containing gilsonite, asphaltum, elaterite or other like substances. And the title to all lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States." *High Meeks* (29 L. D. 456).

Pursuant to the authority of the act of March 3, 1903 (32 Stat. 982, 998), by Executive proclamation of June 6, 1906 (See 34 L. D. 648), the even-numbered sections containing the mineral substances mentioned in the act of June 7, 1897, were offered for sale, saving mining locations made before a certain date and validated by said act, "and saving and excepting lands allotted to Indians, and all other lands legally reserved and appropriated."

It seems very clear from this recital of certain pertinent legislation respecting the Uncompahgre Ute reservation, that the reservation of certain mineral substances named applied only to lands open to location and entry and not to allotments, and that the proclamation of June 6, 1906, offering the lands containing such deposits for sale, distinctly recognized in its saving clause an Indian allotment theretofore made on lands containing such deposits as a legal appropriation. It should also be pointed out that the department in *High Meeks, supra*, definitely rejected the contention there made, that by reason of the treaty stipulations of 1880 entitling the Indians to allotments on "agricultural lands" the order of January 5, 1882, setting apart the Uncompahgre Ute reservation which was subject to allotment, covering mineral land was void, and furthermore under the instructions given to a new commission formed August 26, 1897, nothing is said as to the exclusion of mineral lands from allotments made on the two reservations, the Uintah and Uncompahgre, but as to any allotments the Indians might select on unoccupied and unentered lands elsewhere in Utah it was directed "you

will allot such unoccupied unentered lands elsewhere in Utah, as they may select, such lands being of course *nonmineral*." Without going into detail it is sufficient to say, that allotments were made on the reservations without regard to the mineral or nonmineral character of the land and trust patent issued therefor.

The statutory provision that allotments are to be made on agricultural lands is not peculiar to the acts applicable to the Uncompahgre-Utes. It occurs in numerous acts providing for the allotment of lands on other reservations, and where the question has come up as to certain of these acts whether the words "agricultural" by implication excluded mineral land, the answer, generally speaking, has been in the negative. In this connection may be noticed the instructions of October 1, 1912 (1-43634; 87140-1912) holding allotments on the Fort Peck surplus lands should be permitted to stand although subsequently classified as coal land. The opinion [unreported] of the Solicitor of July 11, 1917, holding that the words "irrigable and grazing," as they occur in the act of March 1, 1907 (34 Stat. 1015, 1035), relating to the Blackfeet Reservation and similar words in the general allotment act of 1887 (24 Stat. 388), did not import exclusion of mineral lands agricultural and grazing in character from allotment. Similar rulings are cited as to the Fort Berthold and Wind River Reservations. In *United States v. Payne* (264 U. S. 446), it was said (p. 449)—

* * * We are, therefore, constrained to reject the rigidly literal interpretation of the Allotment Act for which the Government here contends. It is not an unreasonable view of the requirement that an allotment shall not "exceed eighty acres of agricultural or one hundred and sixty acres of grazing land" to say that it was not meant to preclude an allotment of timbered lands, capable of being cleared and cultivated, but simply to differentiate, in the matter of area, between lands which may be adapted to agricultural uses and lands valuable only for grazing purposes.

In view of the long continued departmental practice and construction, it would seem that stronger language should be required in applicable statutes to import a reservation of mineral land from allotment than implications, contrary to previous constructions, from the use of the words "agricultural", "irrigable" and the like. Especially should this be true, where the allotments as here are tribal allotments, made under the obligations of the treaty of 1880, whereunder the Uncompahgres surrendered the absolute estate in the lands they held in Colorado.

I am therefore of the opinion that at the date of the Executive order of April 15, 1930, the Indian allottees in question had at least a valid, if not a vested right, and their right is not affected by such withdrawal, assuming but not implying that the lands allotted were

public lands, to which the authority to make withdrawals under the act of June 25, 1910 (36 Stat. 847), as amended, only applies. *Payne v. New Mexico* (255 U. S. 367). I am further of the opinion that the act of July 17, 1914, has no application, as these allotments were not made under any "nonmineral public land law." Trust patents should be issued accordingly on allotments Nos. 372 and 400 without mineral reservation. Instructions above mentioned to the contrary are hereby vacated.

With respect to the Fort Peck allotment in question, the only given facts are that the work of allotment was commenced September 7, 1926, and the schedule of allotments completed February 28, 1927, and except as to the allotment of Martin, approved October 21, 1927, without directions to impose the oil and gas reservations in the trust patents under the act of March 3, 1927. The record shows that in due course patents issued accordingly on the allotments so approved. It is also shown that the Martin allotment was excepted from approval because of apparent error in description of the land, and according to the letter of January 26, 1931, from the Commissioner of Indian Affairs, the error consisted in specifying in the description the tract allotted as in Sec. 1 instead of Sec. 2, T. 26 N., R. 42 E.; the statement being further made to the effect that the latter tract was vacant and available for allotment though supplemental plat of survey was necessary to describe the land properly and to issue a trust patent to the allottee in accordance with the acts cited in approving the schedule of October 21, 1927.

As to the error in description of the tract selected, it is believed that the assumption is justified that it was a mere clerical error, that the tract in Sec. 2 was actually selected for allotment, and the case will be considered as if the record showed such tract as selected for allotment. So regarding the selection, the question is presented whether the land included therein was "undisposed of" within the meaning of the act of March 3, 1927, so as to require that a reservation of oil and gas be impressed on the trust patent issued thereon.

In view of the departmental rulings to which attention is called in the discussion above as to the Uncompahgre-Ute allotments, nothing more need be said in support of the view that neither the provisions of the general allotment act nor the act of May 30, 1908 (35 Stat. 558), authorizing allotments on the surplus lands of the Fort Peck Reservation, exclude mineral lands from allotment. Except for the provisions in the act of February 14, 1920 (41 Stat. 408, 421), permitting allotments on lands classified as coal with reservation of the coal to the Fort Peck Indians, no other legislation appears to have been enacted prior to the act of March 3, 1927, affecting the right of the Indian to have allotted to him mineral

land. Martin, therefore, may be regarded as having acquired at least a valid inceptive right prior to the act of March 3, 1927. It is, however, suggested in your memorandum of February 7, 1931, that the words "undisposed of" import a final disposition of, and vested right to the land, and the allotment selection not having received departmental approval, the mere selection did not constitute a vested right.

It should be noticed, however, that the department on October 21, 1927, authorized trust patents, many of which have since been issued, on a great number of allotments on the same schedule, all of which had the status of unapproved selections on March 3, 1927. This action, while it does not necessarily impel the inference that rights were deemed to be vested under the allotments, it must be taken as implying an adjudication, that the setting aside of the land as an allotment in the field and its listing on the completed schedule was a disposition of the land within the meaning of the act above cited.

It is also noticed that the regulations of January 18, 1929 (Circulars and Regulations of the General Land Office, 1930, pp 715-716), providing for the reservation of oil and gas under the act of March 3, 1927, in homestead entries made upon the Fort Peck lands directed that the reservation be made only upon future applications, and made no such requirement as to pending unperfected entries at the date of the act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal of the land under the act. See also the decision in *Raymond Bear Hill* (52 L. D. 688), wherein it was held that "the filing and recording of an allotment selection by a qualified Indian in the field, operates to segregate the land from other disposal and confers upon him a preference right to the land as an allotment, which upon approval by the department, vests in him an equitable right to a patent."

While the question of the character of the interest which the Indian must acquire before March 3, 1927, in the land selected for allotment in order to consider the land disposed of is not free from difficulty, the decisions suggesting a contrary view from that which the department has expressed, are not so plainly in conflict or in point as to require any disturbance of the practice that has heretofore prevailed, i. e., to issue a trust patent without mineral reservation under the act of March 3, 1927, to an allottee on the Fort Peck reservation, where the allotment has been filed and recorded prior to the date of said act. It follows that the trust patent to be issued to Charles Martin No. 2 should be issued without oil and gas reservation to the Indians having tribal rights in the lands of the reservation.

**AUTHORITY OF THE VETERANS' ADMINISTRATION TO TRANSFER
INSANE SOLDIERS, SAILORS, AND MARINES COMMITTED TO ST.
ELIZABETHS HOSPITAL**

Opinion, November 20, 1931

**INSANE PERSONS—SOLDIERS, SAILORS, MARINES—ST. ELIZABETHS HOSPITAL—
SECRETARY OF WAR—VETERANS' ADMINISTRATION.**

The transfer of insane persons of the Army, Navy, or Marine Corps, committed to St. Elizabeths Hospital by the Secretary of War or the Secretary of the Navy pursuant to section 4843, Revised Statutes, to the rolls of the Veterans' Administration does not affect the authority of the hospital to continue to hold such patients until released or discharged by the committing officer.

**INSANE PERSONS—SOLDIERS, SAILORS, MARINES—TRANSFER—ST. ELIZABETHS
HOSPITAL—ADMINISTRATOR OF VETERANS' AFFAIRS—DELEGATION OF AUTHOR-
ITY.**

Transfer of insane persons of the Army, Navy, or Marine Corps, confined in St. Elizabeths Hospital to the rolls of the Veterans' Administration is one of the functions, powers and duties which the Administrator of Veterans' Affairs is authorized to delegate to the Medical Director of that organization by section 5 of the World War Veterans' Act of June 7, 1924, as amended by the act of July 3, 1930.

FINNEY, Solicitor:

Certain questions submitted by the assistant to the Superintendent of St. Elizabeths Hospital relative to the transfer of retired men committed by the Secretary of the Navy to the rolls of the Veterans' Administration at the hospital by order of the Medical Director of that bureau have been referred to me for consideration and opinion.

It appears that the hospital has recently received some 41 letters signed by the Medical Director of that bureau authorizing the inclusion of the names of certain retired officers and men mostly from the Navy on the monthly voucher submitted to the Washington regional office of the Administration.

The notices in each case read as follows:

This office has been informed that a request has been made by the responsible representative of the above named retired man to have his name placed on the Veterans' Administration rolls at your hospital.

Since it has been determined that this retired man is entitled to hospitalization under the provisions of the World War Veterans' Act 1924, as amended, and he has previously been admitted to your hospital upon the authority of the Secretary of the Navy, you are hereby authorized to include this name, from this date, on the monthly voucher submitted to the Washington Regional Office.

The per diem rate for this retired man will be no greater than for discharged ex-service men.

These letters appear to have been written in conformity with an order dated June 23, 1931, issued by the Administrator on the subject of "Authority for placing names of retired men of the U. S.

Army, U. S. Marine Corps, and U. S. Navy, upon the Bureau rolls at St. Elizabeths Hospital, Washington, D. C." A copy of this order was furnished the hospital.

In substance, the Medical Director advises that it has been determined that the retired men named are entitled to hospitalization under the provisions of the World War Veterans' Act of June 7, 1924 (43 Stat. 607), as amended. It is assumed that this determination was made after application and adjudication of their rights under section 202(10) of the said act as prescribed by the order of June 23, 1931, above referred to.

My opinion has been requested with respect to the following questions:

1. Whether the authority to hold such patients when committed either by the Secretary of the Navy or the Secretary of War can be transferred to the Administrator of the Veterans' Administration?

2. Whether the Medical Director of that bureau has the authority to sign these orders transferring such patients, and whether the hospital may continue to hold such patients under his direction?

Section 191, Title 24, of the United States Code, which comprises section 4843 of the Revised Statutes, as amended, reads as follows:

Admission; insane persons of Army, Navy, Marine Corps, and Coast Guard.—The superintendent, upon the order of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Treasury, respectively, shall receive, and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons of the following descriptions:

First. Insane persons belonging to the Army, Navy, Marine Corps, and Coast Guard.

Second. Civilians employed in the Quartermaster Corps of the Army who may become insane while in such employment.

Third. Men who, while in the service of the United States, in the Army, Navy, or Marine Corps, have been admitted to the hospital, and have been thereafter discharged from it on the supposition that they have recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

Fourth. Indigent insane persons who have been in either of the said services and been discharged therefrom on account of disability arising from such insanity.

Fifth. Indigent insane persons who have become insane within three years after their discharge from such service, from causes which arose during and were produced by said service. (R. S. Sec. 4843; Aug. 24, 1912, c. 391, Sec. 3, 37 Stat. 591; Jan. 28, 1915, c. 20, Sec. 2, 38 Stat. 801.)

It has been held that a retired Navy officer is subject to the jurisdiction of the Secretary of the Navy as respects commitment to the hospital for the insane. *White v. Treibly* (57 App. D. C. 238; 19 Fed. (2d) 712). From the facts in that case it appears that Commander Treibly was honorably retired from the Navy on or about November 27, 1922, and on October 31, 1923, by direction of the

Secretary was committed to St. Elizabeths Hospital. The court concluded that as Treibly's "incapacity is the result of an incident of the service," his care and protection while thus incapacitated and unable to act for himself are the concern and duty of the Government, and his commitment therefore was authorized by section 4843 of the Revised Statutes, citing *United States v. Tyler* (105 U. S. 244).

In the case of *United States v. Frizzell* (19 App. D. C. 48), stressing the fact that the statute provides that the patient shall not only be received but likewise kept in custody until he is cured or until removed by the same authority which ordered his reception, the court expressed the view that it gives no authority to the superintendent to discharge him for the reason that by his intermediate discharge from the Army he has ceased to be a soldier of the United States. On page 54 the Court said—

We take it that the purpose and plain intent of the act of Congress were that any person in the military service of the United States becoming insane might be committed to the hospital during his term of service, and thereafter detained there at the expense of the United States, until he was cured, or was removed by the same authority which committed him, notwithstanding that in the meantime he ceased to be in such military service.

However, in later actions in the Supreme Court of the District of Columbia in habeas corpus proceedings the view was expressed that the discharge from the Army of men so committed terminated the authority of the hospital to further hold the patient unless proceedings were instituted for the purpose of testing his soundness of mind as provided by law. (See the unreported case of *In re David Albertstein*, petitioner.) Proceedings having been instituted in the case and the jury having rendered its verdict finding petitioner to be of unsound mind but without suicidal, homicidal or other dangerous tendencies, ordered his release by order dated May 12, 1927.

It does not appear that in either the *Frizzell* or *Albertstein* cases the parties were retired officers or men of the Army or Navy. The authority to hold retired officers committed by order of the Secretary of the Navy which has been definitely established by the decisions of the courts appears to apply in principle to retired enlisted men likewise committed, and their release can be effected only by being discharged as cured or removed by the same authority which ordered their reception. Section 4843, Revised Statutes.

No question is raised as to the authority of the hospital to continue to hold these men under the commitments of the Secretary of the Navy. In fact the order of the Administrator recognizes this authority. In this respect the order provides as follows:

A retired man at St. Elizabeths taken over by the bureau, or his guardian in his behalf, will be informed that he will be transferred to another hospital

should it become administratively desirable or necessary to do so, and if and when that occasion arises the Secretary of War, or Secretary of Navy, as the case may be, will be requested to authorize his removal in accordance with the provisions of the law governing removal or discharge of insane persons belonging to the Army and Navy (Sec. 191, Title 24, U. S. Code). This law provides for the removal of insane persons belonging to the Army and Navy by the same authority which ordered their reception, which in the cases interesting us at the present time would be the Secretary of War or Secretary of the Navy.

In view of the foregoing I am of the opinion that the transfer of the men named in the letters to the rolls of the Veterans' Administration is not intended to affect, nor does it affect, the authority of the hospital to hold these patients under the orders of commitment by the Secretary of the Navy, and the authority to continue to so hold them is expressly recognized in the Administrator's order, until released or discharged as prescribed in Section 191, Title 24, United States Code, *supra*.

The second question concerns the authority of the Medical Director to sign the orders transferring these men to the rolls of the Veterans' Administration. It seems clear that the Administrator himself is clothed with the authority to determine the right of these persons to the benefits of the War Veterans' Acts. He further is clothed with authority to delegate certain functions to officers and employees of the bureau. His powers are defined in Section 426, Title 38, United States Code, amended, as follows:

The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this chapter, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this chapter, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this chapter and all decisions of questions of fact and law affecting any claimant to the benefits of Parts II, III, or IV of this chapter shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of this chapter regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall be made by the director. * * * (June 7, 1924, c. 320, sec. 5, 43 Stat. 608.)

With respect to hospitalization, Section 434, Title 38 of the United States Code [Supplement V] reads in part as follows:

The director, subject to the general directions of the President, shall be responsible for the proper examination, medical care, treatment, hospitalization, dispensary, and convalescent care necessary and reasonable aftercare, welfare of, nursing, vocational training, and such other services as may be necessary in the carrying out of the provisions of this chapter, and for that purpose is hereby authorized, at the direction of the President or with the

approval of the head of the department concerned; to utilize the facilities existing on June 7, 1924, or future facilities of the United States Public Health Service, the War Department, the Navy Department, the Interior Department, the National Home for Disabled Volunteer Soldiers, and such other governmental facilities as may be made available for the purposes set forth in this chapter; and such governmental agencies are hereby authorized to furnish such facilities, including personnel, equipment, medical, surgical, and hospital services and supplies as the director may deem necessary and advisable in carrying out the provisions of this chapter, in addition to such governmental facilities as are hereby made available. (June 7, 1924, c. 320, sec. 10, 43 Stat. 610, as amended July 2, 1926, c. 723, sec. 1, 44 Stat. 790; July 3, 1930, c. 849, sec. 2, 46 Stat. 991.)

The functions, powers, and duties conferred by law upon the Director with other powers are conferred upon and vested in the Administrator of Veterans' Affairs by act of July 3, 1930 (46 Stat. 1016), (Section 11a, Chapter 1A, Title 38, United States Code, Supplement V).

It seems to be within the intent of the act that the Director (now Administrator) may assign certain duties to officers and employees and that all official acts performed by such officers and employees, specially designated therefor by the Director, shall have the same force and effect as though performed by the Director in person. There is no specific provision in the statute conferring authority upon the Medical Director to sign orders of this character, but it appears that under the law he may be specially designated by the Administrator to perform such duties.

In answer to the second question, I have therefore to advise you that in my opinion the transfer of the names specified to the rolls of the Veterans' Administration may lawfully be made under the orders signed by the Medical Director, in the event that he has been specially designated by the Administrator to perform this function, but that such transfer in itself does not affect the authority to hold such patients under commitments of the Secretary of War or Secretary of the Navy, under which they were received and held as provided by Section 4843, Revised Statutes (Sec. 191, Title 24, United States Code).

In the letter of the assistant to the Superintendent presenting the questions, attention is called to the fact that one of the patients named was discharged from the hospital on November 26, 1930, and that two others are on parole. There also appears to be an error in the official designation of one of the parties named. These matters should be brought to the attention of the Veterans' Administration with the view to having such corrections made as the facts may warrant.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

DISTRIBUTION OF CROW INDIAN TRIBAL FUNDS—FINAL ROLLS

Opinion, November 20, 1931.

CROW INDIANS—TRIBAL FUNDS—FINAL ROLLS—STATUTES.

Sections 3 and 11 of the act of June 4, 1920, having been left undisturbed by subsequent legislation, remain conclusive and exclusive as to who are entitled to share in the distribution of the Crow Indian tribal funds, and the expression "to the Indians entitled" has reference only to those whose names appear on the final rolls made as provided for by that act.

CROW INDIANS—MINORS—ALLOTMENT—TRIBAL FUNDS.

The act of May 19, 1926, as amended by the act of May 2, 1928, granted to the children of the Crow Tribe living on the former date and to those thereafter born only allotments of lands, and it did not extend the provisions of sections 3 and 11 of the act of June 4, 1920, to include them in any distribution of funds accruing subsequent to December 4, 1920.

CROW INDIANS—TRIBAL FUNDS—FINAL ROLLS.

The distribution of funds accruing from any source subsequent to six months after June 4, 1920, is limited to those Indians of the Crow Tribe whose names appear on the final rolls prepared in accordance with the provisions of section 3 of the act of that date.

CROW INDIANS—ALLOTMENT—ALLOTTEE—LEASE—MINORS.

The sole object in the amendment of section 1 of the act of June 4, 1920, by the act of May 26, 1926, was to extend to allottees thereunder a further privilege, that of leasing their allotments, or any part thereof, and the allotments of minor children for farming and grazing purposes, and not to move forward the date of the qualifications for allotment from June 4, 1920, to the date of the amendatory act.

FINNEY, Solicitor:

Upon recommendation of the Commissioner of Indian Affairs my opinion is requested on certain questions arising in connection with the final rolls of the Crow Indian Tribe in Montana, prepared under the provisions of the act of June 4, 1920 (41 Stat. 751), entitled "An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds and for other purposes."

The original reservation of the Crow Tribe was reduced in area by cessions made under three successive acts of Congress, each of which provided for allotments in severalty to the Indians and disposal of the unallotted lands under the public land laws. Bills were subsequently introduced in Congress, some looking to the reopening to public entry of the remaining tribal lands and others for the pro-rating instead of such lands among the members of the Crow Tribe. None of these bills was enacted and the matter culminated in the above act of June 4, 1920, section 1 of which authorizes the allotment of lands in severalty to the members of the Crow Tribe as follows:

* * * one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before

the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to *prorate* the remaining unallotted allotable lands and allot them so that *every enrolled member living* on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage of this Act, * * *. [Italics supplied.]

Section 3 of the act provides—

That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also, a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are *living* and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe *living* six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made. [Italics supplied.]

From casual examination it might appear that conflict exists between the provisions of sections 1 and 3 of the act of June 4, 1920, as to the various classes of allottees provided for therein, but a careful analysis of the situation made in the Solicitor's opinion of November 22, 1921 (48 L. D. 479), in the case of *Big Lark*, a Crow Indian, shows that it is possible to reconcile or harmonize the two provisions. Section 11 of the same act after providing, among other expenditures, for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, further provides—

* * * That after said sums have been reserved and set aside, together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distributed per capita *to the Indians entitled*. [Italics supplied.]

The foregoing was the situation so far as the present inquiry is concerned as it existed under the act of June 4, 1920, and before any further congressional legislation had been enacted. It was said, among other things, in the Solicitor's opinion of November 22, 1921, *supra*, with respect to the finality of the rolls of the Crow Tribe as provided for in that act (p. 483)—

Here, however, a different situation obtains, for clearly there is no authority to add to "the final rolls of the Crow Tribe" any children born after December 4, 1920. Again, under our other acts, the lands remaining after completion of the allotment work, either become subject to public sale and entry, or else remain Indian tribal property subject to future disposition by Congress. Here,

theoretically at least, no allotable lands are to remain, as they must be pro-rated in such manner as to give members of the tribe living on a certain date an equal share.

Administrative officers being without power to alter or amend existing law, we can not change the requirements of the act in this respect. * * *

The act of May 19, 1926 (44 Stat. 566), provided for the allotment of lands to living children on the Crow Reservation, including lands theretofore opened to entry. Section 1 of the act reads as follows:

That the Secretary of the Interior is hereby authorized to allot lands in severalty to children of the Crow Tribe, *now living*, not heretofore allotted, from any suitable lands belonging to the tribe now available for allotments, or which may become available, including any Crow lands heretofore opened to entry and sale. [Italics supplied.]

This section was amended by the act of May 2, 1928 (45 Stat. 482), by adding after the words "including any Crow lands opened to entry and sale" the following: "and to allot land to children hereafter born so long as there are lands of said tribe available for allotment purposes." Except for this addition the provisions of said section 1 remain the same.

The act of June 4, 1920, *supra*, was amended by the act of May 26, 1926 (44 Stat. 658), the title of which is "An act to amend sections 1, 5, 6, 8 and 18 of an act approved June 4, 1920." The provisions of sections 5, 6, 8 and 18 have no decisive bearing in connection with the present inquiry. Section 1 of the act of 1920 is repeated verbatim in the amendatory act of May 26, 1926, the amendment consisting of the following addition thereto:

Provided further, That any allottee classified as competent may lease his or her allotment or any part thereof and the allotments of minor children for farming and grazing purposes. Any adult incompetent Indian with the approval of the superintendent may lease his or her allotment or any part thereof and the allotments of minor children for farming and grazing purposes. The allotments of orphan minors shall be leased by the superintendent. Moneys received for or on behalf of all incompetent Indians and minor children shall be paid to the superintendent by the lessee for the benefit of said Indians. No lease shall be made for a period longer than five years. All leases made under this section shall be recorded at the Crow Agency.

The questions submitted by the Indian Office for opinion are the following:

1. Should the distribution of funds accruing from any source subsequent to six months after June 4, 1920, be limited to Indians whose names appear on the final rolls prepared under section 3 of the Act of June 4, 1920?
2. Should the names of after-born children living at the date of payment be added to the roll so that they will participate therein?
3. Should the names of all enrollees who may have died before payment of any such subsequent accruals be eliminated from the roll?

The questions involve the right of Crow children born since the closing of the final rolls, as provided for in the act of 1920, to par-

ticipate in the distribution of the *funds* of the tribe. The act of May 19, 1926, *supra*, expressly authorizes *allotments of land* to Crow children born after the closing of the prior rolls, but nothing is said therein as to the right of the children to share in the distribution of tribal funds. It has been contended that such children are entitled to share in all the funds accruing to the tribe subsequent to December 4, 1920, the date the prior rolls became final and also all future accruals, on the theory that the act of 1920 contemplated that the rolls provided for therein were intended to be final only as to allotments of lands and the distribution of tribal funds "existing at that date"—December 4, 1920; in other words the contention being that as section 3 of the act of June 4, 1920, specifies that the distribution of all tribal funds "existing" six months after the date of the act should be paid to those on the final rolls and makes no provision for the distribution thereof, Congress must have intended when that section is taken in connection with section 11 of the act that such funds should be distributed in accordance with the usual practice as to per capita payments under a fluctuating roll, that is, eliminating the deaths and adding the births.

However, a different view is possible under the legislation, that is, that Congress meant what it said in the act of 1920 in declaring the rolls of the tribe to be final and that the intention of the subsequent legislation was to limit the right of after-born children to allotments of land only—it was not also the intention that they share in the distribution of funds as fixed by section 3 of said act. If the theory advanced were followed the adding of the names of new-born children and striking off the names of enrolled members who have died would virtually require a new roll at the time each payment is made. To adopt such a course would clearly be inconsistent with the declared finality of the rolls in the act of 1920, a course that could only be justified in accordance with express legislation. Besides, as the disposal of the bulk of the Crow property is controlled by the provisions of the act of June 4, 1920, declaring the rolls final, it is unlikely that Congress would provide a different method for the disposition of the comparatively small remaining property, thus necessitating two different rolls.

Section 3 of the act of 1920 which declares: "Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds *existing at said date shall be made*," [italics supplied], and section 11 of said act which declares: "That after said sums have been reserved and set aside, together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated funds, and all other funds to the credit of the tribe or

placed to its credit thereafter, shall be distributed per capita *to the Indians entitled*," [italics supplied], were left undisturbed by the amendatory act of May 26, 1926, *supra*; consequently said sections remain conclusive and exclusive in the absence of subsequent legislation to the contrary as to who are entitled to share in the distribution of the tribal funds and the expression "*to the Indians entitled*" [italics supplied] can refer to none other than those whose names appear on the final rolls provided for in the act of 1920. Of course funds would thereafter accrue and this fact is recognized in section 11. This section taken in connection with section 3 would itself seem to carry an explanation of the provision "*to the Indians entitled*," that is, after providing in section 3 which declares: "Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of lands and the distribution of all tribal funds existing at such date shall be made," it was evidently realized that there would be accruals of funds thereafter, hence the provision in section 11—"and all other funds to the credit of the tribe *or placed to its credit thereafter*, shall be distributed per capita to the Indians entitled," [italics supplied], which necessarily means the Indians appearing on the final rolls. It must be borne in mind that at the time of the act of 1920 not even the allotment of lands, much less the distribution of tribal funds to after-born children was in contemplation. The act of May 26, 1926, as stated, left unchanged sections 3 and 11 of the act of 1920, but nothing was said as to the funds in that connection. Hence there is no significance in the provisions of section 3 of the act of 1920—"distribution of all tribal funds existing at said date"—as would warrant the conclusion that it was intended that the children for whom only allotments are provided in the act of May 19, 1926, should also share in the tribal funds. This is confirmed by section 11 of the act of 1920 when taken in connection with section 3 thereof, showing that the provision "*to the Indians entitled*" was not intended to include children living on May 19, 1926, for whom allotments of land only were provided for in said act. Furthermore, the act of May 19, 1926, authorizing allotments of land to children then living did not alter the situation existing under the provisions of the act of 1920 further than to provide for a class that would not otherwise have been entitled to either allotments of land or other tribal property.

In view of the positive declaration as to the finality of the rolls made up under the act of 1920 and the fact that the act of May 19, 1926, only authorized the allotment in severalty of lands to children living on that date, with no mention of funds, it is fair to con-

clude that it was not the congressional intent in said act to grant to the children any other right than that of an allotment of land; that is, the distribution of funds accruing from any source subsequent to six months after June 4, 1920, should be limited to Indians whose names appear on the final rolls prepared under section 3 of the act of June 4, 1920. Accordingly the answer to the first question propounded by the Indian Office is yes; and the answer to the second and third questions is no.

As hereinbefore stated section 1 of the act of June 4, 1920, is set forth verbatim in the amendatory act of May 26, 1926. In this connection it may be said that apparently the sole object in view in amending said section was merely to extend to allottees thereunder a further privilege, namely, authorizing them to lease their allotments or any part thereof and the allotments of minor children for farming and grazing purposes. To accomplish the object it was evidently thought advisable, as has sometimes been done to repeat the provisions of the entire section, merely adding a proviso to cover the new matter. The method employed, however, was evidently not intended, nor did it have the effect, of moving forward the date of the qualifications of allotment from June 4, 1920, to May 26, 1926. To hold otherwise would be to nullify the declaration of Congress in section 3 of the act of 1920 that the rolls made up pursuant thereto should be the final allotment rolls of the tribe and require the making up of entirely new allotment rolls which should bear among others the names of children subsequently born and living on May 26, 1926, the date of the amendatory legislation. That this was not intended is plainly indicated by the fact that Congress in the act of May 19, 1926, regarded it necessary to enact special legislation authorizing allotments to such children, which special legislation was pending before Congress at the time the amendatory act of May 26, 1926, was under consideration and was enacted but seven days prior thereto; and that such was not the intention is further indicated by the fact that the provisions of the act of May 19, 1926, would otherwise have been unnecessary because children born between June 4, 1920, and the passage of the act of May 26, 1926, would already have been provided for.

If the Indians are not satisfied with existing laws as construed herein their remedy is to apply to Congress for additional legislation.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

HENRY C. BOLYARD ET AL.

Decided November 23, 1931

MINING CLAIM—APPLICATION—AMENDMENT—ADVERSE CLAIM—LAND DEPARTMENT—JURISDICTION.

The Land Department is without jurisdiction to consider an amended application for patent to a mining claim until the applicant has furnished proof as to the final disposition of all adverse claims.

MINING CLAIM—ADVERSE CLAIM—APPLICATION—AMENDMENT—POSSESSION.

Prior to the final disposition of all adverse claims an adverse claimant will not be permitted to exclude from his application the ground in conflict and retain the portion of his mining claim not in controversy and still hold the controverted area under his possessory right.

MINING CLAIM—APPLICATION—ADVERSE PROCEEDINGS—NOTICE—LAND DEPARTMENT.

During the pendency of adverse proceedings pursuant to section 2326, Revised Statutes, affecting any part of a mining application, all proceedings upon the application before the Land Department, except the publication of notice and filing of the affidavit thereof, must be stayed until final disposition of the adverse proceedings.

MINING CLAIM—APPLICATION—AMENDMENT—ADVERSE CLAIM—WAIVER—LAND DEPARTMENT.

Elimination in an amended mining application by an adverse claimant of the portion of his claim in conflict does not in effect constitute a waiver of the adverse claim nor restore the right of the Land Department to proceed.

MINING CLAIM—AMENDMENT—ADVERSE CLAIM—SURVEY.

The Land Department may permit a survey to be made of an amended mining claim in advance of the final disposition of adverse claims where the claimant applies therefor and accepts the risk that the outcome of the pending controversies may nullify such amended survey.

EDWARDS, *Assistant Secretary*:

Harry C. Bolyard *et al.* filed on June 21, 1929, application, Great Falls 075550, for patent to the Vermiculite placer, M. S. 10637, located on unsurveyed land within the Kootenai National Forest, containing 160 acres. Adverse claims were timely filed as follows:

(1) By Francis M. Pfirman, alleging conflicts with the Napoleon, Copper, Antler, Webster, and Central lodes.

(2) By Zonolite Company, alleging conflicts with the Columbia and Hudson lodes.

(3) By Zonolite Company, alleging conflicts with the Chipmunk and Gopher lodes.

(4) By A. W. Grambauer, alleging conflicts with the Blackhawk Nos. 2 and 3 lodes.

It appears from the record that adverse proceedings were commenced in the District Court of the Eighth Judicial District, Lincoln County, Montana, based upon all of such adverse claims except

the claim asserted for the Hudson and Columbia lodes. No showing is made as to the institution of suit based upon these locations.

On August 6, 1931, placer claimants applied for amendment of their application so as to apply to purchase only a tract in the westerly part of the placer, 1,980 feet long and 660 feet wide, containing 30 acres, but expressly excepting and excluding therefrom the area in conflict with the Columbia lode and the area in conflict with the Hudson lode, as shown by the adverse claim of the Zonolite Company, and also excepting and excluding therefrom the area in conflict with the Central lode, as shown by the adverse claim of Francis Pfirman.

Comparison of the amended application with the plats of adverse claimants discloses that the former excludes all the areas to which adverse claim is asserted, as above mentioned, with areas in the easterly part of the claim, not adverse but rendered incontinent by the proposed amendment. Applicants make it plain in their showings that by seeking amendment they are not abandoning their claim to the land sought to be eliminated from the application, but to the contrary, reserve the right to elect to do so or litigate their rights in the adverse suits.

By decision of October 5, 1931, the Commissioner of the General Land Office affirmed his previous action which required the placer claimants in connection with their amended application to apply to the district cadastral engineer for an amended survey to determine the position of the tracts to be eliminated from the entry, and when the amended plat and field notes were transmitted to his office, to furnish proof of the final disposition of the *adverse claims* in accordance with paragraphs 85 to 88, inclusive, of the mining regulations (49 L. D. 15, 81).

The placer claimants appeal, questioning the legal necessity of both of the Commissioner's requirements.

As to the requirement that proof in accordance with mining regulations be furnished as to the final disposition of the adverse claims, the Commissioner, in adhering to that action, assigns reasons substantially in accord with the view of the department expressed upon the facts of this case in its letter of September 24, 1931, to Senator Walsh of Montana, where it was said—

As to the requirement made by the Commissioner that evidence be filed showing disposition of the adverse claims and suits, attention is directed to the following provision of Sec. 2326, Revised Statutes:

"Where an adverse claim is filed during the period of publication * * * all proceedings except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

The department in the case of *Jamie Lee Lode* (11 L. D. 391), held in substance that so long as an adverse claim and suit was pending covering any part of a pending mining application, all proceedings in the Land Office must be stayed pending its final disposition.

This view is concurred in by Lindley in his work on Mines, Vol. 3, 3rd Edition, Secs. 741 and 759. Attention is also directed to the decision of the Supreme Court in the case of *Last Chance v. Tyler Mining Company* (157 U. S. 683), especial attention being directed to pages 693-694 of the decision.

In the *Last Chance case* the Supreme Court said, beginning page 692—

But further, it is contended that the action of the owners of the Tyler claim in amending their application, coupled with the withdrawal of their answer, took them entirely out of the case in the District Court. It is said that they had abandoned all claim to the property theretofore in controversy; that they were really no longer parties to the action, and that it remained simply a case pending between the owners of the Last Chance and the United States. Such seems to have been the view taken by the Court of Appeals when it held that the judgment was improperly admitted in evidence. We are unable to concur in this view. It may well be doubted whether the amendment filed in the land office had any force or effect during the pendency of the action in the District Court. Section 2326 provides that after the filing of the adverse claim, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." As said by this court in *Richmond Mining Company v. Rose*, 114 U. S. 576, 585, referring to the action of the officers of the department pending proceedings in court, "after the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended."

It is suggested by counsel that the abandonment by the owners of the Tyler location of any claim to the disputed territory was in effect a waiver of the adverse claim within the language of the statute, on the happening of which the right of the land office to proceed was restored. But that is not within the letter, even if within the spirit of the statute. The adverse claim is the claim made by the party opposing the application, and the party to waive a claim is the one who makes it. The obvious meaning is that when an adverse claim is filed—that is, a claim filed by some one opposing the application in whole or in part—the proceedings in the land office shall be stayed until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall have in some way waived his opposition to the application. There was no waiver on the part of the parties who filed this adverse claim, and the only way in which any waiver is claimed to have been made was by a proceeding on the part of the applicants in the land office, and every proceeding there was, as we have seen, directed to be stayed. It is doubtless true that if, notwithstanding the pendency of such an action, the land office accepts a reduced application for ground, no part of which is covered by the adverse claim and in respect to which there is no opposition, and proceeds subsequently upon such amended application to grant a patent, there is no one who can object, for the matter is one wholly of procedure between the United States and the applicant, and the former, by granting the patent, waive any irregularity in the procedure.

Commenting upon the above-quoted language of the opinion, the Circuit Court of Appeals, Ninth Circuit, in *Mackay v. Fow et al.* (121 Fed. 487, 492), said—

* * * In the Last Chance Case the court gave as one of the reasons for not regarding the amended application as a waiver the fact that it was made, not by the adverse claimant, but by the original applicant, so that, while it might be within the spirit of the law, it was not within its letter. But the court elsewhere in the opinion gave expression to general views which would seem to sustain the doctrine that such an amendment of an application for patent pending adverse proceedings, whether made by the original applicant or by the adverse claimant, is absolutely void, and that, if not void, it still is not necessarily a waiver of the matter in dispute or determinative of the contest, but that, if patent be issued thereon, it is a matter which rests purely between the government and the applicant, and affects no right of the adverse party, and that the waiver contemplated by the statute must be one which in express terms acknowledges a relinquishment of all claim to the ground in dispute.

The applicants rely on certain views expressed in *Branagan v. Dulaney* (2 L. D. 744) and *Black Queen Lode v. Excelsior No. 1 Lode* (22 L. D. 343), which are to the effect that the adverse claimant may exclude the territory in conflict with that claimed by the applicant for patent and secure patent to the portion of his claim not in controversy and still hold the controverted area under his possessory right, but this view is, apparently, incompatible with the views in the *Last Chance case*, and, furthermore, is not directly in point. It is the department's conclusion that until applicants furnish the proof as to final disposition of all the adverse claims, the jurisdiction to consider the amended application is suspended and that it can not be considered.

All acts of the department performed, or attempted to be performed, while a suit is pending, are null and void. *Richmond Mining Company v. Rose* (114 U. S. 576, 585); *McEvoy v. Hyman* (25 Fed. 539); *Deeney v. Mineral Creek Milling Company* (11 N. M. 279, 67 Pac. 724); *Long John Lode Claim* (30 L. D. 298). It necessarily follows that the action of the Commissioner in attempting to authorize an amended survey, before the submission of satisfactory proof of the disposition of the adverse claims, is a nullity and no way obligatory on the applicants. It can not be presumed that the disposition of controversies pending will be such as will permit the department to issue patent to exactly the same tracts that will be shown on such amended plat of survey. Under section 2326, Revised Statutes, patent is authorized for the claim "or such portion thereof as the applicant shall appear, from *the decision of the court*, to rightly possess." [Italics supplied.] The successful party is entitled to go forward with the patent proceedings as respects the

area awarded to him. *Cole v. Ralph* (252 U. S. 286). While the suits are pending and no waiver of adverse claim is filed, the possibility exists, as illustrated in the case of *James Lee Lode v. Little Forepaugh Lode* (11 L. D. 391), that the adverse claimant may be permitted to amend his complaint so as to cover more ground than is shown by his claim in the land office, and no matter whether the allowance of such amendment be error of law or not, if the award is made accordingly by the court, and becomes final, it is plainly binding upon the Land Department by the terms of the statute, and fixes conclusively the limits of the ground to which the patent may be issued. It then may easily happen that the proposed survey would not agree with the award made by the court, and be not only unauthorized but useless as well.

Nevertheless, if the applicants, in order to expedite the disposition of their patent application, choose to act on the assumption that the disposition of the pending controversies will not affect such an amended survey, and that it will be such as may warrant the approval of such survey when the department shall become reinvested with jurisdiction in the premises, the survey may be made by the cadastral engineer but solely at their own risk.

With respect to the necessity of the survey before any patent could be issued for the land sought in the amended application, there can be no question, and the Commissioner's requirement may be regarded as correctly informing them of what will have to be done in the event that their amended application shall become subject to allowance and the court has not defined the land awarded to either party with such precision in definition of boundaries as to make the survey unnecessary in order to properly amend the original plat and field notes of survey and issue patent in accordance therewith.

As herein modified the Commissioner's decision is

Affirmed.

WHITE ASH COAL MINING COMPANY

Decided November 23, 1931

COAL LANDS—LEASE—RENTALS—WAIVER—SECRETARY OF THE INTERIOR.

The provision in section 7 of the act of February 25, 1920, relating to the payment of annual rentals, in connection with leases issued pursuant to that act, is mandatory and nothing contained in that section or in any other section of the act authorizes the Secretary of the Interior to waive or suspend the payment of such rentals for any period whatsoever. *Witbeck v. Hardeman* (51 Fed. (2d) 450).

EDWARDS, *Assistant Secretary*:

The White Ash Coal Company, holder of coal lease, Santa Fe 059731, filed petition to suspend the terms and provisions of the

lease in their entirety, including the payment of rental, for two years or until within such period operations under the release were resumed.

By decision of September 14, 1931, the Commissioner of the General Land Office held that under the provisions of the act of February 25, 1920 (41 Stat. 437), the time of payment of the rental specified in section 2 (c) of the lease is fixed by law, and can neither be waived nor extended by the department. He required as a condition to the approval of a modified lease sought by the petitioner, that the second year's rent then due be first paid.

The petitioner appeals and contends that the opinion in *United States, ex rel. Barton v. Wilbur* (283 U. S. 414), upholds a broad discretion in the Secretary under the leasing act and supports the view that he has authority under the provisions of the act to suspend the payment of rental on coal leases. The Supreme Court held in the case above cited that the Secretary has discretion to decide whether public lands should be withdrawn from exploitation for oil and gas under section 13 of the leasing act, and could reject or refuse applications for permits to explore them by a general order made in pursuance of a policy of the President to conserve such deposits. But it does not follow that, having decided that the land shall be exploited and having issued oil and gas leases for the land, the Secretary may vary, alter or waive the terms and provisions which the leasing act positively and specifically prescribes shall be contained in such a lease. (See *Witbeck v. Hardeman*, 51 Fed. (2d) 450, 453.)

Section 7 of the leasing act reads as follows:

That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the 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: *Provided*, That the Secretary of the Interior may, if in his

judgment the public interest will be subserved thereby, in lieu of the position herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for: *Provided further*, That the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss. (U. S. C., title 30, sec. 207.)

The language of this section, prescribing the time the rents shall become payable, as well as the minimum rentals, is mandatory, and nothing is perceived in the provisos thereto or elsewhere in the act that authorizes any waiver thereof. The Commissioner's decision is accordingly

Affirmed.

PROCEEDINGS AGAINST OIL SHALE LOCATIONS IN COLORADO— NOTICE

Instructions, November 25, 1931

OIL SHALE LANDS—ADVERSE PROCEEDINGS—NOTICE—CORPORATIONS—TRUSTEES.

Under the laws of Colorado, where a corporation is dissolved, any action affecting its property must be brought against all the trustees individually, or the survivors of them, and consequently service of notice of proceedings against oil shale locations in that State upon only one trustee of a defunct corporation is not sufficient to bind the other trustees or those whom they represent.

Secretary Wilbur to the Commissioner of the General Land Office:

I have considered your [Commissioner of the General Land Office] letter "K" 849139 of November 16, 1931, relative to service of notice of proceedings against oil shale locations in Colorado, where title to the same is shown in a corporation that is defunct. Shortly stated, your proposal, suggested with some uncertainty as to its efficacy, is that where only one of the trustees, who by the statute law of the State are invested with the title to the defunct corporation's property, can be found, that service be made upon him and be deemed sufficient to render any adjudication of forfeiture of the claims conclusive against the corporation and those claiming interest in its assets.

Where it can not be shown that at least the trustee served is an agent of the other trustees to wind up the business of the corporation, and has been given charge of its assets by them, I hardly see sufficient justification for the procedure suggested, and its effect is too seriously a matter of doubt to obtain my approval.

Examination of applicable State statutes, Courtright's Mills Annotated Statutes, sections 1030 to 1035, inclusive, in connection with

decisions on similar statutes elsewhere, leads rather to the conclusion that the powers and duties of trustees are to be exercised as a body, and that no important step affecting the rights and interests of the creditors and stockholders is valid and binding without preceding authorization or subsequent ratification of the trustees, or at least a majority of them.

Under section 1030, upon dissolution by expiration of charter or otherwise, unless otherwise ordered by a court of competent jurisdiction, "the directors or trustees of such corporation or the managers of the corporate affairs, by whatever name known, acting last before the time of their dissolution, and the survivors of them, shall be the trustees of the creditors and stockholders." Section 1033, the statute to which you refer (Colorado Laws, 1921, Sec. 2298), provides that the title to all real and personal estate of the corporation on dissolution "shall pass to and rest in such trustees, directors or managers," and empowers them to bring actions of law for the recovery of property and of debts due the corporation "in their own names by the style of trustees of such corporation dissolved naming it." Under section 1035, an action may be maintained against the corporation after its dissolution, where the cause of action arose prior thereto. (See cases annotated under this section.)

The law of Colorado, extending the existence of a corporation for winding up its affairs, does not contain, as many other State statutes do, provisions for service on designated officers. (See Thompson on Corporations, section 6537), and research does not disclose any reported decision of the State courts indicating clearly what would be sufficient service in such a case, although the language in the opinion in *Kipp v. Miller* (47 Colo. 598; 108 Pac. 164), points to the conclusion that were it not for the appointment of an assignee by the court in that case, all the trustees would have to be served with summons.

In West Virginia, service on a former president was held sufficient, but there the statute provided that service could be made as before the corporation expired. *Richmond Union Pass. Ry. Co. v. New York Seabeach Ry. Co.* (28 S. E. 573).

Under a Nebraska statute providing for the continuance of the corporation for the purpose of winding it up, and that service might be made on "any one" of the trustees, etc., a summons was held sufficient on one who was a director and last acting manager in control of the assets. *Heenan v. Parmele* (118 N. W. 324).

But it has also been held by the Supreme Court of Washington that service of summons on a stockholder who had also been a director and trustee, was of no force on other stockholders, where the corporation had ceased to do business. *Stanton v. Gilpin* (80 Pac.

290). The trustees have the power to make valid conveyances after dissolution of the corporate property, but they must act in concert. *Anthony v. Janssen* (183 Cal. 329; 191 Pac. 538). They may disclaim an adverse holding of property (*Ginaca v. Peterson*, 262 Fed. 904), and may confess judgment in favor of corporate creditors. *Henriod v. East Tintic Development Co.* (52 Utah 245; 173 Pac. 134). It can not, however, be legitimately deduced from any of these cases that the admission, by failure to deny allegations in an action brought against the trustees, on the part of one trustee served with notice, without notice to the others, would bind them or the beneficiaries they represent. The proposition stated by you, citing *Corpus Juris* 46, Notice, Sec. 90, to the effect that notice to one of several trustees or coplaintiffs is notice to the others, has reference to the general subject of notice as to any fact affecting those having a community of interest, and not to the question of validity of legal process and is of doubtful applicability to the question presented. It would seem, under the law of Colorado, where the corporation is dissolved, any action affecting its property, should be brought against all the trustees individually, or the survivors of them. The law is generally well settled that service must be made on each defendant to give the court jurisdiction over him. (50 C. J., Process, Sec. 83, page 485).

For the reasons stated, I do not believe there is sufficient assurance of legal efficacy in the procedure proposed. Your letter is, therefore, returned without approval.

TAXABILITY OF HOMESTEAD ALLOTMENTS OF MEMBERS OF THE OSAGE TRIBE

Opinion, November 28, 1931

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

The termination of the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency have been issued is governed by subsection 7 of section 2 of the act of June 28, 1906, which declared that such allotments should become taxable 25 years from the date of its enactment, unless the allottee die sooner, in which event the homestead becomes immediately taxable.

INDIAN LANDS—ALLOTMENT—ALIENATION—TAXATION—CONGRESS.

Congress has the power to forbid the alienation and at the same time permit taxation of Indian allotments or vice versa.

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

The act of March 2, 1929, has no application to the question of exemption from taxation of homestead allotments of members of the Osage Tribe

having less than one-half of Indian blood or of members of that tribe having more than one-half of Indian blood but to whom certificates of competency had been issued.

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

The act of March 2, 1929, is applicable to and extends the time of the termination of the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency had not been issued to January 1, 1959, where the title remains in the allottee or in his unallotted heirs or devisees of one-half or more of Osage Indian blood.

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

Under subdivision 4 of section 2 of the act of June 28, 1906, as modified by section 3 of the act of March 3, 1921, the homestead allotments of adult members of the Osage Tribe of less than one-half of Indian blood, to whom certificates of competency have not issued, became subject to taxation on and after April 8, 1931, if held by the original allottee on that date.

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

Whether the act of March 3, 1921, was effective to subject to taxation on and after April 8, 1931, homestead allotments of members of the Osage Tribe of less than one-half of Indian blood holding certificates of competency not decided.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion upon the following questions relating to the taxability of lands allotted as homesteads to certain members of the Osage Tribe of Indians in Oklahoma:

(1) Does the period of exemption from taxation of the homestead of an Osage allottee of one-half or more Osage blood who has a certificate of competency end 25 years from the date of the act of June 28, 1906 (34 Stat. 539), or upon his death?

(2) Is the period of exemption from taxation of such a homestead extended to January 1, 1959, by the act of March 2, 1929 (45 Stat. 1478, 1479)?

(3) Is the taxable status of such a homestead similar to that of a member having less than one-half Osage blood under section 3 of the act of March 3, 1921 (41 Stat. 1249)?

By the act of June 28, 1906 (34 Stat. 539), provision was made for the division and distribution of the lands and funds of the Osage Tribe among the enrolled members thereof. Of the tribal lands there were reserved from allotment certain parcels, some of which were used by the United States or the tribe, and others of which were used by individuals for the benefit of the tribe. From the remainder each member was allotted some 600 acres of land of which 160 acres were designated as a homestead and the balance surplus. The funds in trust were divided pro rata to be held for a period of 25 years sub-

ject to the supervision of the United States. The oil, gas, coal, and other minerals in all the lands were reserved for a like period for the benefit of the tribe. The surplus land was made inalienable for a period of 25 years, but nontaxable for only three years. As to the homestead, section 2, subdivision 4, of the act directed that the same "shall be inalienable and nontaxable until otherwise provided by act of Congress." The seventh subdivision of the same section empowered the Secretary of the Interior upon petition of any adult member of the tribe to issue to such member a certificate of competency—

authorizing him to sell and convey any of the lands deeded him by reason of this Act, *except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee.* if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; *Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States.* [Italics supplied.]

The foregoing provision, in so far as pertains to alienability and taxability of the homestead is, it will be observed, at variance with subdivision 4, the latter providing that the homestead shall be inalienable and nontaxable until otherwise provided by Congress and the former that the homestead remain inalienable and nontaxable for a period of 25 years or during the life of the homestead allottee. This apparent conflict, however, has been considered and harmonized by our Federal courts, it being held that subdivision 4 applies only to the homestead allotments of members not having certificates of competency and that subsection 7 relates to those to whom certificates of competency have issued. See *United States v. Aaron* (183 Fed. 347, affirmed 204 Fed. 943); *United States v. Board of Commissioners of Osage County* (193 Fed. 485, affirmed 216 Fed. 883).

The homestead allotments of Indians having certificates of competency were thus inalienable and nontaxable "for a period of 25 years or during the life of the homestead allottee." While this expression is somewhat loosely framed its meaning appears reasonably clear. The period of inalienability and nontaxability was not to run indefinitely so long as the allottees remained alive even beyond the 25-year period, but was to terminate upon the happening of either of the contingencies mentioned, that is to say, at the expiration of 25 years if allottee lived that long, or upon his death should he sooner die. This construction not only brings the period of restric-

tion and taxability of the homestead in harmony with the period of governmental supervision uniformly provided for in the act of 1906, but is in accord with the view expressed by the court in *United States v. Board of Commissioners, supra*. The question in that case related to the taxability of the homestead allotments of members not having certificates of competency. It was urged that they were controlled by the provision in subdivision 7 of section 2, providing for nontaxability for a period of 25 years or during the life of the homestead allottee rather than subdivision 4 of section 2, providing that the homestead should remain inalienable and nontaxable until otherwise provided by Congress, and that therefore the exemption from taxation terminated in any event upon the death of the allottee, notwithstanding the fact that the 25-year period had not then expired. Answering this contention the court said (p. 488)—

* * * But, in the view of this court, the homesteads are not taxable upon the death of the allottees unless certificates of competency are issued to them. Subdivisions 4 and 7 of section 2 should be construed together, and both harmonized and given effect. A conflict of terms is avoided by taking the former to refer to cases where the certificates are not issued and the latter to those where they have issued, and this is clearly the construction which should be adopted. The result is that the homesteads remain inalienable and nontaxable, in the absence of certificates, without further legislation, but, if the certificates issue to the allottees, then their homesteads are inalienable and nontaxable for 25 years, or during the life of the allottee. It is not specified that the homesteads are, in these contingencies, alienable and taxable, but that they were intended to be so seems plain from the language used, if any definite purpose is to be assigned to the provisions, and if the policy is to obtain, as uniformly pursued, of advancing the Indians to independent citizenship, common incidents of which are the right to dispose of property and the duty to pay taxes for the support of government. [Italics supplied.]

By subsequent legislation as found in section 3 of the act of March 3, 1921 (41 Stat. 1249), Congress removed all restrictions against the alienation of lands, both homestead and surplus, of adult Osages of less than one-half blood with the declaration that: "The homestead allotments of the members of the Osage Tribe shall not be subject to taxation if held by the original allottee prior to April 8, 1931." This provision is without importance here because, as held by the Circuit Court of Appeals in *United States v. Mullendore* (35 Fed. (2d) 78), it is confined to lands of Indians of less than one-half blood and has no bearing upon the homesteads of allottees having one-half or more Indian blood, the class with which we are here concerned.

Under the act of 1906, therefore, the homestead allotments of members of this tribe of one-half or more Indian blood to whom certificates of competency have issued will, in my opinion, become taxable 25 years from the date of that enactment unless the allottee die before that time, in which event the homestead becomes immediately

taxable. This answers the first question and brings us to a consideration of the second question as to whether the exemption from taxation attaching to such homestead allotments was extended by the act of March 2, 1929 (45 Stat. 1478, 1479), the pertinent provisions of which read:

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

* * * * *

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

The provision first above quoted is of a general nature operating to continue the existing restrictions and incidental supervision of the United States over all the property of these Indians, whether real or personal, tribal or individual, until January 1, 1959. Under this broad language there can be no doubt, I think, that the restrictions against alienation of the lands allotted as homesteads to Indians of one-half or more Osage blood having certificates of competency were extended for the time stated in all cases where such restrictions had not already expired or otherwise have been removed. The ordinary and usual rule, to be sure, is that where Congress, in the execution of its policy towards the Indians, imposes for their protection restrictions against the alienation of their lands, such lands constitute an instrumentality of the Federal Government, and as such immune from taxation. See *United States v. Rickert* (188 U. S. 432); *Carpenter v. Shaw* (280 U. S. 363, 366), *United States v. Shock* (187 Fed. 870). But it is competent for Congress to vary this rule and it has repeatedly done so with respect to the Osages. A notable illustration of this is found in the act of 1906 under which the surplus lands were made inalienable for 25 years but taxable within 3 years. Again in the act of March 3, 1921, *supra*, the restrictions against alienation of the lands both homestead and surplus of adult members having less than one-half Osage blood were removed, but the exemption from taxation of the homestead allotments was expressly continued until April 8, 1931. The power of Congress to forbid alienation and at the same time permit taxation, or *vice versa*, was considered and upheld in *United States v. Board of Commissioners, supra*, wherein the court, referring to

the status of the surplus lands of members of the Osage Tribe said (p. 490)—

A question arises as to the soundness of a construction by which the surplus lands, although inalienable, may be subject to taxation. As already noticed, the powers of alienation and taxation generally are forbidden or authorized concurrently. But the subject is purely legislative, and no question can be raised as to the power of Congress to prescribe absolutely the time and terms for the exercise of both. *Rainbow v. Young*, 161 Fed. 835, 88 C. C. A. 653. This being so, it may forbid one and authorize the other. It will be noted that subdivision 4 of section 2 declares the homesteads inalienable and nontaxable, but declares the surplus lands inalienable only, forcibly manifesting a purpose to permit the taxation of the latter in advance of alienation.

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

Any lingering doubt about the intent of Congress is removed by the legislative history of the enactment which it is competent to consider in matters of this kind. See *Work v. Braffet* (276 U. S. 560); *United States v. Mullendore, supra*. The measure was first introduced as H. R. 9294 and S. 2727. Numerous hearings were had, many objections were made, and numerous amendments suggested with the result that a substitute or compromise bill was drafted and introduced as H. R. 13407 and S. 2360. So far as material to the present issue, the compromise bill provided "homestead allotments shall remain exempt from taxation while the title remains in the allottee or in his unallotted heirs of one-half degree or more of Osage Indian blood until January 1, 1959." This provision, had it been enacted, would have continued the exemption from taxation attaching to homestead allotments, not only of Indians not having certificates of competency, but also of those to whom certificates of competency had issued. For this reason the Oklahoma delegation actively opposed the measure. Of interest in this connection is the statement contained in the

minority views of Representative Howard appended to the report of the subcommittee on Indian Affairs, House of Representatives, on H. R. 9294, as follows: "I suggest that the measure be so written that nontaxable land provided for shall only be granted to Indians without certificates of competency and that whenever lands descend to those of less than one-half blood that the nontaxable status cease." When the compromise bill was pending before the subcommittee of the Committee on Indian Affairs, United States Senate, Representative Howard appeared and objected, among other things, to any extension of the tax exemption on homesteads of Indians having certificates of competency and the amendment suggested by him is disclosed in the following discussion (see pages 5 and 6 of hearing before the Senate Subcommittee on S. 2360, February 20, 1929)—

Senator Thomas. What is your recommendation as to that section?

Representative Howard. On behalf of the Oklahoma delegation, I was asked to say—I am asking that on line 24, after the word "allotments", there be inserted the words "homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation."

Senator Thomas. How would it read then?

Representative Howard. It would read "homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation."

A like amendment was suggested by Representative Hastings on the floor of the House with the statement (see volume 70, Congressional Record, page 2947)—

My amendment is to require those who are free from Government's supervision and who are turned loose to be taxed and it will permit those of one-half or more Indian blood to whom certificates of competency have been issued to have their lands taxed.

The bill was amended as suggested and as so amended passed both Houses of Congress and was finally enacted into law. The intent of Congress to exclude the homesteads of members of the Osage Tribe of one-half or more Indian blood to whom certificates of competency have issued from the benefit of the tax exemption extension is thus made plain. The taxation of such homesteads is therefore controlled by the provisions of the act of June 28, 1906, *supra*, under the provisions of which, as we have seen, the exemption terminates 25 years from June 28, 1906, or June 28, 1931, unless accelerated by the death of the allottee prior to that time. The second question is accordingly answered in the negative.

Regarding the third question—whether the taxable status of the homestead of an allottee of one-half or more Osage blood to whom a certificate of competency has issued is the same as that of a member having less than one-half Osage blood—it is clear that the exemption from taxation in the latter case like the former, remained as before and was not extended by the act of March 2, 1929. Whether alike or

not in other respects may be sufficiently answered by pointing out the situation with respect to the taxation of homestead allotments of members having less than one-half blood inasmuch as the taxable status of members having one-half or more blood to whom certificates of competency have issued, has already been determined. From the viewpoint of taxation, the homesteads of allottees of less than one-half blood must of necessity be divided into two classes: *First*, those not having certificates of competency, and *second*, those having certificates of competency. As to the first class, we have seen that the taxation of homestead allotments of all members of the Osage Tribe not having certificates of competency and regardless of degree of blood was originally controlled by subdivision 4, section 2 of the act of 1906, declaring that the homestead should remain inalienable and nontaxable until otherwise provided by Congress. As to them, therefore, no definite period of nonalienability and nontaxability was fixed, the matter being left for such further action as Congress saw fit to take. The restrictions against alienation of such homesteads belonging to adult allottees of less than half blood were subsequently removed by section 3 of the act of March 3, 1921, *supra*, but with the declaration that the lands should not be subject to taxation if held by the original allottee prior to April 8, 1931. As regards members not having certificates of competency of the degree of blood mentioned, this declaration fixing the tax-exemption period to expire on April 8, 1931, was within the power reserved by Congress in the act of 1906, and the exemption must, therefore, be held to have terminated upon the date fixed. See *United States v. Mullendore, supra*.

With respect to the taxation of homesteads of members of the second class, that is those of less than one-half blood to whom certificates of competency had issued, Congress had provided in subdivision 7, section 2 of the act of 1906 that they should be inalienable and nontaxable for a period of 25 years, or during the life of the homestead allottee. Under that provision, as we have seen, the restrictions against alienation and the exemption from taxation continued until June 28, 1931, if the allottee lived that long. Upon the passage of the act of March 3, 1921, the restrictions against alienation of these homesteads were also removed, but whether that act was effective to cut down the period of tax exemption from June 28, to April 8, 1931, presents a question of some difficulty unnecessary here to decide because it appears that in either event the lands would not be placed upon the tax rolls of the State until the fiscal year beginning July 1, 1931, and ending June 30, 1932. (See sections 9690 and 9719, Compiled Oklahoma Statutes 1921.)

Approved:

Jos. M. Dixon,

First Assistant Secretary.

SHALE OIL COMPANY

Decided November 30, 1931

LAND DEPARTMENT—ADVERSE PROCEEDINGS—HEARING—DEFAULT—ADMISSION OF CHARGES.

Where the Land Department initiates proceedings to forfeit a claim, if the claimant fails to deny the charges and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, such failure must be taken as an admission of the charges and obviates the necessity of a hearing.

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—ADVERSE PROCEEDINGS—ANSWER—PRACTICE.

Rule 13 of Practice requires that an answer must specifically meet and respond to the allegations of the charge, and a denial in an answer to a charge based on mere information and belief that the required work on a mining claim was not fully performed is not sufficient to fulfill the requirement.

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—DEFAULT—FORFEITURE—RESUMPTION OF WORK—RELOCATION.

To constitute a resumption of assessment work on a mining claim after default sufficient to prevent a forfeiture, the claimant must resume work in good faith and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed, that is, one year's delinquency is made up, and suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation. Sec. 654, Lindley on Mines.

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—POSSESSION—FORFEITURE.

Actual, open and notorious possession of a mining claim continued from year to year without performance of the full amount of work each year required under the mining act will not prevent a forfeiture of the claim. *Honaker v. Martin* (27 Pac. 297), and *McCormick v. Baldwin* (37 Pac. 903).

EDWARDS, *Assistant Secretary*:

Adverse proceedings were directed June 27, 1931, against the Shale Oil Company, charging—

That annual assessment work to the value of \$100 was not performed upon each or any one of the Velvet Nos. 2, 3, 6, and 7 oil shale placers for the year ending July 1, 1929, and that work had not been resumed on said claims May 5, 1930, when challenges to the validity thereof were posted thereon on behalf of the United States.

An answer subscribed by Carl J. Sigfrid, as attorney in fact for the Shale Oil Company, was filed, denying, on information and belief, that the work had not been fully performed.

As a second defense, Sigfrid averred—

That it has at all times mentioned in said contest been in the actual open and notorious possession of said oil shale placer claims and engaged actively in developing the same and was in such actual, open and notorious possession

at the time and on the day and date when the United States of America alleges that it took possession of said property for its own use, and specifically denies that work had not been resumed on said claims on the 5th day of May, A. D. 1930.

As a third defense he averred, in substance, that \$500 worth of work had been performed on each claim.

As a fourth defense he alleged—

That it is not necessary under the law, rules and regulations in relation thereto for the owner and holder of oil shale placer claims to do and perform each year one hundred dollars worth of work, labor or improvements for the development of such property when and if in actual possession for the purpose of doing said work even though the labor actually done during any assessment period is not sufficient to equal one hundred dollars for each claim, and that said Shale Oil Company was at all times in said contest mentioned in the open, notorious and actual possession of said claims and all of them for the purpose of doing and in the doing of work and labor thereon tending to develop the same.

Sigfrid further stated that he was the company's qualified attorney in fact and its attorney at law as well, but no power of attorney in fact or appearance as attorney at law has been filed in the cause, nor did he apply for a hearing.

By decision of September 9, 1931, the Commissioner held the answer ambiguous and that it did not specifically meet and respond to the allegations of the charge as required by Rule 13 of Practice, and that an application for hearing was required by Circular No. 460 (44 L. D. 572); that the contention that the performance of assessment work to the value of \$100 each year on an oil shale placer claim is unnecessary while claimant is in actual possession of the claim for the purpose of doing work would be considered when the contest record was adjudicated. Accordingly, the Commissioner required that a proper answer and application for hearing be filed by a qualified representative of the company who has personal knowledge of the work performed, or if he were without such knowledge, then the answer should be accompanied by an affidavit made by a person or persons who had such knowledge, and upon default in compliance with the requirements laid, the claim would be held void, without further notice.

Sigfrid responded by a letter addressed to the local register, which was forwarded to the Commissioner, and by him treated as an appeal to the department. In this letter request is made to consider a certain power of attorney from the Shale Oil Company to Carl J. Sigfrid, filed in connection with an application for patent to sundry hydrocarbon claims as an authorization to act for the claimant company in the present proceeding. If the writer alludes to applications, Denver 041938 and 042552, which appear to answer his description,

the powers therein conferred are limited to matters solely pertaining to those applications and are therefore insufficient to establish that he is the duly constituted attorney in fact to act for the Shale Oil Company with reference to the claims here involved. Furthermore, the records of the department fail to show his admission to practice before it. His appearance, consequently, either formally or informally for claimant as its attorney at law, can not be recognized. The answer therefore is not accompanied by evidence of authorization, and the same must be said of the subsequent letter, treated as an appeal, which may be dismissed as not the act of the defendant in the proceeding.

To aid in expediting the disposition of the proceedings, the department will not dismiss the matter from consideration because of the nonobservance of necessary procedural rules, but will consider the Commissioner's rulings as to the insufficiency of the so-called answer. Section 10 of the regulations (44 L. D. 572, 574), governing the procedure in the instant case, prescribes, among other things, that if claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, such failure is taken as admission of the charges and obviates the necessity of a hearing. The requirement of the Commissioner that the statement of facts in denial or in avoidance of the charges should be verified by one personally cognizant of the facts so alleged, is in harmony with the regulations, in accordance with established practice, and, if not observed, renders the oath required of no importance. The denial that the required work was not fully performed on information and belief, and with the admission that the deponent has no knowledge of the thing whereof he speaks, is insufficient as traverse of the charge.

The second defense, in effect, is that the claimant had resumed work on the claim and was in actual possession thereof, and was actively engaged in its performance at the time and on the day the United States entered thereon and declared a forfeiture of the claim by reason of default in assessment work. Although the courts have not been always uniform in their rulings as to what constitutes a valid resumption of work so as to prevent forfeiture, it is believed that the conclusion expressed after review of pertinent cases in Lindley on Mines, Sec. 654, correctly states the law, which is as follows:

In order to prevent a forfeiture for failure to perform the assessment work required by law, the claimant must resume work in good faith, and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed—that is, one year's delinquency must be made up. It is not necessary that work should be done for every year that the claim was idle. Nothing less than the outward manifestation of an intent to atone for the delinquency by a diligent and continuous prosecution of substantial and valuable development work will satisfy the law; that while the

claim will be protected from relocation so long as the claimant is actually engaged in making up the deficiencies, a suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation.

It would seem to follow from the foregoing that if the defendant established the truth of his allegations, it would disclose the invalidity of the challenge at the time it was made by the Government, and necessitate dismissal of these particular proceedings, without determination of whether the claim is now subject to forfeiture for failure to fully perform the assessment work, and without prejudice to the Government in instituting proceedings *de novo* as to performance of the required work in the year alleged in the charge. It also follows that such a defense presents a material issue of fact sufficient as a basis for a hearing, if the claimant chooses to present solely that issue.

The matters mentioned in the third defense as to the total amount of work performed upon the claim are immaterial and not responsive to the charge and need no further notice.

The fourth defense is a conclusion of law. In so far as it is therein contended that the actual, open and notorious possession of the claim for the purpose of doing the required assessment work, without alleging that claimants are actually and diligently engaged in the performance of it, is sufficient to prevent the forfeiture of the claim to the United States, it is contrary to the doctrine above expressed and untenable. Neither is there any merit in the proposition that by such actual and continued possession from year to year without performing the full amount of work each year as required under the mining act, a forfeiture can be prevented.

In *Honaker v. Martin* (11 Mont. 91, 97; 27 Pac. 397, 398) the court said—

* * * Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government. The resumption of work by the original locator, whose rights are subject to forfeiture without the expenditure, with reasonable diligence, during the year, of the sum of one hundred dollars for labor or improvements upon the mine, is an evasion of the statute, *supra*.

Similar views by the Supreme Court of California were expressed in *McCormick v. Baldwin* (37 Pac. 903, 904), as follows:

* * * a party can not hold a mining claim for several years without doing in any year the work required, by simply going on it at the beginning of each year and doing a few hours' work, with no bona fide intent to comply with the statutory requirement as to the amount of work to be done. * * * It is against the policy of the law, and a fraud against the government and the law, to hold quartz claims by merely doing a few dollars' worth of work thereon at or near the beginning of the year next following the year on which claimant failed to do the necessary work, when such work is not commenced with the

bona fide intention of being continued till the full amount is done. Such labor, so done, is a mere pretense and a sham, and will not prevent the relocation for want of necessary work.

This so-called answer, if it indeed could be considered the answer of the defendant company, contains nothing showing the charge assailed immaterial or invalid.

The action of the Commissioner, as set forth in the last paragraph of his decision, is

Affirmed.

CLAYTON STACY

Decided December 11, 1931

REPAYMENT—PURCHASE MONEY—DESERT ENTRY.

Repayment of the purchase money paid in connection with a desert-land entry regularly allowed for land subject thereto and canceled for default is not authorized by the act of June 16, 1880, where the entry could have been completed by complying with the reclamation law and no legal obstacle prevented its confirmation, nor can it be allowed under the act of March 26, 1908, where the claim is barred by the limitation contained in the amendatory act of December 11, 1919. *Heirs of James Byrne* (50 L. D. 161), *J. M. Hudson* (50 L. D. 297), and *Olive M. Harrison* (50 L. D. 418).

EDWARDS, *Assistant Secretary*:

This is an appeal by Clayton Stacy from a decision of the Commissioner of the General Land Office dated August 18, 1931, denying application for repayment of the purchase money of \$1.25 per acre paid by him in connection with desert land entry, Evanston 03609; for N $\frac{1}{2}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 32, T. 33 N., R. 113 W., 6th P.M., Wyoming. The action of the Commissioner rests upon the ground that the conditions authorizing repayment are nonexistent.

It appears that two separate and distinct repayment applications have been filed in this case, one for the refund of the advance payment of 25 cents per acre made when the entry was allowed, the other for the refund of the final purchase money of \$1 per acre tendered with final proof.

The entry in question was allowed May 20, 1913. Final proof was submitted October 3, 1914, and final certificate issued November 9, 1914. Following field examination and report, the Commissioner directed adverse proceedings against the entry November 9, 1916, charging that claimant did not have a sufficient water supply and that the land had not been irrigated, cultivated, and reclaimed as required by law.

Thereupon, under date of April 1, 1918, claimant withdrew his proof. He failed to submit new proof after due notice and by reason of such default his entry was canceled June 4, 1919.

The legislation governing repayments is found in the act of June 16, 1880 (21 Stat. 287), and the act of March 26, 1908 (35 Stat. 48), as amended by the act of December 11, 1919 (41 Stat. 366). The former act, in section 2 thereof, authorizes repayment in cases where entries are canceled for conflict, or where they have been erroneously allowed and can not be confirmed. This act does not authorize refund in the instant case. Stacy's entry was regularly allowed for land subject thereto. It remained of record for his benefit for its statutory life and it was not canceled until he made default. There was no legal obstacle in the way to prevent confirmation. It could have been completed by complying with the provisions of law respecting reclamation. Hence, the conditions which authorize repayment under the act of June 16, 1880, *supra*, do not exist. In this connection the department said in the case of *Heirs of James Byrne* (50 L. D. 161), syllabus—

In coupling the expression "can not be confirmed" with the term "erroneously allowed," as those phrases are used in section 2 of the act of June 16, 1880, which authorized repayment where an entry was "erroneously allowed and can not be confirmed," the law necessarily contemplated an entry with reference to which the defect could not be cured.

A similar ruling was made in the case of *Olive M. Harrison* (50 L. D. 418), where the department said—

* * * In order for a repayment claim to be properly allowable under the provision in section 2 of the act of June 16, 1880, for repayment in cases where an entry has been erroneously allowed and can not be confirmed, two conditions must concur. In addition to being incapable of confirmation, the entry must have been erroneously allowed in the first instance.

Neither can the application be allowed under the act of March 26, 1908, *supra*, as repayment under said act is governed by the limitations of the amendatory act of December 11, 1919, which operates to bar the instant claim as it was not filed until July 14, 1931. See case of *J. M. Hudson* (50 L. D. 297).

For the reasons stated, the action of the Commissioner is

Affirmed.

THOMAS H. B. GLASPIE

Decided January 8, 1932

STOCK-RAISING HOMESTEAD—COMMUNITY PROPERTY—ARIZONA.

In the State of Arizona property acquired by a husband or wife during the marital status becomes community property and one-half of the property acquired by either becomes the property of the other by operation of law at the moment of its acquisition.

STOCK-RAISING HOMESTEAD—COMMUNITY PROPERTY—ARIZONA.

One who acquires more than 160 acres of land which by operation of law becomes community property at the moment of its acquisition, is not the

proprietor of more than 160 acres within the meaning of the homestead law if his undivided interest does not exceed that amount.

STOCK-RAISING HOMESTEAD—ADVERSE CLAIM—MINING CLAIM—DISCOVERY—NOTICE—EVIDENCE.

Testimony as to discovery of mineral based upon an examination of a mining claim subsequent to allowance of a conflicting stock-raising homestead entry is incompetent of itself to prove a discovery that would establish a prior valid location, nor are the declarations in the recorded location notices *prima facie* evidence of the fact of discovery.

STOCK-RAISING HOMESTEAD—WATER HOLES—DESIGNATION OF LAND—FRAUD.

Where land containing a water hole was designated as of the character subject to entry under the stock-raising homestead law and no charge was preferred that the land or any subdivision thereof was valuable as a public water hole, the designation will not be vacated unless it is shown that it was erroneously induced by fraudulent statements of the entryman.

STOCK-RAISING HOMESTEAD—ADVERSE CLAIM—MINING CLAIM—WATER HOLES—EVIDENCE.

A stock-raising homestead entry is not invalid though embracing land claimed under mining locations where the evidence shows that the locations were made primarily to protect a developed water hole, and where the evidence is insufficient to establish that the locations were prior and valid, and where the spring or water hole is held under a claim of private right and is incapable of providing sufficient water for general use for watering purposes.

EDWARDS, Assistant Secretary:

Thomas H. B. Glaspie has appealed from a decision of the Commissioner of the General Land Office dated September 25, 1931, holding for cancellation his second homestead entry, Phoenix 063974, made under the act of December 29, 1916 (39 Stat. 862), for all of Sec. 14, T. 5 S., R. 14 E., G. and S. R. M., Arizona. The application was filed September 11, 1928, and allowed December 15, 1928, although the land was not designated until June 27, 1929.

Proceedings were instituted against the entry October 9, 1929, based upon a report from the field service, charging—

1. That the entryman was not qualified to make homestead entry on September 11, 1928, the date he filed application therefor, is not now and has not been since said date qualified to make entry for the reason that he was on said date and is now the owner and proprietor of more than 160 acres of land in the United States, to wit: SW $\frac{1}{4}$ Sec. 35, T. 4 S., R. 14 E., and Lots 2 and 3 Sec. 2, T. 5 S., R. 14 E., containing 240.10 acres.

2. That the entryman having on August 6, 1913, made homestead entry 023024, Phoenix series, for the NW $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 21, T. 4 S., R. 14 E., and having sold his relinquishment of said entry is not now and was not at date of this entry or at any time thereafter qualified to make a homestead entry under the act of September 5, 1914 (38 Stat. 712); inasmuch as the first entry was not forfeited, lost or abandoned because of matters beyond the entryman's control, but on the contrary the entryman speculated in his right.

3. That the entry conflicts with certain subsisting mining claims, which claims are prior in time to the initiation of the homestead entry; namely, the General Grant Nos. 1 and 2.

Upon consideration of the testimony and other evidence adduced at a hearing between the parties, the Commissioner affirmed the local register's decision, holding the second charge not proven, but sustaining the first and third charges.

The evidence of the Government shows, and the defendant admits, in effect, that he obtained warranty deeds conveying to him alone as grantee the two tracts mentioned in the first charge prior to his application and that he still holds such title and has been assessed and paid taxes thereon ever since. But the defendant further showed without contradiction, that at the time of the sale and conveyance of these tracts to him, he was married; that his wife died June 19, 1920, leaving three children by a former husband and five children by the entryman; that the first tract mentioned in the charge was purchased with money loaned on the security of his wife's cattle, and the second tract was paid for out of proceeds of sale of certain of their community property. The defendant claims under the law of Arizona that but one-half of the property belongs to him personally and the other half belonged to his wife at the dates of acquisition, and upon her death intestate her undivided one-half interest passed to and vested in her children.

One of the tracts was purchased in 1915, the other in 1917. Paragraph 3850, Revised Statutes, Arizona (1913), and paragraph 2172, Revised Code, Arizona (1928), provide—

All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; * * *

Paragraph 1100, Revised Statutes, Arizona (1913), and paragraph 985, Revised Code, Arizona, (1928), provide—

Upon the death of the wife one-half of the community property shall go to the surviving husband, and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to her descendants, equally, if such descendants are of the same degree of kindred to the decedent * * *

In *Molina v. Ramirez* (15 Ariz. 249, 138 Pac. 17), it was held (syllabus)—

Where real property was acquired * * * by a husband during marriage, it was community property, and hence, on the dissolution of the community by the death of the husband, the property passed without probate

proceedings or other legal action—one half to the widow and the other half to the children of the marriage.

It was further held therein that it belongs to the wife as much as to the husband.

In *La Tourette v. La Tourette* (15 Ariz. 200, 137 Pac. 426), it was held that the law makes no distinction between husband and wife in respect to the right each has in the community property, and that it is not a mere possibility—not the expectancy of an heir.

The Supreme Court of the United States recently, in arriving at the conclusion that a wife may make a separate income-tax return on her share of community property in the State of Washington and in Arizona and certain other States, said, in *Poe v. Seaborn* (282 U. S. 101, 110):

* * * save for property acquired by gift, bequest, devise or inheritance, all property however acquired after marriage, by either husband or wife, or by both, is community property.

And in the companion case, *Goodell v. Koch* (282 U. S. 118, 121), in considering similar laws of Arizona, the same court said—

We have examined the statutes and authorities cited, and have concluded that they present no significant differences from the Washington system. In *La Tourette v. La Tourette*, 15 Ariz. 200, 205, it was said: "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. As in Washington, each spouse has unlimited testamentary power over his or her interest in the community, and upon failure to exercise it, such interest passes to the descendants of the decedent."

The Arizona Supreme Court has likened the community to a partnership. *Forsythe v. Paschal*, 34 Ariz. 380. The husband as agent may not act in fraud of his wife's rights, and if he attempts to do so, she has a remedy in the courts. *Cristy v. Hudgens*, 23 Ariz. 339.

Enough has been said to show that our conclusion in *Poe v. Seaborn*, *supra*, holds here, and that the wife has such equal interest in community income as to entitle her to treat one-half thereof as her income, and file a separate return * * *.

Enough has been said also in the instant case, to clearly show that the first charge was brought without regard to the law of Arizona as to property acquired during the marital relation by one spouse, that it has no basis in fact and should be dismissed. The observation made both by the register and the Commissioner that entryman Glaspie had not conveyed the half interest to the wife or heirs is of no importance. The interest in one-half of each of the two tracts became that of the wife at the moment of acquisition by operation of law, if the fact that one of the tracts purchased out of funds from the proceeds of her separate property acquired before marriage did not make that tract solely hers.

The evidence pertinent to the second charge has been carefully considered and no sufficient grounds appear for disturbing the concurring conclusions below that the charge was not sustained. Briefly stated, it is shown that defendant relinquished his former entry, Phoenix 023024, in November, 1915, and sold the improvements thereon to Urbane House who immediately made entry thereof on relinquishment. Part of the consideration of \$1250.00 paid was for defendant's promise to keep his cattle on the other side of the Gila River, which purchaser admits has been kept. There was much conflict of testimony as to the value of the improvements on the land at the time of sale, but defendant's testimony clearly preponderates to the effect that the improvements, consisting principally of a nine-room house in which he and his family resided, clearing and fencing, two wells equipped with pumps and two corrals and a barn and chicken houses, and the construction of an irrigation ditch to bring water from the Gila River to the land cost much more than the sum received from House. Defendant also showed that it was true, as alleged for ground of second entry, that his crops of 40 acres were destroyed by flood and the land covered by sand and debris prior to his relinquishment. There is little in the circumstances established to induce the belief that he speculated in his homestead right.

As to the third charge, the department has held in *Ainsworth Copper Co. v. Bew* (53 I. D. 382, 383)—

* * * Illegality of the stock raising entry is not shown by merely establishing that the land is mineral in character, all minerals being reserved by the act under which it is made. In *United States v. Hurliman* (51 L. D. 258), wherein was considered the conflicting claims of stock-raising and mineral claimants to the same land, it was held that at the date of the inception of the stock-raising entry, there must exist either a prior perfected location under the mining law, or a mining location though not perfected by discovery in the actual possession of the locator who is diligently engaged in the search for mineral, to warrant cancellation of the entry to the extent so claimed to be located or possessed.

Neither of these conditions being shown to exist, no part of the land can be deemed to be claimed, occupied or as being worked under the mining law. With respect to perfected mining locations, it was said in the *Hurliman* case (p. 262)—

"The acts of Congress prescribed two and only two prerequisites to the vesting in a competent locator of a complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land, within the limits of the claim of a mineral-bearing lode and the distinct markings of the boundaries of the claim so that they can be readily traced. No appropriation of the land is made until these requirements are fulfilled. *Erwin v. Perego* (93 Fed. 608, 611) *Nevada Sierra Oil Co. v. Home Oil Company* (98 Fed. 673, 677)."

It appears from the evidence that notices of the location of two claims were recorded in December, 1925, called the General Grant Nos. 3 and 4, and affidavits of annual assessment work were filed for

the years 1926, 1927, and 1928, and there is evidence that one Bowman was paid \$100 per claim per year to do the work for 1927 and 1928, but there were strong grounds for doubt in view of the impeaching testimony, whether or not he knew where the claims were situated in 1927, or did the work for that year.

Through Price, the Government's irrigation engineer, who examined the entry in May, 1929, a plat was introduced depicting two mining claims wholly within the NW $\frac{1}{4}$ Sec. 14, which he states should be designated General Grant Nos. 1 and 2. This plat was prepared from the data obtained by a surveyor who accompanied Price. These locations, Price states, cover the identical ground and are the locations designated in the location notices as General Grant Nos. 3 and 4. He found some of the corners to General Grant No. 1, but there was no evidence of any identification of the corners or lines of General Grant No. 2. Aside from insufficiency of identification of the latter, the evidence of prior discovery on either claim is very meager and unsatisfactory. On what he designates as General Grant No. 1, there is an open cut 35 feet long between two old shafts within which he found *indications* of mineralization in rock in place, chalcopryrite and chalcocite (Tr. 49). At some unspecified place "on the ground" he states: "There is a vein about five feet thick showing indications of chalcocite, chalcopryrite and the like." (Tr. 57.)

Bowman, who stated that his business was mining and prospecting, testified (Tr. 83) that on the "General Grant" some of it ran over one and a half in copper, perhaps some a little richer—

And all the way through, the ledge is about six or eight feet. I should judge I haven't measured it, only just by looking at it, and it would carry about three dollars in gold and a couple of dollars in silver.

He, however, testified that he did not sample the vein and knew of no samples being taken therefrom. Price also stated, apparently referring to the General Grant No. 1, that there was another shaft north that "had some working on it that shows some copper, but I did not make any detailed investigation as to that because the contest seemed to be relative to a water hole which was on this mining claim."

There is no evidence of any *bona fide* efforts of mining on the land in question or surrounding land, although it appears clearly the land has been under location by one mineral claimant and then another and that primarily a group of General Grant claims were located to protect a developed water hole from a spring on the land known recently as Behr Springs. The examination by Price having been made subsequent to the entry, his evidence of itself is incompetent to establish discovery, and the declarations of such facts in the re-

corded location notices are not *prima facie* evidence of the fact of discovery. *Ainsworth Copper Company v. Bea*, *supra*, and cases there cited.

The Government on cross-examination brought out testimony that the land was more valuable for its water hole than for mineral (Tr. 316). Bowman's statements as to mineral values, if he ever was on the land before entry, are mere guesses without verification. The evidence is clearly insufficient to establish that the General Grant claims are prior valid locations.

It is shown beyond question that there is a spring within the boundaries of the claim called General Grant No. 1, which has been developed for a number of years, and which for a time was enclosed and used for irrigating a garden by a mineral claimant, but for the most of the time, though held under claim of private right, it has been and is still being used by the community as a watering place for cattle. At the time of the examination by Price there was a cement trough about 18 by 25 feet in width and length and seven feet deep and a one and one-half inch pipe leading from the cement trough to a watering trough. Price, from measurements of the flow of water, estimated it to be about 45 gallons an hour. J. J. Anderson, whose protest against the entry led to the institution of the present proceedings, testified to the effect, and documentary evidence was introduced to show, that he posted a notice of location and appropriation of the water right and right of way for pipe line and trough February 23, 1918, recorded June 28, 1928, and also obtained from the State Water Commissioner on October 5, 1928, a certificate of water right, limited to one and one-half miner's inches. He also testified that he bought the water rights of one Behr, a mineral claimant of the land, for \$550.00 and expended about \$500.00 more in development of the water for stock-raising purposes, which he as well as others have used beneficially.

No charge was preferred that the land or any subdivision thereof was valuable as a public water hole, and unless it appears that the designation of the land as subject to entry under the stock-raising act was erroneously induced by fraudulent statements of the entryman, no basis exists for vacating the designation, and canceling any part of the entry. *Dominquez v. Cassidy* (47 L. D. 225).

The entryman, in support of his application, made an affidavit containing this statement—

There is within the NW $\frac{1}{4}$ of the said Sec. 14 a small spring furnishing approximately after development 10 gallons of water per hour, or sufficient for domestic and domestic stock watering purposes. This spring has been developed to that capacity (by) prospectors formerly holding a mining claim in the vicinity. Said spring or seep does not furnish sufficient water for a large number of stock and is wholly unnecessary for public watering pur-

poses for the reason that the Gila River, which is approximately one and one-half miles north of the land, carries a large amount of running water throughout the year and furnishes water for all stock grazing on the open range in the vicinity, rendering this small spring unnecessary for such purposes. This spring has never been used as a public watering place but, as above stated, has been developed by private individuals and used by them during the time they occupied the land surrounding same.

The evidence at the hearing does not show that any of the above statements are untrue. Price admits that the statements are not untrue except as to the volume of flow of the water (Tr. 61). It is not believed that his single measurement on a single day establishes the normal flow of the spring so as to demonstrate intentional underestimation thereof by the entryman. Simple calculations from the statements of Anderson, the water appropriator, as to the number of gallons one head of livestock will drink at one time, based on Price's estimate of the flow of the spring, disclose that the spring is plainly inadequate to water the number of cattle Anderson estimates could be watered there. It is not shown that this spring is capable of providing enough water for general use for watering purposes or that it is a public necessity in that locality, or that it has had the true status of a public watering place, but to the contrary has been for many years claimed under private appropriation by Anderson and prior thereto by mineral claimants who have controlled the use of the water. If Anderson has any rights to the water, such rights may be protected by appropriate court proceedings, as the patent issued to Glaspie will be subject to any prior vested rights therein. See numerous authorities cited in the United States Code, Annotated, Title 43, Section 661, Note 38.

Without prejudice to mineral claimants who may have evidence not adduced in this case to show a prior valid mining possession, the Commissioner's decision canceling the entry is

Reversed.

HOMER H. HARRIS

Decided January 13, 1932

SCHOOL LAND—RECORDS—NOTICE—MINERAL LANDS—EVIDENCE—APPLICATION.

Until the record is cleared of the *prima facie* title of the State by a determination, after due notice to the State and the submission of satisfactory proof that the land was known to be mineral in character prior to the date the State's right to a school section would otherwise have attached, mineral applications for the land confer no rights and can not be recorded.

SCHOOL LAND—INDEMNITY—LAND DEPARTMENT—JURISDICTION.

The approval of a State indemnity school land selection list deprives the Land Department of further jurisdiction over the land contained in the list.

SCHOOL LAND—STOCK DRIVEWAY WITHDRAWAL—POTASH WITHDRAWAL.

Withdrawals for stock-driveway purposes and reservations for potash made subsequent to the date that the rights of a State attached under its school-land grant do not affect the title of the State under the grant.

EDWARDS, *Assistant Secretary*:

July 31, 1931, Homer H. Harris made application, Las Cruces 044268, for a potash prospecting permit covering all of Secs. 20, 32, and 36, T. 20 S., R. 30 E., and Sec. 32, T. 20 S., R. 31 E., N. M. P. M. October 18, 1931, the Commissioner of the General Land Office held the application for rejection, except as to NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 20. Harris has filed an appeal.

Plat of survey of T. 20 S., R. 30 E., was accepted March 29, 1904; of T. 20 S., R. 31 E., July 5, 1912. Sec. 36, T. 20 S., R. 30 E. is included in the school-land grant to the Territory of New Mexico made under the act of June 21, 1898 (30 Stat. 484), and confirmed to the State by the act of June 20, 1910 (36 Stat. 557). Secs. 32 in T. 20 S., R. 30 E., and T. 20 S., R. 31 E., are included in the additional grant of school land to the State made under the act of June 20, 1910, *supra*. The record does not show that the State ever tendered these school sections as bases for indemnity, nor does it appear that at the several dates when the right of the State would attach, if at all, the land had been classified as mineral land or claim thereto asserted under the mining or other public land laws. Presumptively, title passed to the State to Sec. 36 on March 29, 1904, the date of the acceptance of the survey; to Sec. 32 in the same township on January 6, 1912, the date of the admission of the State into the Union (*United States v. State of New Mexico, On Rehearing*, 48 L. D. 11), and to Sec. 32 in T. 20 S., R. 31 E., on July 5, 1912, the date of the acceptance of the survey. Regulations of March 6, 1903 (32 L. D. 39); Instructions June 23, 1910 (39 L. D. 39); *State of Colorado, On Rehearing* (49 L. D. 341); *George G. Frandsen* (50 L. D. 516).

Until the record is cleared of the *prima facie* title of the State by a determination, after due notice to the State and the submission of satisfactory proof, that the land was known to be mineral in character prior to the date the State's right would have otherwise attached, applications for the land give rise to no rights, and no such application can be allowed of record (32 L. D. 39); *State of Utah* (32 L. D. 117); *Charles L. Ostenfeldt* (41 L. D. 265); *Work v. Braffet* (276 U. S. 560, 565). There is nothing in the present application sufficient as basis for challenge of the State's title.

The E $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 20, were patented February 24, 1908. The NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 20, are included in State indemnity school selection, Roswell 018772, List 10, approved August 5, 1910. The patent was issued and list

approved without mineral reservation. The patent and the approval of the list ended the jurisdiction of the department over the land. *Sewell A. Knapp* (47 L. D. 152, 156); *James R. Crawford et al.* (53 L. D. 435, adhered to on rehearing, 439).

The E $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 20 are included in outstanding potash prospecting permit 040516, issued November 15, 1929, uncanceled of record. The application of Harris for the same class of deposits give rise to no rights, while the prior permit remains uncanceled on the records of the local land office. *Martin Judge* (49 L. D. 171); *Harvey V. Craig* (50 L. D. 202). Withdrawals for stock-driveway purposes and reservations of the land for potash made subsequent to the date the State's rights attached do not affect its title. *Wyoming v. United States* (255 U. S. 489), *State of New Mexico* (52 L. D. 679; on rehearing, 681), involving stock-driveway withdrawals prior to acceptance of the plat of survey of the land withdrawn, which are relied upon by Harris, are inapposite.

The Commissioner's decision was right and is

Affirmed.

SIX COMPANIES, INC.

Decided January 19, 1932

WORKMAN'S COMPENSATION INSURANCE—HOOVER DAM—PAYMENT.

The cost of workman's compensation insurance comes within the class "or other general expenses," and must be excluded from payment under a contract for extra work which limits the charges to "actual necessary cost," defined therein as "labor, materials, and supplies," but not "office or other general expenses."

ACCOUNTS—GENERAL ACCOUNTING OFFICE—JURISDICTION—OFFICERS—HOOVER DAM.

Section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, confers upon the General Accounting Office authority to settle and adjust all claims, demands, and accounts in which the United States is concerned either as debtor or creditor, and the decisions of the accounting officer are controlling upon administrative officers of the Government.

WILBUR, *Secretary*:

Six Companies, Inc., contractors for the construction of Hoover Dam and appurtenant works, have appealed from a ruling of the contracting officer, dated November 7, 1931, eliminating an item of \$16.31 for workmen's compensation insurance from the statement of extra work performed under Extra Work Order No. 1, on the ground that said item is not a proper item of actual necessary cost of performing the extra work.

Extra Work Order No. 1, under which the work was performed, reads as follows:

In accordance with the provisions of Article 3 of your contract (Symbol No. 114-633) dated March 11, 1931, and paragraph 10 of specifications No. 519, made a part of your contract, you are hereby directed to place *HAND PLACED RIPRAP* on the lower side of the fill between stations 416 and 418 of the black canyon highway, in accordance with detailed instructions of the engineer in charge of the work. It is estimated that the work will require the placing of about 3,000 square yards of hand placed rock riprap and will cost approximately \$4,500.00.

As the work was not provided for in the schedule of bids you will be compensated in accordance with paragraph 10 of specifications No. 519, which provides that you will be paid at actual necessary cost as determined by the contracting officer, plus fifteen per cent (15%) for superintendence, general expense and profit.

Your claim for extra work must be submitted in writing in sufficient detail for checking and should be certified as accurate and just, and that payment thereof has not been received.

Paragraph 10 of specifications No. 519, relating to "extras", reads as follows:

Extras.—The contractor shall, when ordered in writing by the contracting officer, perform extra work and furnish extra material, not covered by the specifications or included in the schedules, but forming an inseparable part of the work contracted for. Extra work and material will ordinarily be paid for at a lump-sum or unit price agreed upon by the contractor and the contracting officer and stated in the order. Whenever in the judgment of the contracting officer it is impracticable because of the nature of the work or for any other reason to fix the price in the order, the extra work and material shall be paid for at actual necessary cost as determined by the contracting officer, plus 15 per cent for superintendence, general expense, and profit. The actual necessary cost will include all expenditures for material, labor, and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, to be agreed upon in writing before the work is begun, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

Article 15 of the contract is as follows:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

A brief in support of the appeal has been filed by the contractor with accompanying exhibits, consisting of copies of the extra work statement submitted and the correspondence between the contracting officer and the contractor, including the ruling from which appeal is taken.

The action taken by the contracting officer was based primarily on the decision of the Comptroller of the Treasury, dated March 23, 1914 (20 Comp. Dec. 656). Reference also was made to the decision

of the Acting Comptroller General, dated February 6, 1926 (5 Comp. Gen. 589).

The arguments presented in the brief have been carefully considered and the decisions referred to have been examined.

In the opinion of the department the controlling decision is that of March 23, 1914 (20 Comp. Dec. 656), the others being readily distinguishable. The question submitted in that case was identical with the one here presented. Paragraph 14 of the specifications there considered provided, among other things, that—

Extra work shall be charged for at actual necessary cost, as determined by the engineer, plus 15 per cent for profit, superintendence, and general expenses. The actual necessary cost will include expenditures for materials, labor, and supplies furnished by the contractor, and a reasonable allowance for the use of shop equipment where required, but will not include any allowance for office expenses, general superintendence, or other general expenses.

The Comptroller, in his decision, referred to a previous decision of November 14, 1907 (14 Comp. Dec. 297), which declined to allow cost of liability insurance as part of "the actual necessary cost" and to the decision of the Court of Claims which afterward allowed the contractor's claim of said account (*Lovell v. United States*, 46 Ct. Cls. 318). The cases, however, were distinguished by the Comptroller in the following terms:

If the terms of the Lovell contract there considered were identical with those here in question, the decision referred to would be ample authority for the allowance of the item now in dispute, but paragraph 14 of the contract here in question defines what shall and what shall not be considered as parts of the "actual necessary cost" of doing extra work, whereas the Lovell contract contained no such definitions.

Under the contract here in question "expenditures (by the contractor) for materials, labor, and supplies * * * and a reasonable allowance for the use of shop equipment where required", but not expenditures on account of "office expenses, general superintendence or other general expenses" were, and are, to be classed as "actual necessary cost." Whether or not, then, the cost of liability insurance is to be classed as a part of the "actual necessary cost" of doing the extra work depends upon whether such cost is to be rated as an "expenditure for materials, labor, and supplies" or as an "office * * * or other general expense." If the former, the charge must be allowed as proper; if the latter, it can not be allowed.

I do not think the item of \$44.90, charged as cost of liability insurance, can properly be allowed as a part of the labor cost, but am constrained to hold that it must be classed as one of the "other general expenses" which in express terms are excluded from the "actual necessary cost" of the extra work. This item should therefore be eliminated by you from the account presented before payment is made.

Special consideration is given in the brief to the decisions in which the item here excluded was allowed as a part of "the actual necessary cost" of extra work (*Lovell v. United States*, *supra*; 22 Comp. Dec. 261), and it is urged by the contractor that the only possible theory

on which the item claimed in this case can be rejected is that it is an item included within the phrase "or other general expenses," which the specifications exclude from the actual necessary cost. With respect to this it is submitted that the cost of insurance on particular workmen engaged in particular work can not be called a general expense—a term which implies an item of expense which can not be allocated to any particular work but is considered general over all of the contractor's operations, and which is impossible to segregate and charge to particular work. That it is practicable to segregate this cost and that it has been done in the instant case is argued at length in the brief.

After careful consideration of the matter, I am of the opinion that the decision of the Comptroller of March 23, 1914 (20 Comp. Dec. 656), is applicable to the case presented in this appeal and that, in accordance therewith, workmen's compensation insurance must be classed as one of the "other general expenses" excluded from the "actual necessary cost" under the terms of paragraph 10 of the specifications. The reasons for the Comptroller's decision are stated in the above quotation therefrom.

Under the law, decisions of the accounting officer are controlling upon administrative officers, by reason of the authority of that officer to settle and adjust all claims, demands, and accounts whatever in which the United States is concerned, either as debtor or creditor, as provided by section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921 (42 Stat. 24); United States Code, title 31, section 71; see 4 Comptroller General 713; 6 Comptroller General 43.

In view of the foregoing, the decision of the contracting officer, from which appeal has been taken, is

Affirmed.

STATUS OF BOARD OF INDIAN COMMISSIONERS

Opinion, February 3, 1932

BOARD OF INDIAN COMMISSIONERS—DEPARTMENT OF THE INTERIOR—JURISDICTION.

The Board of Indian Commissioners created by the act of April 10, 1869, although provided for by appropriations included in the acts covering the Indian Service, nevertheless is independent of any department or bureau of the Government, and the selection and compensation of its personnel are matters not subject to the jurisdiction of the Department of the Interior.

FINNEY, Solicitor:

You [Secretary of the Interior] have requested my opinion as to what, if any, jurisdiction you have over the Board of Indian Commissioners, particularly with reference to the number of employees

maintained in the Washington office of the board and the compensation paid them. This question, it appears, has arisen in connection with the recent promotion of Earl Y. Henderson to secretary of the board, vice Malcolm McDowell, and the promotion of Mrs. Clara R. Burrows to assistant secretary, vice Mr. Henderson.

The Board of Indian Commissioners was organized under the provisions of section 4 of the act of April 10, 1869 (16 Stat. 13, 40), which reads—

SEC. 4. That there be appropriated the further sum of two millions of dollars, or so much thereof as may be necessary, to enable the President to maintain the peace among and with the various tribes, bands, and parties of Indians, and to promote civilization among said Indians, bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self-support; a report of all expenditures under this appropriation to be made in detail to Congress in December next; and for the purpose of enabling the President to execute the powers conferred by this act he is hereby authorized, at his discretion, to organize a board of commissioners, to consist of not more than ten persons, to be selected by him from men eminent for their intelligence and philanthropy, to serve without pecuniary compensation, who may, under his direction, exercise joint control with the Secretary of the Interior over the disbursement of the appropriations made by this act or any part thereof that the President may designate; and to pay the necessary expenses of transportation, subsistence, and clerk hire of said commissioners while actually engaged in said service, there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary.

The Board of Indian Commissioners, as created under the foregoing provision, consists of a body of unpaid private citizens. The purpose of its creation as expressed in the statute, was to enable the President of the United States to execute the powers conferred upon him thereby, which were to maintain peace among the Indian tribes, to promote their civilization, to relieve their necessities, and to bring them upon reservations. To carry out such powers an appropriation of \$2,000,000 was made with the provision that the board might, under the direction of the President, exercise "joint control" with the Secretary of the Interior for the disbursement of such appropriation or any part thereof (See *Ryan v. United States*, 8 Ct. Cls. 265). The "joint control" to be exercised by the Secretary of the Interior and the board obviously had reference to the disbursement of the two million-dollar appropriation and not to the smaller appropriation of \$25,000 made to meet the expenses of transportation, subsistence, and clerk hire of the commissioners. The board and the Secretary were to cooperate, but neither was made subordinate to the other.

The existence of the board was continued and its powers and duties defined by certain provisions contained in the act of July 15, 1870 (16 Stat. 335, 360), March 2, 1871 (16 Stat. 544, 568), May 29,

1872 (17 Stat. 165, 186), and May 17, 1882 (22 Stat. 68, 70). The latter act limited the powers of the board to visits to and inspection of agencies and other branches of the Indian Service and the inspection of goods purchased for that service with the requirement that the Commissioner of Indian Affairs consult with the board in the purchase of supplies and that the board should report its doings to the Secretary of the Interior. From that time onward the existence of the board, with the powers and duties mentioned, has been recognized by annual appropriations made by Congress to meet its expenses, such appropriation having been carried for convenience at first in the Indian appropriation acts, and in more recent years in the Interior Department appropriation acts.

Regarding the personnel employed by the board, it is important to note that the act of July 15, 1870, *supra*, expressly empowered the board to appoint one of its number as secretary with such reasonable compensation as it may designate. An amendment to this provision authorized the employment of a secretary not a member of the board and the payment of his salary out of the appropriations which may be made for the board (Act August 24, 1912, 37 Stat. 518, 521). These provisions but illustrate the independent nature of the board and the intention of Congress that the appropriations made for its benefit should be expended upon its own responsibility.

The Board of Indian Commissioners has been regarded, since its creation more than 60 years ago, as independent of any department or bureau. No control whatever over the employment of personnel by the board has been exercised or attempted by the Secretary of the Interior during all this time. In none of the legislation dealing with the board and its activities is there any provision authorizing the Secretary of the Interior to fix the compensation of its employees or to supervise the action of the board in that particular.

As the head of the Interior Department you are authorized to employ such number of employees of the various classes recognized by law as may be appropriated for by Congress from year to year (Sec. 169, R. S.), subject, of course, to allocation of positions to grades and the fixing of rates of compensation as provided by the Classification Act of March 4, 1923 (42 Stat. 1488). Your authority in this regard, however, is necessarily confined to employees only of those bureaus or offices of the Interior Department which have been constituted such by the law of its organization or some subsequent enactment. The Interior Department was made one of the executive departments on March 3, 1849 (9 Stat. 395). It was specifically charged with the supervision of certain Executive bureaus, and its jurisdiction was defined in section 441, Revised Statutes. The Board of Indian Commissioners has never been placed under its jurisdiction by any express statute.

I am of the opinion, therefore, that the Board of Indian Commissioners can not properly be regarded as a part of the Interior Department and hence the personnel to be employed by the board and the compensation to be paid to them are matters not coming within your jurisdiction.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

**SMALL HOLDING CLAIMS—RAILROAD GRANT—ACT OF APRIL 28,
1904—CIRCULAR NO. 522, MODIFIED**

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 5, 1932.

THE SECRETARY OF THE INTERIOR:

On October 5, 1931, the Santa Fe Pacific Railroad Company filed its selection, Santa Fe 064994, under the act of April 28, 1904 (33 Stat. 556), for 590.40 acres of land, for which 591.09 acres was assigned as base. The tracts offered as base were part of the lands the company reconveyed to the United States under the said act of April 28, 1904, in its deed accepted by the department on September 27, 1930. The deed covered 1147.32 acres.

By letter of January 7, 1932, this office held the selection for cancellation for the reason that it did not exhaust the area embraced in the deed of relinquishment as provided by Circular No. 522, approved January 24, 1917 (45 L. D. 617). Said circular reads in part as follows (p. 619):

For any lands reconveyed by the company after April 23, 1916 (the date of the departmental order so directing), it will be required to select in lieu thereof an area in compact form approximating that relinquished. For example, if 160 acres be relinquished for the benefit of any one settlement claim, a selection in lieu thereof must be in compact form approximating that area; and if an entire section be relinquished because of a settlement claim or claims for a portion thereof, then in that case the lieu selection must be of a like area in compact form.

In the administration of said act prior to the date of the mentioned circular, the company was permitted to make piecemeal selections, that is, a selection of a 40 or 80 acre tract at a time until the total area of the base lands relinquished had been exhausted. It may be added that this practice has also prevailed since the date of the regulations; but only in those cases where the base land had been

relinquished prior thereto. An examination of the records shows that only one relinquishment has been made by the company since April 28, 1916, the deed having been accepted September 27, 1930.

It appears that several contemplated exchanges have recently been under consideration. This office has been informally advised that the land commissioner for the railroad company will not take the initiative with a view of making any further exchanges in case the department adheres to the practice provided for by that part of the circular above quoted. Manifestly, said act of April 28, 1904, was passed in the interest of the small holding settlers who had improved land within the grant to the railroad company, and a refusal on the part of the company to make any further exchanges will not only prevent relief being granted to the individuals concerned in the contemplated exchanges, but will in effect nullify the provisions of said act.

The purpose of the order of April 28, 1916, was to put an end to the multiplicity of field examinations of land which could have been examined at one time, had all of the relinquished base lands been exhausted in one selection. Whatever justification there may have been for such an order in 1916, it is believed that its results are more far-reaching than necessary. Furthermore, the area which is subject to such exchanges is being reduced year by year so that it may cause a hardship and considerable inconvenience to adhere to said order of April 28, 1916.

Accordingly, it is recommended that the above quoted portion of circular No. 522 of January 24, 1917, be revoked, and that in lieu thereof the following be substituted:

For any lands reconveyed by the company one or more selections may be made in lieu thereof until the entire area relinquished has been exhausted, provided: that not less than a legal subdivision of base land will be designated for any legal subdivision selected, such selection to exhaust any subdivision of base designated therefor.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

STATUS OF ALASKAN NATIVES

Opinion February 24, 1932

ALASKAN NATIVES—INDIANS.

The United States has never at any time recognized any tribal independence or relations among the Indians or natives of Alaska nor treated with them in any capacity.

ALASKAN NATIVES—INDIANS.

No distinction is to be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned and the question as to whether the Eskimos and other natives are of Indian origin or not is immaterial in that respect.

ALASKAN NATIVES—INDIANS—CITIZENSHIP.

The natives referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefit of and are subject to the general laws and regulations governing the Indians of the United States to the same extent as are the Indian tribes within the territorial limits of the United States, including the right of citizenship accorded by the act of June 2, 1924.

SECRETARY OF THE INTERIOR—ALASKAN NATIVES—INDIANS.

The inherent power conferred upon the Secretary of the Interior by section 441, Revised Statutes, to supervise the public business relating to the Indians includes the supervision over reservations in Alaska created in the interest of the aboriginal natives of that Territory.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion on the legal status of the natives of Alaska—Eskimos, Aleuts, Indians, *et al.*

Alaska was ceded to the United States by Russia under the treaty of March 30, 1867 (15 Stat. 539). Article III of the treaty provides—

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

An opinion by the Solicitor of this department under date of May 18, 1923 (49 L. D. 592), sets forth the following (p. 594):

In the beginning, and for a long time after the cession of this Territory Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our Government, in many respects, that was borne by the American Indians. (16 Ops. Atty. Gen. 141; 18 id., 139); *United States v. Ferueta Seveloff* (2 Sawyer U. S. 311); *Hugh Waters v. James B. Campbell* (4 Sawyer U. S. 121); *John Brady et al.* (19 L. D. 323).

With the exception of the act of March 3, 1891 (26 Stat. 1095, 1101), which set apart the Annette Islands as a reservation for the use of the Metlakahtlans, a band of British Columbian natives who immigrated into Alaska in a body, and also except the authorization given to the Secretary of the Interior to make

reservations for landing places for the canoes and boats of the natives. Congress has not created or directly authorized the creation of reservations of any other character for them.

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

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

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians; and this conclusion is supported by the fact that in creating the territorial government of Alaska and vesting that Territory with the powers of legislation and control over its internal affairs, including public schools, Congress expressly excluded from that legislation and control the schools maintained for the natives and declared that such schools should continue to remain under the control of the Secretary of the Interior.

Any change that may have occurred in the original attitude of the United States towards the natives of Alaska is reflected in subsequent acts of Congress which were invariably intended to be in their interest and for their benefit, no distinction being made as to any particular natives.

Some disposition has been shown to make a distinction between the Indians of Alaska and other natives, particularly the Eskimos. It has been asserted by ethnologists that the Eskimos are not of Indian but more likely are of Manchurian and Chinese origin. After the Indians, the Eskimos of Alaska are probably the most advanced of the natives and for this reason these two races are best known and are more frequently referred to than the other natives such as the Aleuts, Athapascans, Tlinkets, Hydahs and other natives of indigenous race inhabiting the Territory of Alaska. The Eskimos are said to know nothing of their early predecessors. The origin of the natives of Alaska will possibly some day become known, but whether that comes to pass or not the fact is that they are all wards of the Nation and are treated in material respects the same as are the aboriginal tribes of the United States.

The act of March 3, 1899 (30 Stat. 1253), defining the penal and criminal laws of the United States relating to the District of Alaska provides in section 142 of Chap. 8 thereof, in the matter of selling liquor or firearms to Indians, as follows (p. 1274) :

* * * That the term "Indian" in this Act shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood.

The above provision was amended by the act of February 6, 1909 (35 Stat. 600, 603), by adding after the words "half blood"—"who have not become citizens of the United States." This provision loses whatever significance it may have had if the act of June 2, 1924 (43 Stat. 253), declaring "all noncitizen Indians born within the territorial limits of the United States" to be citizens of the United States, is applicable to the natives of Alaska.

In the case of *United States v. Lynch* (7 Alaska Reports 568, 572), referring to article III of the treaty of cession between Russia and the United States, the court held—

Under this treaty the Tlinket tribe became subject to such rules and regulations as the United States may thereafter adopt as to the native Indians of the United States. Therefore, by the provisions of the treaty, the Indians of the Tlinket tribe became citizens of the United States, in common with the native Indian tribes of the United States, under the Act of June 2, 1924 (8 USCA Sec. 3), which provided that all noncitizen Indians born within the territorial limits of the United States, shall be citizens and that the granting of citizenship shall not, in any manner, impair or otherwise affect the right of any Indian to tribal or other property.

Demurrer in the Lynch case was overruled (7 Alaska Reports 643); see also case of *Rasmussen v. United States* (197 U. S. 516).

As Indians of Alaska are within the category of natives of Alaska and as the term "Indian" is to be so construed as to include the aboriginal races inhabiting Alaska, the ruling of the court in the *Lynch case* would seem to be equally applicable to all other natives of that Territory.

Reference to the provisions of certain acts will give a definite idea of the extent to which the natives of Alaska have been recognized by the Congress as well as show the similarity of their treatment to that accorded the Indians of the United States. In the first place, the treaty between Russia and the United States after providing that the civilized native tribes "shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property, and religion," further provides: "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of *that country*." [Italics supplied.]

The Indians, Eskimos, Aleuts and other natives of Alaska are therefore the wards of the Nation the same as are the Indians inhabiting the States. *In re Sah Quah* (31 Fed. 327), wherein it was held (p. 329)—

* * * The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of Congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts. * * * They are practically in a state of pupillage, and sustain a relation to the United States similar to that of a ward to a guardian. * * *"

In section 13 of the act of May 17, 1884 (23 Stat. 24, 27), entitled "An Act providing a civil Government for Alaska" the Secretary of the Interior is authorized to make needful and proper provision for the education of the children of school age in the Territory of Alaska "*without reference to race*, until such time as permanent provisions shall be made for the same." [Italics supplied.]

A similar provision is contained in the act of June 6, 1900 (31 Stat. 321, 330). This act was amended by the act of March 3, 1901 (31 Stat. 1438), by providing that 50 per cent of all license money collected on business carried on outside incorporated towns in the District of Alaska should be used by the Secretary of the Interior in his discretion and under his direction for the support of schools outside incorporated towns. All schools were supported by annual appropriations made by Congress up to June 30, 1901. Thereafter, all schools outside incorporated towns remained under the supervision of the Secretary of the Interior and were supported by the license money referred to, until January 27, 1905.

The act of January 27, 1905 (33 Stat. 616), entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska and for other purposes" provided in section 7 thereof as follows:

That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior, and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States.

The act of March 30, 1905 (33 Stat. 1156, 1188), made an appropriation—

EDUCATION IN ALASKA: To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of

the Eskimos, Indians, and other natives of Alaska; for erection, repair, and rental of school buildings; for text-books and industrial apparatus; for pay and necessary traveling expenses of general agent, assistant agent, superintendents, teachers, physicians and other employees, and all other necessary miscellaneous expenses which are not included under the above special heads, fifty thousand dollars, to be immediately available.

The appropriation made by the act of June 30, 1906 (34 Stat. 697, 729), for \$100,000 was "To enable the Secretary of the Interior in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians, and other natives of Alaska."

Appropriations in increased amounts have since been made by Congress annually for the support of schools among the Eskimos, Aleuts, Indians and other natives of Alaska, the amount appropriated for that purpose for the fiscal year ending June 30, 1920, being \$250,000. The act of May 27, 1908 (35 Stat. 317, 351), contains this additional provision—

That all expenditure of money appropriated herein for school purposes in Alaska shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules, and regulations as to conduct and methods of instruction and expenditure of money as may from time to time be recommended by him and approved by the Secretary of the Interior.

All subsequent acts making appropriations for the support of schools among the natives of Alaska contain a like provision to the above.

The Territory of Alaska was created by the act of August 24, 1912 (37 Stat. 512), and it is provided in section 3 thereof that the authority granted therein to the legislature to alter, amend, modify, and repeal laws in force in Alaska, shall not extend to the act of January 27, 1905, *supra*, and the several acts amendatory thereof, which act provides that schools for and among the Eskimos and Indians of Alaska shall be *provided for* by an annual appropriation.

Section 415 of the Compiled Laws of Alaska provides: "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

The act of March 3, 1917 (39 Stat. 1131), reads as follows:

That the Legislature of Alaska is hereby empowered to establish and maintain schools for white and colored children and children of mixed blood who lead a civilized life in said territory and to make appropriations of Territorial funds for that purpose; and all laws or parts of laws in conflict with this Act are to that extent repealed.

Until that act was passed, as hereinbefore shown, the matter of schools for the children named therein was controlled by congressional legislation.

In later acts, notably that of May 24, 1922. (42 Stat. 552, 583), Congress went further and made and is still making appropriations "To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians, and other natives of Alaska."

Two things are apparent from the foregoing, namely that the Indians and other natives of Alaska are as truly the wards of the Nation as are the aborigines and their descendants inhabiting the States with whom the Government has had to deal since its organization; and that Congress has assumed full cost for all educational facilities among the Alaskan natives. Under the act of March 3, 1917, *supra*, separate schools are in existence in Alaska, that is, those for the education of white and colored children and "children of mixed blood who lead a civilized life", established and maintained by appropriations from territorial funds; and those for the education of Eskimos, Aleuts, Indians, and other natives provided for by the annual appropriations of Congress.

The Solicitor for this department has held that the Territory of Alaska can not legally collect from Eskimos, Aleuts and other natives of Alaska of full blood nor of those natives of mixed blood who do not lead a civilized life, the school tax imposed by the territorial act. The case of *Davis v. Sitka School Board*, (3 Alaska Reports 481), involved a construction of the act of January 27, 1905, *supra*, particularly that provision relating to "children of mixed blood who lead a civilized life." The court held that (p. 482)—

* * * while the Davis children are of "mixed blood," they do not "lead a civilized life," within the meaning of section 7 of the act of Congress of January 27, 1905. (33 Stat. 617, c. 277), so as to entitle them to attend the public schools maintained for "white children and children of mixed blood who lead a civilized life." *Held*, that mandamus will not lie to compel the school board of Sitka to admit such children to the public schools therein; it appearing that the government maintained a separate school for Eskimos and Indians "under the direction and control of the Secretary of the Interior."

In the case of *United States v. Berrigam* (2 Alaska Reports 442), referring to the clause of the third article of the treaty of 1867 between Russia and the United States that "the uncivilized tribes (in Alaska) will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country," it was held (syllabus)—

That the Athapascan stock, including the native bands of the Tanana, belong to the uncivilized tribes mentioned in this clause. As such they are entitled to the equal protection of the laws which the United States affords to similar aboriginal tribes within its borders.

Also that (syllabus)—

All the vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain and public lands of the United States.

And further that (syllabus)—

The uncivilized native tribes of Alaska are wards of the government. The United States has the right, and it is its duty, to protect the property rights of its Indian wards.

In the case of *Nagle v. United States* (191 Fed. 141), after referring to the act of May 17, 1884 *supra*, providing a civil government for Alaska, and to section 1891 of the United States Revised Statutes which provide that "The Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory hereafter organized as elsewhere within the United States," the court held "all laws of Congress of general application not locally inapplicable are in effect in Alaska." The court further held (syllabus)—

The provision of Act Feb. 8, 1887, c. 119, sec. 6, 24 Stat. 390 relating to allotments of lands to Indians in severalty, that "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 citizen," is in effect in Alaska, and operates to make Indians therein who are descendants of the aboriginal tribes, born since the annexation of Alaska, but who have voluntarily taken up their residence separate and apart from any tribe and adopted the habits of civilization, citizens of the United States, and the sale of liquor to such an Indian does not constitute an offense under Alaska Code Cr. Proc. sec. 142, as amended by Act Feb. 6, 1909, c. 80, sec. 9, 35 Stat. 603 making it an offense to sell liquor to an "Indian," which term is defined to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood "who have not become citizens of the United States."

The court also held, referring to the clause in article III of the Alaska treaty with Russia stipulating that the uncivilized native tribes of Alaska "will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes in that country" (p. 142)—

* * * There can be no doubt that this stipulation relates to the Indian tribes in Alaska, and manifestly the treaty was designed to insure them like treatment, under the laws and regulations of Congress, as should be accorded Indian tribes in the United States.

It was argued in the *Nagle case, supra*, that because the Government has never treated with the Indian tribes in Alaska, therefore

it was not the intendment that general laws respecting Indians should extend to the Territory of Alaska. But the court said (p. 146)—

* * * It should be borne in mind, however, that it has long since been declared to be the policy of Congress not to treat further with the Indians as tribes. Act March 3, 1871, c. 120, 16 Stat. 544, 566. Ever since the passage of that act, Congress has governed the Indians by law, and not by treaty, and the policy affords cogent reason why general laws should apply to individual Indians in Alaska as well as elsewhere.

It was held in the case of *United States v. Cadzow* (5 Alaska Reports 125), that the aboriginal tribes of Alaska have a right to occupy the public lands of the United States therein subject to the control of both the lands and the tribes by the United States; also that the uncivilized native tribes of Alaska are wards of the Government—the United States has the right, and it is its duty, to protect the property rights of its Indian wards.

There are provisions in each of the following acts designed to protect the Indians of Alaska in the use and occupancy of the lands held by them: acts of May 17, 1884 (23 Stat. 24), and June 6, 1900 (31 Stat. 321, 320), providing a civil government for Alaska; act of March 3, 1891 (26 Stat. 1095), repealing timber culture laws and for other purposes, and act of May 14, 1898 (30 Stat. 409, 412), extending the homestead laws and providing for right of way for railroads in the District of Alaska.

The act of May 17, 1906 (34 Stat. 197), is entitled "An Act authorizing the Secretary of the Interior to allot homesteads to the *natives* of Alaska." [Italics supplied.] This act authorizes the Secretary of the Interior in his discretion to allot not to exceed 160 acres of nonmineral land "to any Indian or Eskimo of either full or mixed blood who resides in and is a native of said district". It was held in the case of *Frank St. Clair* (52 L. D. 597, 599-600)—

* * * This is a special act relating to Alaska natives and is clearly separate and distinct from the act of May 14, 1898 (30 Stat. 409), extending the homestead land laws of the United States to the district of Alaska.

* * * * *
The vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain of the United States; and the Indians of Alaska are wards of the Government and as such are entitled to the equal protection of the laws applicable to Indians within the limits of the United States. *United States v. Berrigan* (2 Alaska Reports 442); *United States v. Cadzow* (5 Alaska Reports 125). The natives of Alaska are wards of the Government and under its guardianship and care at least to such an extent as to bring them within the spirit if not within the exact letter of the laws relative to American Indians, their relations are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial

limits of the United States (49 L. D. 592). The Indians and other "natives" of Alaska are in the same category as the Indians of the United States; from an early date, pursuant to the legislative intent indicated by Congress, this department has consistently recognized and respected the rights of the Indians of Alaska in and to the lands occupied by them. 50 L. D. 315; 51 L. D. 155; *Alaska Pacific Fisheries v. United States* (248 U. S. 78); *Territory of Alaska v. Annette Island Packing Co.* (289 Fed. 671).

The status of an applicant under the act of May 17, 1906, authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska is analogous to section 4 of the act of February 8, 1887 (24 Stat. 388), which provides that an Indian who has settled upon public lands of the United States shall be entitled to have the same allotted to him in the manner as provided by law for allotments to Indians residing upon reservations. This, of course, involves separation and living apart from the tribe. A reservation allottee is not required to reside upon or improve the land allotted to him. The court took the position in the case of *Nagle v. United States* (191 Fed. 141), that said act, especially that section thereof which declares an Indian born within the Territorial limits of the United States who has taken up within said limits his residence separate and apart from the tribe to be a citizen is in effect in Alaska.

* * * * *

The allotment to an Indian or Eskimo under the act of May 17, 1906, creates a particular reservation of the land for the allottee and his heirs but the title remains in the United States. *Charlie George et al.* (44 L. D. 113), *Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.* (229 Fed. 966).

See also the cases of *Charlie George et al.* (44 L. D. 113), and *Charley Clattoo* (48 L. D. 435).

The natives of Alaska do not for the most part live on reservations and very few have been created. However, the Attorney General and the courts have recognized that power exists to create Indian reservations as well as reservations for other public purposes. *Alaska Pacific Fisheries v. United States* (248 U. S. 78); *United States v. Leathers* (Fed. Cas. No. 15581, 26 Fed. Cas. 897, 6 Sawyer 17); and 17 Ops. Atty. Gen. 258.

The act of March 3, 1891 (26 Stat. 1095, 1101), authorizing the establishment of townsites in Alaska, the acquisition by individuals of limited areas for trade or manufacturing purposes, etc., expressly excepts "any lands * * * to which the natives of Alaska have prior rights by virtue of actual occupation." The act also set apart the Annette Islands as a reservation for the use of the Metlakahtla Indians who immigrated from British Columbia to Alaska, "and such other Alaskan natives as may join them." It has since been held that the reservation so created extends to and includes adjacent "deep waters." It was also held in *Alaska Pacific Fisheries v. United States* (248 U. S. 78, 88, 89)—

* * * The reservation was not in the nature of a private grant but simply a setting apart "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a

dependent Indian people dwelling within the United States. See *United States v. Kagama*, 118 U. S. 375, 379, et seq.; *United States v. Eickert*, 188 U. S. 432, 437.

* * * * *

The purpose of creating the reservation was to encourage, assist and protect the Indians in their efforts to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.

And in the case of *Territory v. Annette Island Packing Company* (6 Alaska Reports 585, 601, 604)—

While it may be true, as urged by counsel for the Territory that the Matlakahtlans residing on the reserve are not a tribe of Indians in the sense used in the Constitution of the United States, yet they are, and always have been, recognized as members of the Indian race, and the dealings of the Government with them have been as if they were a dependent people. * * *

* * * These people, residing on a reservation established on their behalf by Congress, which they were authorized to use in common, subject to such restrictions and regulations as the Secretary of the Interior might make, took, in my view, a status politically analogous to that of native Indians on reservations within the United States, and hence became wards of the Government. This view of the status of these people is borne out by the Supreme Court in *Alaska-Pacific Fisheries v. United States*, reported in 248 U. S. 78, 39 Sup. Ct. 40, 63 L. Ed. 138.

The court also held in that case (syllabus)—

* * * The contract of lease between the Secretary of the Interior and the Annette Island Packing Company, together with its cannery, fish traps, and property used on the reservation under the lease, constitute and are an instrumentality of the United States, used by it in the performance of its duties to its Indian wards, and are not subject to taxation by the territory of Alaska. The attempt of the territory to levy and collect taxes on the said property or the packing company is ultra vires and void. Decree in favor of defendant and intervener and against the territory.

See also *Alaska Pacific Fisheries* (240 Fed. 274); *Territory of Alaska v. Annette Packing Company* (289 Fed. 671).

By Executive order of February 27, 1915, the President withdrew "from disposal, and set apart for the use of the Bureau of Education" 25,000 acres, including both land and water, surrounding the village of Tyonek near the north end of Cook Inlet in Alaska. The primary object of the reservation was to enable the department through the Bureau of Education to maintain a school and otherwise care for, support and advance the interests of the aboriginal natives of the village mentioned whose main support was through hunting, trapping and fishing. The question was submitted by the officers of the Bureau of Education as to the authority for entering into a lease for the establishment of a salmon cannery at or near the village. In Solicitor's opinion of May 18, 1923 (49 L. D. 592), it was held

that such authority existed, reference being made to the similar case of the Metlakahtla Indians of Annette Islands where it was held that the Secretary of the Interior had the power to grant such a lease. *Territory of Alaska v. Annette Islands Packing Company* (289 Fed. 671). The Solicitor stated, among other things (p. 593)—

The fundamental consideration underlying this question is the fact that these natives are, in a very large sense at least, dependent subjects of our Government and in a state of tutelage; or in other words, they are wards of the Government and under its guardianship and care. The relations existing between them and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States.

It was also held (syllabi)—

By article III of the treaty of March 30, 1867, under which the Territory of Alaska was ceded to the United States, and by subsequent acts providing for their education and support, Congress has recognized the natives of Alaska as wards of the Federal Government, thus giving them a status similar to that of the American Indians within the territorial limits of the United States.

While there is no specific statute relating to the subject, yet the inherent power conferred upon the Secretary of the Interior by section 441, Revised Statutes to supervise the public business relating to the Indians, includes the supervision over reservations in the Territory of Alaska created in the interest of the natives and the authority to lease lands therein for their benefit.

The Solicitor's opinion of March 12, 1924 (50 L. D. 315), had under consideration the status of the natives of Alaska with respect to the title to certain tide lands near Ketchikan. Reference was made in that connection to the provisions of the treaty of March 30, 1867, under which the Territory of Alaska was acquired by the United States as well as to the act of May 17, 1884 (23 Stat. 24), which virtually constitutes the organic act for the Territory of Alaska and which declares:

That the Indians or other persons in said district shall not be disturbed in the *possession* of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire *title* to such lands is reserved for future legislation by Congress. [Italics supplied.]

The act of March 3, 1891 (26 Stat. 1095), as previously stated, excepts "any lands * * * to which the natives of Alaska have prior rights by virtue of actual occupancy." The act of May 14, 1898 (36 Stat. 409), extended the homestead laws of the United States to the Territory of Alaska and authorized the Secretary of the Interior to reserve for use of the natives of Alaska "suitable tracts along the water front of any stream, inlet, bay or seashore, for landing places for canoes and other craft used by such natives." Pursuant to this authority the Secretary on August 5, 1905, reserved the lands described as "all lands in the vicinity of the mouth of Ketchi-

kan Creek which lie between the lands occupied by the natives and the limits of low tide of Tongass Narrows."

It was held in the above Solicitor's opinion that "the tide or other lands occupied by or reserved for the Indians at Ketchikan, Alaska, can not be disposed of under existing law, but that power rests with Congress."

It was also stated in that connection (p. 317)—

* * * From an early date, pursuant to the legislative intent indicated by Congress, this department has consistently recognized and respected the rights of the natives of Alaska in and to the lands occupied by them. See 13 L. D. 120; 23 L. D. 335; 24 L. D. 312; 26 L. D. 517; 28 L. D. 427; 37 L. D. 334.

See Solicitor's opinion of May 27, 1925 (51 L. D. 155), relative to the power of the Territorial Legislature to impose a tax upon reindeer held or controlled by the natives of Alaska. Reference was made to the case of *Territory of Alaska v. Annette Island Packing Company* (289 Fed. 671), which involved the question as to the authority of the Territory to tax the output of a salmon cannery under lease by the Secretary of the Interior to a packing company. It was held that the lease was an instrumentality of the Government to assist the Metlakahtla Indians to become self-supporting and hence the Territory of Alaska could not collect such a tax from the corporation.

It was held in the case of *Steamer Coquiltam v. United States* (163 U. S. 346, 352)—

* * * Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory. * * *

Under authority of the act of March 3, 1891 (26 Stat. 826), the Supreme Court of the United States in execution of this law by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

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

2, 1924 (43 Stat. 253), as Alaska has been held to be one of the Territories of the United States. Under the terms of Article III of the cession treaty of March 30, 1867, the civilized natives of Alaska have all along been citizens of the United States.

Approved:

RAY LYMAN WILBUR,

Secretary.

TAXATION OF INCOME FROM MINERAL PRODUCTION FROM RESTRICTED LANDS OF MEMBERS OF FIVE CIVILIZED TRIBES

Opinion, February 26, 1932

STATUTORY CONSTRUCTION.

Where the general language of a statute is broad enough to include the subject matter, any intent to exclude a person or class of persons must be definitely expressed therein.

INDIANS—INCOME TAX.

Indians as well as other citizens must be regarded as subject to the revenue laws of the United States and of the States in which they reside unless the particular income sought to be reached has been exempted from taxation by some Congressional enactment or rule of law.

INDIAN LANDS—ALIENATION—INCOME—TAXATION.

Restrictions against alienation imposed against lands for the protection of Indians have uniformly been regarded as withdrawing the lands from taxation, and where the lands themselves are nontaxable the income derived therefrom is likewise exempt.

DOUBLE TAXATION.

Double taxation or unequal taxation, so long as the inequality is not based upon arbitrary distinctions, is not repugnant to the Federal Constitution.

INDIAN LANDS—MINERAL LANDS—OIL AND GAS LANDS—INCOME—TAXATION—FIVE CIVILIZED TRIBES.

Section 3 of the act of May 10, 1928, subjected the income derived from mineral production from the restricted lands of the Five Civilized Tribes to both Federal and State taxation on and after April 26, 1931, except as to those lands allotted to members to which exemptions attached under provisions of the agreements under which allotted, such exemptions to continue for the periods specified irrespective of subsequent legislation by Congress purporting to subject them to taxation.

INDIAN LANDS—MINERAL LANDS—OIL AND GAS LANDS—INCOME—TAXATION—FIVE CIVILIZED TRIBES.

The Federal and State income tax to be levied upon the income derived from the mineral production from the restricted lands of the Five Civilized Tribes under section 3 of the act of May 10, 1928, is to be based upon the net income, that is the gross income less allowable deductions, accrued after April 26, 1931, and not to be confined to interest alone.

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion upon the following questions:

1. Does section 3 of the act of May 10, 1928 (45 Stat. 495), empower the State of Oklahoma and the Federal Government to levy and collect taxes upon the income derived by members of the Five Civilized Tribes in Oklahoma from the production of oil, gas and other minerals from their restricted lands?

2. If so, upon what basis should the taxes be computed?

Said section 3 reads—

That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

In my opinion of September 22, 1931 (53 I. D. 502), I had occasion to consider the scope and extent of the foregoing statute, and it was therein held that its provisions operated to subject the minerals produced from the restricted lands of these Indians to both Federal and State taxation save only as to those allottees upon whom exemptions from taxation had been conferred by the tribal allotment agreements, which exemptions constituted property rights within the protection of the Fifth Amendment to the Federal Constitution and hence were not subject to impairment by subsequent Congressional legislation. *Choate v. Trapp* (224 U. S. 665); *Carpenter v. Shaw* (280 U. S. 363).

That opinion, however, neither considered nor decided the question of whether the income received by restricted members of the Five Civilized Tribes from mineral production on their lands was taxable by the Federal and State governments under their respective revenue laws.

Section 3 above does not specifically mention income taxes unless that form of taxation be regarded as included in the broad language "All State and Federal taxes of every kind and character, the same as those produced from lands owned by other citizens of the State of Oklahoma." That taxation upon the income from production of minerals is included in this broad language is a permissible, if not a necessary, view. There is a substantial distinction, of course, between what are commonly known as property taxes and income taxes, the latter constituting an assessment upon the income of the

person and not upon any particular property from which that income is derived. See *Young v. Illinois Athletic Association*, (310 Ill. 75, 141 N. E. 369). This distinction has been repeatedly recognized by both the State and Federal Courts in connection with covenants contained in leases requiring the lessee to pay all taxes and assessments against the leasehold premises, the uniform holding in such cases being that the covenant does not impose upon the lessee the obligation of paying income taxes which the lessor is required to pay upon the rent received, such holding resting primarily on the ground that an income tax is not a tax on the property from which the income is derived. *Young v. Illinois Athletic Association, supra*; *Brainard v. New York Central Railroad Company* (242 N. Y. 125, 151 N. E. 152); *Illinois Central Railroad Company v. Indianapolis Union Railway Company* (6 Fed. (2d) 830, 837); *Mahoning Coal Railroad Company v. United States* (41 Fed. (2d) 533, 537). Similarly, it might be urged that as section 3 subjects not the Indians but the minerals produced from their lands to taxation, Congress contemplated only the levy and collection of property taxes as distinguished from income taxes and did not intend to subject the Indians to the payment of the latter in addition to the former. Recognizing fully the propriety of drawing a distinction between property taxes and income taxes in a proper case, such distinction can not well be invoked here inasmuch as we are not dealing with the obligation of one under a contract to pay the taxes of another, but with the validity of the tax assessment itself, the determination of which obviously must rest upon quite different considerations.

The language of the Federal revenue acts subjects the income of "every individual" to tax and includes income "from any source whatever". It has been suggested that this language, though otherwise comprehensive enough to include all Indians, restricted or unrestricted, does not embrace restricted Indians in the absence of special language bringing them within the provisions of the revenue laws. See *Blackbird v. Commissioner of Internal Revenue* (38 Fed. (2d) 976), also 34 Opinions Attorney General 439, 444. This broad proposition, however, seems to have been definitely rejected by the Supreme Court in *Choteau v. Burnet* (283 U. S. 691), in which it was held that the income derived from tribal sources of an Osage Indian having a certificate of competency was subject to the Federal income tax, the court saying, among other things: "The intent to exclude must be definitely expressed where, as here, the general language of the act laying the tax is broad enough to include the subject matter." Indians as well as other citizens must therefore be regarded as subject to the revenue acts of the United States and

of the States in which they reside unless—and herein lies the fundamental reason for the exemption of the restricted Indians from the income-tax laws—the particular income sought to be reached has been exempted from the tax by some Congressional enactment or rule of law. Congress, in its dealings with the Indians, has frequently provided in express terms that their lands shall be exempt from taxation. Even in the absence of such express declaration, however, the restrictions against alienation imposed against the lands for the protection of the Indians have uniformly been regarded as withdrawing the lands from taxation. *Carpenter v. Shaw* (280 U. S. 363, 366); *United States v. Rickert* (188 U. S. 432); *United States v. Shock* (187 Fed. 870). The lands themselves being nontaxable, the income therefrom, coming as it does from an exempt source, is likewise exempt. *Pollock v. Farmers' Loan & Trust Company* (157 U. S. 429; 158 U. S. 601). See also *Gillespie v. State of Oklahoma* (257 U. S. 501). In the *Gillespie* case the Supreme Court held that the net income derived by lessee from sales of his share of oil and gas received under leases of restricted Osage and Creek lands could not be taxed by the State of Oklahoma, saying, among other things: "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void."

The periods of restriction surrounding the lands belonging to the members of the Five Civilized Tribes, as fixed in the original allotment agreements negotiated with these tribes, were not identical but were subsequently made uniform by the acts of April 26, 1906 (34 Stat. 137), and May 27, 1908 (35 Stat. 312). The period of restrictions as fixed by these acts would have expired in the absence of further legislation by Congress on April 26, 1931. During this period the lands, the underlying minerals, and the income therefrom, were protected from both State and Federal taxation. *Gillespie v. State of Oklahoma, supra*; *Carpenter v. Shaw, supra*; 34 Opinions Attorney General 275. By section 1 of the act under consideration Congress extended the restrictions for an additional period of 25 years, but in so doing saw fit to depart from its usual policy of relieving the lands from taxation by declaring in section 3 that all minerals including oil and gas produced from these lands should be subject to all forms of State and Federal taxation. By this Congressional direction the exemption from taxation of the minerals was plainly and effectively removed, a circumstance which likewise made the income derived by the Indians from mineral production subject to taxation. *Pollock v. Farmers' Loan & Trust Company, supra*.

Section 27 of the Oklahoma income-tax law, which became a law on April 4, 1931 (236 Acts of the 13th Legislature, Chap. 66, Art 7) provides—

All gross production taxes, gross receipts or gross revenue taxes paid or to be paid under other laws of this state, are hereby declared to be in lieu of general *ad valorem* property taxes, and shall not be construed to be in lieu of the net income tax hereby levied.

It appears from the foregoing provision that the tax to be levied by the State of Oklahoma upon the income derived by these Indians from mineral production will be in addition to the gross production tax provided for by other laws of that State. This seems to savor strongly of double taxation but that in itself would not invalidate the tax. This was expressly decided in *Shaffer v. Cartér* (252 U. S. 37). Upon this point the court said (p. 57)—

Reference is made to the gross production tax law of 1915 (c. 107, Art. 2, Subdiv. A, Sec. 1; Sess. Laws 1915, p. 151), as amended by c. 39 of Sess. Laws 1916 (p. 104), under which every person or corporation engaged in producing oil or natural gas within the State is required to pay a tax equal to 3 per centum of the gross value of such product in lieu of all taxes imposed by the State, counties, or municipalities upon the land or the leases, mining rights, and privileges, and the machinery, appliances, and equipment, pertaining to such production. It is contended that payment of the gross production tax relieves the producer from the payment of the income tax. This is a question of state law, upon which no controlling decision by the Supreme Court of the State is cited. We overrule the contention, deeming it clear, as a matter of construction, that the gross production tax was intended as a substitute for the *ad valorem* property tax but not for the income tax, and that there is no such repugnance between it and the income tax as to produce a repeal by implication. Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367-368.

The first question is accordingly answered in the affirmative with the qualification that as to those lands allotted to the members of the Five Civilized Tribes to which exemptions from taxation attached under the provisions of the agreements under which allotted, such exemptions continue for the periods specified in such agreements irrespective of subsequent legislation by Congress purporting to subject them to taxation.

Regarding the second question, involving the basis for computation of the taxes to be paid, it is plain that the tax under both Federal and State law is upon the net income, which is determined by subtracting the allowable deductions from the gross income. From a letter presented with the record, signed by the superintendent for

the Five Civilized Tribes, it appears that he is in doubt as to whether, in making returns, there should be reported as gross income the entire amount of royalties and other funds received from mineral leases or whether the report of gross income should be confined to the interest earned or accruing upon such funds. He states in this connection that it has been the practice heretofore to report interest only. Explaining this former practice, it may be said that while both the Attorney General and the Internal Revenue authorities have recognized that the royalties produced from tax-exempt land were not subject to taxation, the latter authorities have ruled that the income which may be obtained by reinvestment of such royalties is taxable to the same extent as the investment income of other citizens and residents of the United States. See opinion of General Counsel, Bureau of Internal Revenue, July 13, 1931 (Vol. X, Internal Revenue Bulletin No. 28, p. 2). The practice of reporting interest only under this decision may have been proper, but as the exemption from taxation of the minerals and the income therefrom has now been removed, it is clear that the entire amount of royalties and other funds accruing from mineral leases should be reported as gross income. See *Von Baumbach v. Sargent Land Company* (242 U. S. 503). Under the provisions of the statute, however, only such income as accrued from minerals produced "on or after April 26, 1931" should be included in the returns.

Approved:

JOS. M. DIXON,

First Assistant Secretary.

MERRILL, BUCK, INTERVENOR v. SMITH

Decided February 29, 1932

CONTEST — HOMESTEAD ENTRY — HEARING — DEPOSITION — CONTINUANCE — WITNESSES — PRACTICE

A motion by one of the parties to a hearing in a contested land matter before a local office to take a deposition of a person residing without the State is in the nature of a continuance and is to be governed by the Rules of Practice relating to continuance, and an exception to the rule will not be made where the motion was not timely presented for the reason that it was expected that the witness would be present and testify at the hearing. *McEuen v. Quiroz* (50 L. D. 167), and *Southern Pacific Railroad Company* (52 L. D. 437).

EDWARDS, *Assistant Secretary:*

Hubert M. Merrill, contestant, and Bushrod M. Buck, intervenor, have appealed from the decision of the Commissioner of the General Land Office, dated November 12, 1931, wherein he affirmed the deci-

sion of the local register in dismissing the contest of Merrill against the homestead entry, Phoenix 061115, of Gibson C. Smith made August 18, 1927, under section 2289, Revised Statutes. The entry originally embraced NW $\frac{1}{4}$ Sec. 34, T. 3 N., R. 3 E., G. & S. R. M., but subsequently he relinquished the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ to extent of conflict with the Elizabeth lode claim, because of conflict with mining claims.

Upon the evidence adduced at a hearing between the parties the register and Commissioner both found that the land was not mineral in character as alleged by appellants. Sufficient warrant for this finding is challenged in the appeal. The testimony in full and documentary evidence in the record has been considered by the department particularly that part thereof quoted extensively in contestants' brief and argument. The department is convinced that the findings below are right and according to the clear weight and preponderance of the evidence, and that the grounds upon which the Commissioner bases his decision are fully warranted by the evidence and well stated, and need no restatement or further elaboration here.

Contestants further complain of the ruling of the register, sustained by the Commissioner, which denied on objection by contestee their motion to take the deposition of a person residing without the State. Notice of such motion was not served on the opposite party until four days before the date of hearing set before the local office, and not filed until the day before the hearing. Pursuant to directions of the Commissioner dated July 8, 1930, to proceed with a hearing, notice thereof was issued October 22, 1930, setting the case for trial November 19, 1930. The only explanation given for the belated motion was that it was anticipated that the person whose deposition was to be taken would return to Phoenix in time to be present and testify at the hearing. Counsel for contestant disclaimed any intention, by presenting the motion, to obtain a continuance of the hearing, but merely requested that the case be left open for the submission of the deposition desired. But the grant of such a motion necessarily would operate as a continuance. See *McEuen v. Quiroz* (50 L. D. 167). The contestee was not obliged to present his case until the contestant closed his evidence in chief. Before that time he is not fully advised of the nature of the evidence against him. If such procedure is countenanced, then it might be necessary for contestee also to adduce further evidence to refute that in the deposition, and thus be subjected to the additional burden and expense of an additional hearing, all because the contestants instead of applying for the authority to take the deposition, and applying for a continuance, if that were shown necessary in order to secure the deposition desired, took a chance on securing

the personal presence of a witness at the trial. If contestants had adequate grounds under the Rules of Practice, at the date of hearing to obtain a continuance, they could have presented their motion to that effect, but this was not done. In *Southern Pacific Railroad Company*, (52 L. D. 437), the department took occasion to disapprove of the practice of compelling a defendant to try his case piecemeal, by a practice similar to that sought to be justified here, without stipulation between the parties or proper showing justifying a postponement of the hearing. The case of *Harper v. Bell* (8 L. D. 197), and *Chinn v. Coge* (10 L. D. 480), cited by contestants' attorney are not applicable to this case. They were cases arising before the act of January 31, 1903 (32 Stat. 790), which provided for the issuance of subpoenas for witnesses and making their attendance compulsory. The witnesses in those cases either refused or neglected to attend, and it is stated in those decisions that the facts set up in the motion would have justified a postponement of the hearing. The reason for the rule there applied does not exist in this case. The register under the circumstances presented did not abuse his discretion in denying the motion. The Commissioner's decision is

Affirmed.

CARTER BLATCHFORD

Decided March 10, 1932

PUBLIC LANDS—CONTRACT TO PURCHASE—POSSESSION—PREFERENCE RIGHTS—MEANDER LINE—SURVEY—WISCONSIN.

A purchaser in possession of land under a contract to purchase is an owner within the contemplation of section 3 of the act of February 27, 1925, which provides that erroneously meandered lands in the State of Wisconsin may be divided among the owners of the surrounding or adjacent tracts, and is, therefore, entitled to the preference right privilege accorded by section 2 of that act. *Boone v. Chiles* (10 Pet. 177), and *Williams v. United States* (138 U. S. 514).

EDWARDS, Assistant Secretary:

Carter Blatchford has appealed from a decision by the Commissioner of the General Land Office dated November 25, 1931, rejecting his application, G. L. O. 03356, filed June 11, 1931, to purchase lots 9 and 10, Sec. 23, T. 42 N., R. 5 E., 4th P. M., Wisconsin, under the act of February 27, 1925 (43 Stat. 1013), on the ground that he did not have title to the adjoining lots 6 and 7, Sec. 23 at the date of the passage of said act of February 27, 1925, and had placed no improvements upon nor cultivated any portion of said lots 9 and 10.

The appellant showed that on December 26, 1925, he secured title by warranty deed to said lots 6 and 7, and other lands not here

involved. He admitted that he had not placed any improvements upon or cultivated any portion of said lots 9 and 10. But he has also shown that he has been in possession of said lots 6 and 7 and other lands, under an agreement to purchase since January 1, 1923.

Section 2 of the act of February 27, 1925, reads in part as follows:

That any owner in good faith of land shown by the official public land surveys to be bounded in whole or in part by such erroneously meandered area, and who acquired title to such land prior to this enactment, or any citizen of the United States who in good faith under color of title or claiming as a riparian owner has, prior to this Act, placed valuable improvements upon or reduced to cultivation any of the lands subject to the operation of this Act, shall have a preferred right to file * * * an application to purchase the lands thus improved by them * * *.

A purchaser in possession by a contract to sell has the equitable title, the vendor having the mere right to retain the legal title as security for any unpaid balance of the agreed purchase price. See *Williams v. United States* (138 U. S. 514, 516); *Boone v. Chiles* (10 Pet. 177, 224).

In section 3 of said act of February 27, 1925, it is provided that such erroneously meandered lands may be divided among the *owners* of such surrounding or adjacent tracts.

It is clear that on February 27, 1925, the appellant held the equitable title to and was the owner of said lots 6 and 7 so that he had a preferred right to file application to purchase the lots 9 and 10 involved.

The decision appealed from is

Reversed.

WAGNER ASSETS REALIZATION CORPORATION

Decided March 11, 1932

MINING CLAIM—CONTIGUITY—APPLICATION—PATENT.

The element of contiguity of certain mining claims is not destroyed by the fact that an absolute fee title exists in the claimant as to some of them, and an owner of a number of claims who has received patent for certain contiguous claims of a group may apply for a patent for the remainder in one application under section 2325, Revised Statutes.

EDWARDS, Assistant Secretary:

July 3, 1931, the Wagner Assets Realization Corporation made mineral entry, Sacramento 026480, for the Last Chance No. 3, and Major Butt lode claims. The claims are not contiguous to one another, but each of them is contiguous to a body of land embraced in either the patented Southwest or Last Chance No. 2 lode claims which adjoin each other. It is averred by the corporation that the three claims entered and the two patented as above stated have for five

years last past been held by it in common ownership and undisturbed possession. The official plat of survey shows that the three claims entered and the two claims patented, together considered, form one integral body of land.

Notice of application for patent was posted on the Last Chance No. 3. The Commissioner of the General Land Office, by decision of December 11, 1931, permitted the entry to stand as to the Last Chance No. 3 but held it for cancellation as to the Last Chance and the Major Butt because of noncontiguity with the Last Chance No. 3. Departmental decisions *Tomera Placer Claim* (33 L. D. 560), and *Hidden Treasure Consolidated Quartz Mine* (35 L. D. 485), are cited as authority for this action.

The requirement that lode mining claims sought to be embraced in a single application and entry shall be contiguous does not, as recognized in the last-cited case, rest upon specific prescription either by statute or mining regulation, but is implied from certain words of section 2325, Revised Statutes, in which the mining claim for which patent may be obtained is spoken of as "a piece of land" and in the same connection as "the claim or claims in common." The principle deduced from that statute was, in the *Hidden Treasure case*, that the locations embraced in one application shall together comprise one body of land. Consequently, where, as in that case, the locations only had a common corner and no lines coincided, it was held that (p. 487)—

* * * The provisions of the statute in that behalf are clearly inapplicable to detached locations, which can not in the nature of things form the piece or body of land to which the requisites to the obtaining of a patent are made to relate.

Likewise in *Tomera Placer Claim*, *supra*, where the same rule was applied patent was sought to a placer location composed of a number of ten-acre tracts some only cornering with the others.

But where the locations for which patent was sought were valid and otherwise patentable and were part of one and the same body of land held in common ownership by the applicant and legal obstacles appeared to prevent entry and patent of all the body so owned and under location, the department has not rigidly adhered to the rule that the locations embraced in one entry and patent should be contiguous. Instances of departure from the letter of the rule but not the underlying principle appear in the following cases:

In *William Dawson* (40 L. D. 17), where the rejection of one lode claim for insufficient patent expenditure rendered the remaining claims incontiguous, the latter were allowed to be retained and patented. In *United States v. The Millfork Oil and Shale Company* (52 L. D. 610), like action was taken as to placers. In *United States*

v. Bunker Hill and Sullivan Mining and Concentrating Company (48 L. D. 598, 604), of the 31 lode claims applied for only 16 were held to have adequate discoveries. The necessary elimination of the remainder rendered certain of the 16 claims inconspicuous, nevertheless, it was held—

* * * the department is not disposed to cancel such noncontiguous claims, in view of the fact that the claims as located and held by applicant company form a contiguous body of land held and worked under the general mining laws, and will occupy that status after the cancellation of the entry to the extent of the claims on which discovery has not been made.

As stated above, with reference to the question of discovery after application, no good purpose would be served in a case like this by cancellation of the said locations and the subjecting of the company to new proceedings. The law is met, in my judgment, by the fact above stated that the group of claims forms a contiguous body, held and worked in common ownership—contiguous in fact—upon the ground, and which presumably will be made contiguous upon the records by subsequent proceedings by the applicant after discovery shall have been established on the claims now held for cancellation because of nondiscovery.

In *American Gem Mining Syndicate*, decided February 27, 1915, unreported, locations covering three detached areas but all contiguous to a patented claim owned in common with the locations embraced in the entry were allowed to remain intact, but it was expressly stated in the decision that it was not to be taken as a precedent in cases arising hereafter and for that reason the Commissioner in this case declined to follow it.

The department is, however, unable to perceive in cases where an owner of a number of mining locations has received patent for certain contiguous claims of the group or acquired the title thereunder may not apply for patent to the remainder in one application where the record shows the claims patented and the claims for which patent is sought, together considered, satisfy the rule as to contiguity. The element of contiguity is not destroyed by the fact that an absolute fee title exists in the applicant as to some of them. The Supreme Court in *Smelting Company v. Kemp* (104 U. S. 636, 643), in holding that separate applications need not be made for each location of a contiguous group of locations, said (p. 653)—

* * * Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land-officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subject to onerous and ruinous burdens.

No advantage to the public or mining interests is seen in an insistence in the present case upon the presentation of separate applications for the two locations held for cancellation. The law does not require it, and patents to inconspicuous parcels of land under the

mining law have been upheld by the courts. See *Round Mountain Mining Company v. Round Mountain Sphinx Mining Company* (Nev.) (138 Pac. 71).

The decision of the Commissioner is accordingly

Reversed.

HENRY P. BOCKRATH

Instructions, March 15, 1932

TRANSFER OF PURCHASE PRICE—RECLAMATION—WATER RIGHT—OPERATION AND MAINTENANCE CHARGES—PATENT.

The Secretary of the Interior has no authority to accept a transfer to the United States of a tract of land and water right within the limits of the Yuma auxiliary reclamation project patented under the act of January 25, 1917, subject to a condition that the purchase price of the reconveyed property shall be applied toward the operation and maintenance charge on another tract of land patented to the grantor under the same act and upon the same project.

First Assistant Secretary Dixon to the Commissioner of the General Land Office.

By your [Commissioner of the General Land Office] letter of March 7, 1932, you have requested instructions as to whether a patentee of a land and water right application initiated under the act of January 25, 1917 (39 Stat. 868) as amended February 11, 1918 (40 Stat. 437), may reconvey patented tracts to the United States and have the land and water right moneys paid thereon transferred to and applied as operation and maintenance charges due or to become due on a patented farm unit retained.

The acts of Congress referred to were authorizations for the construction of the Yuma auxiliary project near Yuma, Arizona. By section 1 of the act of 1917, *supra*, it is provided, among other things—

That the Secretary of the Interior is hereby authorized to set apart any lands in the State of Arizona heretofore or hereafter withdrawn under the reclamation law in connection with the Yuma reclamation project as an auxiliary reclamation project or unit, and sell, in tracts of such size as he may determine of not more than 160 acres to any one purchaser, the lands so set apart and believed to be susceptible of irrigation, at public sale under suitable regulations for not less than the reasonable value per acre of the land plus the estimated cost per acre of reclamation works to be constructed for the reclamation of said lands so set apart plus the proportionate cost per acre of the works previously constructed and available therefor * * * The Secretary of the Interior at or prior to the time of sale shall fix and determine (a) the reasonable value of the land per acre; (b) the estimated cost per acre of the works to be constructed and (c) the proportionate cost per acre of the works previously constructed and available for the lands offered for sale.

It is provided in the second section of the act that—

* * * Upon full payment of the purchase price patent shall issue for the lands and no qualification or limitation shall be required of any purchaser or patentee except that he be a citizen of the United States. Such patent shall also contain a grant of a water right appurtenant to the land.

Certain lands on the Yuma Mesa lying east of the irrigated section of the Yuma project were subdivided into farm units and an estimate was made before the time of sale which determined the reasonable value of the land to be \$25 per acre, the estimated cost of the works to be constructed \$160 per acre, and the proportionate cost per acre of the works previously constructed at \$40 per acre, or a total of \$225 per acre for the land and water right. The act provided that the lands should be sold and payment of 25 per cent of the purchase price should be made at the time of sale and 25 per cent each year thereafter with 6 per cent interest on the deferred installments. There was no limit upon the number of units that one person could acquire. The act of 1918, *supra*, is not important in the consideration of the question submitted.

On December 13, 1927, the General Land Office issued patent No. 1010044 to Henry P. Bockrath on land and water right application 056405, Phoenix, Arizona, series, embracing farm unit "M" or NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 5, T. 10 S., R. 23 W., G. & S. R. M., Arizona, under the act of January 25, 1917, *supra*, and on December 13, 1927, patent No. 1010045 issued to Henry P. Bockrath under the provisions of the same act on application 057571, Phoenix series, embracing farm unit "E" or SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 5, T. 10 S., R. 23 W., G. & S. R. M., Arizona.

On April 27, 1931, Bockrath filed in the local land office a relinquishment of said land and water right application 056405, which relinquishment was accompanied by a warranty deed executed March 27, 1931, from Henry P. Bockrath and Blanche G. Bockrath, his wife, conveying said farm unit "M" to the United States. The deed was recorded March 30, 1931. The grantors filed an abstract of title which showed good title in Bockrath at the time of the executing and recording of the deed. The deed of reconveyance and the application for transfer of credits were approved by the project superintendent of the Bureau of Reclamation at Yuma, Arizona, under order of the First Assistant Secretary of the Interior dated May 10, 1922, as supplemented by departmental order of July 31, 1924.

The order of May 10, 1922, was issued on a statement of facts which outlined that some of the purchasers of land found that while they were unable to meet the payments on the total amount of land purchased they would be able to meet the payments on a reduced area until relinquishments were permitted and all of the payments al-

ready made were applied to a reduced area. This had reference to those who had purchased more than one unit. There was also a second class of purchasers who had holdings in the south part of the subdivision which holdings could not be irrigated for some time because the irrigation canals had not been extended to the land. Upon relinquishments being made of areas in the north part of the subdivision it would be advantageous for those in the south part to entirely relinquish their holdings and transfer their rights (payments) to units in the north part or subdivision so they would be able to irrigate the land at an early date. At the time this order was issued none of the lands had proceeded to patent and apparently no applicant had paid the full water right charge.

By the order of July 31, 1924, authority was granted to permit a purchaser who had obtained patent for his land by completion of payments of land and water right charges to reconvey the land to the United States and take a lieu selection at some favorable location on the project and have the money paid on the patented tract transferred for payment of land and water right charges on the lieu tract. It is not the intention of this instruction to change any of the provisions of these two orders because they contain reasonable provisions. Paragraph (a) of the order of May 10, 1922, provides—

That upon approval of the project manager any purchaser of land in Part One, Mesa Division (formerly First Mesa Unit), Yuma Irrigation Project, Arizona, be permitted to relinquish to the United States land so purchased, in areas of either 5, 10 or 15 acres: Provided that, except as modified under (b), an area of not less than 5 acres be retained by the persons so relinquishing; Provided further, that all moneys theretofore paid by any such purchaser on account of the land so relinquished shall be credited and applied in payment of the charges against the area retained.

Paragraph (b) of the said order provides—

That upon approval by the project manager any such purchaser may relinquish to the United States his entire holding, for the purpose of transferring their rights to a different area within said Part One, Mesa Division, in which event all moneys theretofore paid by any such purchaser on account of the land so relinquished shall be credited and applied in payment of the charges against the new area the same as if such new area had been originally selected by such purchaser.

These paragraphs deal with the transfer of credits before patent issued. In order to allow an exchange of a patented unit and the transfer of moneys paid thereon to a new unit under a lieu application the departmental order of July 31, 1924, ruled as follows:

The reasons specified as justification for the exchange arrangement therein provided in respect to the unwatered area apply as well to claims which have passed to patent as to those which have not been completed by final payment of purchase price and issuance of patent. The present regulations appear to be sufficient for this purpose when considered in connection with general regula-

tions in respect to amendment of entries and exchanges. Of course, in all cases where patent has issued, it is necessary to show good title in the party applying for exchange and a proper reconveyance of title to the Government.

The case under consideration at the present time involves two patented tracts of land on which all of the land and construction charges have been paid in full and title to the land passed out of the United States by patent. The request of Bockrath is that the payments made on the land and water right application 056405 conveyed to the United States be applied to and credited on said patented land and water right application 057571 retained. It is apparent that there is nothing owing the United States on the land and water right charge on 057571. Therefore, such application of credits could not be made and the United States would be placed in the position of owing Mr. Bockrath a considerable sum of money due on a purchase of a tract of patented land. This involves an entirely different situation than that presented and allowed by the orders of May 10, 1922, and July 31, 1924. In this instance the applicant would be entitled to receive from the United States \$2,316.48 as purchase price of the land and water right less any sum that might be due from the grantor to the United States. While the statements in the record seem to imply that this balance would be used in payment of operation and maintenance charges on the retained unit as such charges accrue from year to year, it is evident that the transaction would involve many possible difficulties. The grantor might demand the money from the United States in payment of the purchase price for the land transferred, and so far as the record now stands a recovery could be had against the United States for the balance due. Operation and maintenance charges are annual obligations and Bockrath would not owe the United States for operation and maintenance a sufficient amount to balance the account until an elapsed period of over ten years.

There is no authority of law and no regulation under the Yuma auxiliary enactments authorizing the transfer to the United States of a patented tract of land located within the limits of the Yuma auxiliary project on condition that the purchase price of the reconveyed tract shall be applied upon the operation and maintenance charge of a tract of land held by the grantor.

The request of Mr. Bockrath should be rejected.

LEAVE OF ABSENCE FROM HOMESTEADS IN DROUGHT-STRICKEN
AREAS—ACT OF MARCH 2, 1932

INSTRUCTIONS

[Circular No. 1265]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 26, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

The act of March 2, 1932 (47 Stat. 59), entitled "An act to excuse certain persons from residence upon homestead lands during 1929, 1930, 1931, and 1932, in the drought-stricken areas," reads as follows:

That any homestead settler or entryman who, during the calendar year 1929, 1930, or 1931, found it necessary, or during 1932 should find it necessary, to leave his homestead to seek employment in order to obtain food and other necessities of life for himself, family, or work stock because of serious drought conditions, causing total or partial failure of crops, may, upon filing with the register of the district proof of such conditions in the form of a corroborated affidavit, be excused from residence upon his homestead during all or part of the calendar years 1929, 1930, 1931, and 1932, and said entries shall not be open to contest or protest because of such absences: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law, but an equivalent period shall be added to the statutory life of the entry.

Leaves of absences for all or part of the years mentioned by this act may be granted thereunder by the register of the district land office to any homestead settler or entryman who has established actual residence upon the lands and who thereafter found it necessary to leave his homestead to seek employment in order to obtain food and other necessities of life for himself, family, or work stock because of total or partial failure of crops due to serious drought conditions.

The application for such leave of absence must be sworn to by the applicant and corroborated by at least one witness in the land district or county within which the lands claimed under the homestead laws are located before any officer authorized to administer oaths and using a seal. It must describe the land claimed and show the date when residence was established thereon and how the same was maintained thereafter by giving the dates of the beginning and ending of all residence periods and of all absence periods and the character of the improvements and cultivation performed by the applicant. It must set forth fully all the facts on which the claimant bases his right to a leave of absence, the purpose of his request for leave, what

effort was made to raise crops, giving the dates of the planting and the kind of crops planted and whether or not the drought conditions caused total or partial failure of crops.

If a leave of absence under this act is granted, it protects the entry from contest or protest on a charge of abandonment unless it be shown that the leave of absence was fraudulently obtained. The failure of an entryman to apply for such a leave of absence does not forfeit his right to show in defense of a contest or protest the existence of conditions which might have been made the basis for such an application.

The period during which a homesteader is absent from his claim pursuant to a leave duly granted under this act cannot be counted as any part of the actual residence on the land required by law but an equivalent period may be added to the statutory life of the entry.

This circular should be posted in a conspicuous place and be given to the press as a news item.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

SATUS UNIT OF THE WAPATO IRRIGATION PROJECT

Opinion March 30, 1932¹

RECLAMATION—WAPATO IRRIGATION PROJECT—YAKIMA INDIAN LANDS.

Congress has by legislation determined that the Wapato irrigation project in the State of Washington comprises all of the lands on the Yakima Indian Reservation irrigated by diversion waters from the Yakima River.

RECLAMATION—WAPATO IRRIGATION PROJECT—YAKIMA INDIAN LANDS—WATER RIGHTS—DIVERSION—SEEPAGE—POSSESSION.

Seepage and waste water remaining after a lawful appropriation of water diverted from a stream continues to belong to the original appropriator so long as he does not abandon it and is able and willing to apply it to beneficial uses, notwithstanding that it had been commingled with other waters and that his possession was not at all times actual and continuous. *Ide v. United States* (263 U. S. 497).

RECLAMATION—WAPATO IRRIGATION PROJECT—SATUS UNIT—YAKIMA INDIAN LANDS—WATER RIGHTS.

Lands under the Satus unit found to be irrigable and for which irrigation facilities were provided by the act of January 24, 1923, and subsequent acts, are to be considered as a part of the Wapato irrigation project for all purposes in connection with distribution of waters and construction costs.

¹ Adhered to in unpublished Solicitor's opinion of May 13, 1932.—Ed.

RECLAMATION—WAPATO IRRIGATION PROJECT—SATUS UNIT—YAKIMA INDIAN LANDS—ALLOTMENT—WATER RIGHTS—CONSTRUCTION CHARGES—LIEN.

Forty acres of each Indian allotment under the Satus unit are entitled to a free water right but are subject to a lien for construction charges in the same amount as all other lands on the project receiving the same water right.

RECLAMATION—WAPATO IRRIGATION PROJECT—SATUS UNIT—YAKIMA INDIAN LANDS—ALLOTMENT—WATER RIGHTS—CONSTRUCTION CHARGES.

All lands in excess of forty acres in each Indian allotment under the Satus unit shall be considered in the class subject to their *pro rata* share of the construction charge of the project, including the cost of the water right.

RECLAMATION—WAPATO IRRIGATION PROJECT—SATUS UNIT—YAKIMA INDIAN LANDS—ALLOTMENT—PATENT—WATER RIGHTS—CONSTRUCTION CHARGES—LIEN.

The lien imposed by the act of May 18, 1916, upon allotted lands patented in fee before all the charges authorized by the act shall have been paid, extends to the lands of the Satus unit of the Wapato irrigation project.

FINNEY, *Solicitor*:

My opinion is requested upon questions submitted by the Commissioner of Indian Affairs in his letter of March 3, 1932. The questions are as follows:

1. Shall lands under the Satus unit found to be irrigable and for which irrigation facilities were provided under authorization of the act of January 24, 1923, and subsequent acts, be considered as a part of the Wapato project as far as determining the per acre cost of construction?

2. Shall 40 acres of each Indian allotment under the Satus unit be entitled to a Class "A" water right and only be required to pay its *pro rata* share of the Wapato project construction costs?

3. Shall all the land in excess of 40 acres in each allotment under the Satus unit be considered as having a Class "B" water right and be required to pay the *pro rata* share of storage water costs of the Wapato project?

These questions might all be answered in the affirmative without further discussion, but some foundation should be laid for the conclusion.

The legislative relative to the Yakima Indian Reservation and the irrigation of lands therein extends over a period of more than 75 years, commencing with the treaty of June 9, 1855, made with the Yakima Confederated Tribes, ratified by the Senate March 8, 1859, proclaimed by the President April 18, 1859 (12 Stat. 951), down to the last appropriation act of Congress making appropriation for the Interior Department. For the purpose of ready reference the acts of Congress are listed, and where appropriations have been made for the Wapato project the amount is set opposite the appropriate act.

Date of act	Reference	Amount appropriated reimbursable	Amount appropriated nonreimbursable
March 8, 1859	12 Stat. 951		
February 8, 1887	24 Stat. 388		
March 3, 1893	27 Stat. 612, 631		
June 21, 1906	34 Stat. 325, 377	\$15,000.00	
March 1, 1907	34 Stat. 1015, 1050	15,000.00	
April 30, 1908	35 Stat. 70, 96	15,000.00	
March 3, 1909	35 Stat. 781, 813	15,000.00	
April 4, 1910	36 Stat. 269, 286	265,000.00	
March 3, 1911	36 Stat. 1058, 1075	15,000.00	
August 24, 1912	37 Stat. 518, 538	15,000.00	
June 30, 1913	38 Stat. 77, 100	15,000.00	
August 1, 1914	38 Stat. 582, 604	15,000.00	\$100,000.00
March 4, 1915	38 Stat. 1228	15,000.00	100,000.00
May 18, 1916	39 Stat. 123, 153	215,000.00	100,000.00
March 2, 1917	39 Stat. 969, 989	215,000.00	100,000.00
May 25, 1918	40 Stat. 561, 587	515,000.00	100,000.00
June 30, 1919	41 Stat. 3, 27	515,000.00	100,000.00
February 14, 1920	41 Stat. 408, 431	250,000.00	35,000.00
March 3, 1921	41 Stat. 1225, 1246	250,000.00	
May 24, 1922	42 Stat. 552, 578	250,000.00	
May 25, 1922	42 Stat. 595		
January 24, 1923	42 Stat. 1174, 1200	190,000.00	11,000.00
June 5, 1924	43 Stat. 390, 403	10,000.00	11,000.00
March 3, 1925	43 Stat. 1141, 1154	10,000.00	11,000.00
May 10, 1926	44 Stat. 453, 467	6,000.00	11,000.00
January 12, 1927	44 Stat. 934, 946	185,000.00	11,000.00
March 7, 1928	45 Stat. 200, 214	185,000.00	
March 4, 1929	45 Stat. 1562, 1576	1,000.00	11,000.00
May 14, 1930	46 Stat. 279, 292	91,000.00	11,000.00
February 14, 1931	46 Stat. 1115, 1129	361,000.00	11,000.00

The limits of the Yakima Indian Reservation in Washington are set forth in Article II of the treaty made with the Yakima Nation of Indians on June 9, 1855, *supra*. The description is as follows:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

On the Yakima Indian Reservation there are three separate diversions of water for the irrigation of three widely separated areas: first, the area irrigated by diversions from Ahtanum Creek; second, the area irrigated near Fort Simcoe by diversions from Toppenish Creek, and third, the area lying west of the Yakima River and irrigated by diversions from that stream. The questions submitted for

answer and this opinion deal only with the area irrigated by diversion from the Yakima River. According to the latest available reports it appears that the Wapato project comprises a total area of 153,680 acres of which 124,442 are classed as irrigable.

Allotment of lands on the reservation began in the early 90's under the general allotment act of February 8, 1887 (24 Stat. 388), section 7 of which statute provides as follows:

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 reservation; 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.

The allotments were made in 80-acre tracts to each Indian in the area now comprising the Wapato project. After the enactment of the reclamation act, June 17, 1902 (32 Stat. 388), the development of irrigation on the opposite side of the Yakima River from the Indian reservation became important to the reservation interests. The regular flow of the Yakima River naturally reduced to a very small volume during August of each year, thus limiting the crops that could be irrigated successfully in this arid region. As an incident to the work by the Reclamation Service before construction was begun under the act referred to, a settlement of the existing water rights on the Yakima River was required, and in this operation the Secretary of the Interior decided that the lands on the Indian Reservation were entitled to 147 cubic feet per second of the low-water flow of the stream, and that the remaining water was intended for use on lands of the white settlers.

The act of December 21, 1904 (33 Stat. 595), authorized the sale and disposition of the surplus or unallotted lands of the Yakima Indian Reservation in the State of Washington. This act settled a dispute with the Indians relative to the western boundary of the reservation and provided, by sections 4 and 5 of the act, as follows:

SEC. 4. That the proceeds arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral lands, exclusive of the customary fees and commissions, shall, after deducting the expenses incurred from time to time in connection with the appraisements and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the Yakima Reservation, and shall be expended for their benefit under the direction of the Secretary of the Interior in the construction, completion, and maintenance of irrigation ditches, purchase of wagons, horses, farm implements, materials for houses, and other necessary and useful articles, as may be deemed best to promote their welfare and aid them in the adoption of civilized pursuits and in improving and building homes for themselves on their allotments; *Provided*, That a portion of the proceeds may

be paid to the Indians in cash per capita, share and share alike, if in the opinion of the Secretary of the Interior such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise.

Sec. 5. That the Secretary of the Interior is hereby authorized, in the cases of entrymen and purchasers of lands now irrigated or that may be hereafter irrigated from systems constructed for the benefit of the Indians, to require such annual proportionate payments to be made as may be just and equitable for the maintenance of said systems: *Provided*, That in appraising the value of irrigable lands, such sum per acre as the Secretary of the Interior may deem proper, to be determined as nearly as may be by the total cost of the irrigation system or systems, shall be added as the proportionate share of the cost of placing water on said lands, and when the entryman or purchaser shall have paid in full the appraised value of the land, including the cost of providing water therefor, the Secretary of the Interior shall give to him such evidence of title in writing to a perpetual water right as may be deemed suitable: *Provided*, That the Secretary of the Interior shall have power to determine and direct when the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense, under such forms of organization and under such rules and regulations as may be acceptable to him: *Provided also*, That the title to and the management and operation of the reservoirs, and the works necessary for their protection and operation, shall remain in the Government until otherwise provided by Congress.

This act is the one opening the reservation to homestead settlement and made available for construction of irrigation works tribal funds accumulated by the sale of land.

The act of March 6, 1906 (34 Stat. 53), provided for the disposition of surplus and allotted lands on the reservation and authorized the sale by allottees of all of their allotments in excess of 20 acres upon the approval of the Secretary of the Interior. The provisions of this act were not carried out and were repealed by implication in subsequent legislation.

The act of April 4, 1910 (36 Stat. 269, 286), provided for the extension of the irrigation system on lands allotted to Yakima Indians in Washington, the sum of \$15,000, and for construction of drainage system, \$250,000. It provided that the amount appropriated and all moneys heretofore or hereafter to be appropriated for these purposes shall be repaid into the Treasury of the United States in accordance with the provisions of the act of December 21, 1904. This legislation definitely determined that the appropriations for the construction of irrigation works should be reimbursable. While it determined that the reimbursement should be made in accordance with the act of 1904, Congress later changed the plan for securing reimbursement of the expenditures.

The act of March 3, 1911 (36 Stat. 1058, 1075), appropriates \$15,000 "for extension and maintenance of the irrigation system of lands allotted to Yakima Indians in Washington, provided, that the

amount hereby appropriated, and all moneys heretofore or hereafter to be appropriated, for this project shall be repaid into the Treasury of the United States in accordance with the provisions of the act of March first, 1907."

The act of March 1, 1907 (34 Stat. 1015, 1050), cited in the preceding quotation, refers back to the act of December 21, 1904, as governing the method of reimbursement of the expended funds for irrigation.

The act of August 24, 1912 (37 Stat. 518, 538), authorized the Secretary of the Interior to investigate conditions on the Yakima Indian Reservation in the State of Washington to determine the most practicable and feasible plan for providing water for lands that may be irrigated and to cause surveys and estimates to be made, and to report such facts and reasons in support of the construction of the project. This act also appropriates \$350,000 for survey, classification, and appraisal of lands allotted in severalty under the general allotment act of 1887.

The act of June 30, 1913 (38 Stat. 77, 100), appropriated \$15,000 for extension and maintenance of the irrigation system of lands allotted to Indians in Washington, reimbursable as provided in the act of March 1, 1907 (34 Stat. 1015, 1050). This act also provided for a Congressional investigation of the water rights on the Yakima Indian reservation, and in accordance with such legislation two Members from the Senate and two from the House of Representatives were appointed and made a report to Congress on December 20, 1913 (Senate Doc. No. 337, 63d Cong., 2d Sess.). This report contained certain recommendations which had an important bearing upon the water rights on the Indian reservation, and the subsequent legislation resulted in making two classes of water rights for the irrigable lands in the Wapato project. The applicable portion of the recommendations in the report to Congress are as follows:

1. That the allowance by the former Secretary of the Interior, Mr. Hitchcock, of 147 second-feet of water of the low-water flow of the Yakima River, for the use and benefit of the irrigable lands of the Yakima Indian Reservation was, when made, and now is inadequate, inequitable, and unfair to said Indian reservation.

2. From a consideration of the whole subject, we believe that vested rights have accrued to water users other than those on said reservation, and that the low-water flow of the Yakima River is insufficient to supply their needs and the requirements of said reservation. We therefore believe that the United States should provide for the use and benefit of the irrigable portion of said reservation, free from storage cost and storage maintenance cost, sufficient water to equal the amount to which said reservation was equitably entitled when the finding of Secretary Hitchcock was made.

While it is difficult to determine what this amount should be, we are convinced that it should not be less than one-half of the natural flow of the Yakima

River, and should be sufficient to irrigate one-half of each allotment of irrigable land on said reservation.

* * * * *

3. As to the portion of the irrigable allotments in excess of the area to be furnished water free, the allottees may be permitted, but should not be required, to sell the same or any portion thereof under such terms and conditions as the Secretary of the Interior may prescribe. The cost of furnishing water, for such as are not to be furnished water free shall be apportioned equitably according to benefits.

4. As to all allottees on the said Yakima Indian Reservation, the equitable proportionate cost, both as to storage water in addition to such amount as shall be furnished free, and as to the cost of maintenance and distribution of all water furnished for said irrigable lands on said reservation shall be charged to the allottees respectively, and payable from their proportionate individual shares of tribal funds when distributed.

By the act of August 1, 1914 (38 Stat. 582, 604), there was authorized an appropriation of \$635,000. The conditions under which the appropriation was made are quoted from the statute as follows:

It appearing by the report of the Joint Congressional Commission, created under section twenty-three of the Indian Appropriation Act, approved June thirtieth, nineteen hundred and thirteen (Senate Document Numbered Three hundred and thirty-seven, Sixty-third Congress, second session), that the Indians of the Yakima Reservation in the State of Washington, have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled for the purposes of irrigation, having only been allowed one hundred and forty-seven cubic feet per second, the Secretary of the Interior is hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred and forty-seven cubic feet per second heretofore allotted to said Indians, so that there shall be, during the low-water irrigation season, at least seven hundred and twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of Yakima River and adequate for the irrigation of forty acres on each Indian allotment; the apportionment of this water to be made under the direction of the Secretary of the Interior, and there is hereby authorized to be appropriated the sum of \$635,000 to pay for said water to be covered into the reclamation fund; the amount to be appropriated annually in installments upon estimates certified to Congress by the Secretary of the Treasury. One hundred thousand dollars is hereby appropriated to pay the first installment of the amount herein authorized to be expended, and the Secretary of the Interior is hereby directed to prepare and submit to Congress the most feasible and economical plan for the distribution of said water upon the lands of said Yakima Reservation, in connection with the present system and with a view to reimbursing the Government for any sum it may have expended or may expend for a complete irrigation system for said reservation.

The act of May 18, 1916 (39 Stat. 123, 153), provides an appropriation for operation and maintenance of the irrigation system on lands allotted to the Yakima Indians and provides that money received under agreements for temporary water supply may be

expended under the direction of the Secretary of the Interior for maintenance and improvement of the irrigation system on said lands. It further provides (p. 154)—

For construction of a dam across the Yakima River for the diversion and utilization of water provided for forty acres of each Indian allotment on the Yakima Reservation, Washington, and such other water supply as may be available or obtainable for the irrigation of a total of one hundred and twenty thousand acres of allotted Indian land on said reservation, and for beginning, the enlargement and extension of the distribution and drainage system on said reservation, \$200,000, to be immediately available and to remain available until expended: *Provided*, That the cost of the entire diversion works and distribution and drainage system shall be reimbursed to the United States by the owners of the lands irrigable thereunder in not to exceed twenty annual payments, and the Secretary of the Interior may fix operation and maintenance charges, which shall be paid as he may direct.

In the apportionment of charges against Indians, due allowance shall be made for such amounts as may have been repaid the United States on account of reimbursable appropriations heretofore made for this project, and for the construction of the irrigation system prior to the passage of the Act of December twenty-first, nineteen hundred and four (Thirty-third Statutes at Large, page five hundred and ninety-five), as therein provided. All charges against Indian allottees herein authorized unless otherwise paid may be paid from individual shares in the tribal fund when the same is available for distribution, and if any allottee shall receive patent in fee to his allotment before the amount so charged against him has been paid to the United States, then such amount remaining unpaid shall be and become a lien upon his allotment, and the fact of such lien shall be recited in such patent and may be enforced by the Secretary of the Interior by foreclosure as a mortgage, and should any Indian sell any part of his allotment with the approval of the Secretary of the Interior, the amount of any unpaid charges against the land sold shall be and become a first lien thereon and may be enforced by Secretary of the Interior by foreclosure as a mortgage, and delivery of water to such land may be refused within the discretion of the Secretary of the Interior until all dues are paid: *Provided further*, That no right to water or to the use of any irrigation ditch or other structure on said reservation shall vest or be allowed until the owner of the land to be irrigated as herein provided shall comply with such rules and regulations as the Secretary of the Interior may prescribe, and he is hereby authorized to prescribe such rules and regulations as he may determine proper for making effective the foregoing provisions, and to require of owners of lands in fee such security for the reimbursement herein required as he may determine necessary, and to refuse delivery of water to any tract of land until the owners thereof shall have complied therewith.

The act of March 2, 1917 (39 Stat. 969, 989), provides appropriations for continuation of construction and for the fourth installment in the payment of \$635,000 for water supply for irrigation of 40 acres of each Indian allotment on the Yakima Indian Reservation irrigation system in the State of Washington, and appropriates other money "for continuing construction and enlargement of the irrigation and drainage system to make possible the utilization of the water supply provided for 40 acres of each Indian allotment on the

Yakima Indian Reservation, Washington." This wording in the legislation was repeated in subsequent enactments, but up to this time Congress had not named the project which obtained its water supply by diversion from the Yakima River.

The act of May 25, 1918 (40 Stat. 561, 588), provides—

For the fifth installment in payment of \$635,000 for water supply or irrigation of forty acres of each Indian allotment on the Yakima Indian Reservation irrigation system in the State of Washington, provided by the Act of August first, nineteen hundred and fourteen (Thirty-eighth Statutes at Large, page six hundred and four), \$100,000 to be covered into the reclamation fund: *Provided*, That the land for which the aforesaid water supply was purchased shall be understood to be included within the Wapato irrigation project.

* * * * *

For continuing construction and enlargement of the Wapato irrigation and drainage system, to make possible the utilization of the water supply provided by the Act of August first, nineteen hundred and fourteen (Thirty-eighth Statutes at Large, page six hundred and four), for forty acres of each Indian allotment under the Wapato irrigation project on the Yakima Indian Reservation, Washington, and such other water supply as may be available or obtainable for the irrigation of a total of one hundred and twenty thousand acres of allotted Indian lands on said reservation, \$500,000 to be immediately available, and to remain available until expended: *Provided*, That the entire cost of said irrigation and drainage system shall be reimbursed to the United States under the conditions and terms of the Act of May eighteenth, nineteen hundred and sixteen: *Provided further*, That out of the sum herein appropriated the Secretary of the Interior is hereby authorized to pay to Violetta Stone and W. D. Stone, husband and wife, the sum of \$629.48 for lands purchased of them for use in connection with the construction of the diversion dam across the Yakima River, as provided for in the Act of May eighteenth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page one hundred and fifty-four), and the sum herein appropriated shall be available for the purchase of such other lands as may be required in connection with the construction of the aforesaid irrigation project.

This act is the first one in which Congress gave a name to the project. It referred to the irrigation of 40 acres of land in each Indian allotment on the Yakima Indian Reservation irrigation system in the State of Washington. At the time this act was passed there was no Satus unit of the Wapato project developed by the use of water diverted from the Yakima River, and no appropriation of Congress had been made for such unit.

The act of June 30, 1919 (41 Stat. 3, 27), provides, among other things, as follows:

For the sixth installment in payment of \$635,000 for water supply for irrigation of forty acres of each Indian allotment on the Yakima Indian Reservation irrigation system in the State of Washington, provided by the Act of August 1, 1914 (Thirty-eighth Statutes at Large, page 604), \$100,000 to be covered into the reclamation fund: *Provided*, That the land for which the aforesaid water supply was purchased shall be understood to be included within the Wapato irrigation project.

* * * * *

For continuing construction and enlargement of the Wapato irrigation and drainage system, to make possible the utilization of the water supply provided by the Act of August 1, 1914, (Thirty-eighth Statutes at Large, page 604), for forty acres of each Indian allotment under the Wapato irrigation project on the Yakima Indian Reservation, Washington, and such other water supply as may be available or obtainable for the irrigation of a total of one hundred and twenty thousand acres of allotted Indian lands on said reservation, \$500,000; *Provided*, That the entire cost of said irrigation and drainage system shall be reimbursed to the United States under the conditions and terms of the Act of May 18, 1916: *Provided further*, That the funds hereby appropriated shall be available for the reimbursement of Indian and white landowners for improvements and crops destroyed by the Government in connection with the construction of irrigation canals and drains of this project.

The act of February 14, 1920 (41 Stat. 408, 431), provides, among other things, for the following:

For the seventh and last installment in payment of \$635,000 for water supply for irrigation of forty acres of each Indian allotment on the Yakima Indian Reservation irrigation system in the State of Washington; provided by the Act of August 1, 1914 (Thirty-eighth Statutes at Large, page 604), \$35,000, to be covered into the reclamation fund.

For continuing construction and enlargement of the Wapato irrigation and drainage system, to make possible the utilization of the water supply provided by the Act of August 1, 1914 (Thirty-eighth Statutes at Large, page 604), for forty acres of each Indian allotment under the Wapato irrigation project on the Yakima Indian Reservation, Washington, and such other water supply as may be available or obtainable for the irrigation of a total of one hundred and twenty thousand acres of allotted Indian lands on said reservation, \$250,000: *Provided*, That the entire cost of said irrigation and drainage system shall be reimbursed to the United States under the conditions and terms of the Act of May 18, 1916.

This act again refers to the irrigation of 40 acres of each Indian allotment under the Wapato project. This amounts to a statutory naming of the irrigation project.

The act of March 3, 1921 (41 Stat. 1225, 1246), appropriates money for continuing construction and enlargement of the Wapato irrigation and drainage system to make possible the utilization of the water supply provided by the act of August 1, 1914 (38 Stat. 604), for 40 acres of each Indian allotment under the Wapato irrigation project on the Yakima Indian Reservation, Washington.

The act of May 24, 1922 (42 Stat. 552, 578), appropriates money for continuing the construction and enlargement of the Wapato irrigation and drainage system, using practically the same words as contained in the act of February 14, 1920, *supra*.

The act of May 25, 1922 (42 Stat. 595), makes appropriation of moneys for project construction but reduces the annual per-acre payments to be made by landowners other than Indians under the irrigation system to the sum of \$2.50. A previous act had required a payment of \$5.00 per acre.

By the act of June 5, 1924 (43 Stat. 390, 403), there is an appropriation for continuing the construction and enlargement of the Wapato irrigation and drainage system, and also an appropriation in the following language (p. 404):

For construction of that part of the *Satus unit of the Wapato project* that can be irrigated by gravity from the drainage water from the Wapato project, and for operation and maintenance of the system, Yakima Reservation, Washington, \$50,000, to be reimbursed under such rules and regulations as the Secretary of the Interior may prescribe. [Italics supplied.]

This is the first reference to the *Satus unit* and the first appropriation made for the construction of such unit. It refers to the unit as a part of the Wapato project. It also provides for a method of reimbursement of the appropriation.

The act of March 3, 1925 (43 Stat. 1141, 1154), appropriates money for continuing the construction and enlargement of the Wapato irrigation and drainage system of the Wapato irrigation project and appropriates \$5,000 for operation and maintenance of the *Satus unit*.

The act of May 10, 1926 (44 Stat. 453, 467), appropriates money for operation and maintenance of the Wapato irrigation and drainage system and \$4,000 for operation and maintenance of the *Satus unit of the Wapato project*.

The act of January 12, 1927 (44 Stat. 934, 946), makes appropriation for continuing the construction, operation, and maintenance of the Wapato irrigation and drainage system and appropriates \$3,000 for operation and maintenance of the *Satus unit of the Wapato project*.

The act of March 7, 1928 (45 Stat. 200, 214), appropriates money for continuing the construction of the Wapato irrigation and drainage system and also for operation and maintenance of the *Satus unit of the Wapato project* that can be irrigated by gravity from the drainage water from the Wapato project, Yakima Reservation, Washington, to be reimbursed under such rules and regulations as the Secretary of the Interior may prescribe.

The last three acts of Congress referred to have contained nearly identical language in referring to the *Satus unit* and to the method of reimbursement of funds.

The act of March 4, 1929 (45 Stat. 1562, 1576), appropriates money for operation and maintenance of the *Satus unit of the Wapato project* that can be irrigated by gravity from the drainage water from the Wapato project, Yakima Reservation.

The act of May 14, 1930 (46 Stat. 279, 292), provides for appropriations for the *Satus unit of the Wapato project* in the following language:

For operation and maintenance of the Satus unit of the Wapato project that can be irrigated by gravity from the drainage water from the Wapato project, Yakima Reservation, Washington, \$1,000; for construction of pumping plant and canals for the irrigation of higher lands in subdivision 2 of the Satus unit, \$90,000; in all, \$91,000, to be reimbursed under such rules and regulations as the Secretary of the Interior may prescribe.

This is a further designation of a part of the Wapato project, namely, subdivision 2 of the Satus unit, which is a pumping unit.

The act of February 14, 1931 (46 Stat. 1115, 1129), provides as follows:

For continuing construction of the Wapato irrigation and drainage system, for the utilization of the water supply provided by the Act of August 1, 1914 (38 Stat., p. 604), \$360,000, reimbursable as provided by said Act.

For reimbursement to the reclamation fund the proportionate expense of operation and maintenance of the reservoirs for furnishing stored water to the lands in Yakima Indian Reservation, Washington, in accordance with the provisions of section 22 of the Act of August 1, 1914 (38 Stat., p. 604), \$11,000.

For operation and maintenance of the Satus unit of the Wapato project that can be irrigated by gravity and pumping from the drainage water from the Wapato project, Yakima Reservation, Washington, \$1,000, to be reimbursed under such rules and regulations as the Secretary of the Interior may prescribe.

It is evident that the limits of the Wapato project have been fixed indirectly by the Secretary of the Interior and that Congress has by legislation determined that the Wapato project comprises all of the land on the Yakima Indian Reservation irrigated by diversion from the Yakima River.

The water for this land is obtained from four sources: (1) By appropriation of the waters of the Yakima River, limited to 147 second-feet by the decision of the Secretary of the Interior; (2) By purchase of storage right for 573 second-feet under an arrangement for the storage of water by construction of storage works under the supervision of the Bureau of Reclamation; (3) By an arrangement between the Bureau of Reclamation and the Commissioner of Indian Affairs, duly approved by the Secretary of the Interior on March 31, 1921, whereby the Indian Service obtained a perpetual diversion right for 250,000 acre-feet per annum of water in addition to the right to 720 second-feet for the lands of the Wapato division, such diversion right to mean the right to divert natural flow or storage water, or both, during the irrigation season each year, the water to be measured at the diversion works of the Wapato division; and (4) By the development of a water supply by the construction of drainage ditches on the portion of the Wapato project lying north of Toppenish Creek.

To divert and distribute to the lands in the Wapato project the waters above described it was necessary to build a diversion dam in the Yakima River and an extensive system of canals and laterals

which contemplated the delivery of irrigation water to each Indian allotment. As the irrigation development proceeded it was discovered that seepage water was injuring a considerable area of the irrigable land, and to relieve this condition a system of drainage ditches was constructed as a part of the irrigation scheme. These drainage ditches gathered approximately 250 second-feet of water which would flow back into the Yakima River near the confluence of Toppenish Creek with the river. To utilize this water, irrigation works were constructed for its delivery by gravity to a part of the Satus unit, and later a pumping unit was installed to deliver some of the water to a higher area. The drainage water thus became the principal supply of irrigation water for the Satus unit of the Wapato project and represents recaptured water brought on to the project by the diversions from the Yakima River under the water rights above described. The right to use this water as a part of the original appropriation is well described by the Supreme Court of the United States in the case of *Ide v. United States* (263 U. S. 497, 505). This was a case involving water diverted from the Shoshone River by the United States for the irrigation of certain lands on the north side of the Shoshone River in the vicinity of Powell, Wyoming. Seepage and waste water, gathered in drainage ditches constructed by the United States, was turned into a natural waterway called Bitter Creek. The defendant claimed the right to divert the seepage water for the irrigation of his land and asserted that it had been used by the United States under its original appropriation and could not be picked up and used again. The Supreme Court said—

3. The seepage producing the artificial flow is part of the water which the plaintiff, in virtue of its appropriation, takes from the Shoshone River and conducts to the project lands in the vicinity of the ravine for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again—that the right to use it is exhausted. But we perceive no ground for thinking the appropriation is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be so conserved that it may be subjected to the largest practicable use. A further contention is that the plaintiff sells the water before it is used, and therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff. Its right in the seepage is well illustrated by the following excerpt from the opinion of District Judge Dietrich in *United States v. Haga*, 276 Fed. 41, 43:

"One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used."

An instructive application of this rule is found in *McKelvey v. North Sterling Irrigation District*, 66 Colo. 11.

See also *Ramshorn Ditch Company v. United States* (269 Fed. 80).

The water used on the Satus unit of the Wapato project is a part of the water appropriated for the Wapato project and compels the decision that this water shall be used for the irrigation of 40 acres of each Indian allotment on the Satus unit. In the legislation providing a water right for a part of each Indian allotment, Congress, in no instance, defined the location of the Indian allotments to be irrigated. The water right was to be used or utilized for the irrigation of 40 acres of land of each Indian allotment on the Yakima Indian Reservation. Therefore, the right to the supply of free water must extend to 40 acres of each Indian allotment. This right has been designated as an "A" water right. All other water rights have been designated as "B." The "B" rights have their foundation in the purchase of 250,000 acre-feet of water for \$1,625,000. The area of land irrigated on the portion of the project north of Toppenish Creek is about equally divided between "A" and "B" water rights. It is evident, therefore, that the drainage water that is picked up and used on the Satus unit comes from two sources; namely, the water brought in by diversion of the 720 second-feet appropriation and that brought in under the right to 250,000 acre-feet per annum. The commingling of these waters is imperative, and the water taken from the drainage ditches for use on the Satus unit comes from both sources of water supply. The water for "A" land on the Satus unit takes the same status as water for the "A" land on the area north of Toppenish Creek. The area on the Satus unit, designated as "B" land, should take its water rights equal to that of the "B" lands on the area north of Toppenish Creek. The construction charges on the Satus unit should be similar to those on the remainder of the project because the water supply is from the same appropriation, and it was necessary to construct the canals, laterals, and drainage ditches

on the portion of the project north of Toppenish Creek in order to supply the water for the Satus unit. It is my opinion that the Wapato project of the Yakima Indian Reservation should be treated as an entity and the costs of the irrigation works for "A" lands should be distributed equally over the irrigated area, and the cost of irrigation works and of water rights for "B" lands should be distributed equally over that area. Any other plan of distribution would be inequitable. To charge one amount for construction on a part of the project and another amount for the remainder would be equivalent to charging the lands near the headgates of an irrigation system less per acre than is charged for lands near the tail of the ditch, simply because the cost for delivering the water to the lands near the point of diversion was less than the cost of delivering water over the lands at the lower end of the ditch.

It is the usual rule in the development of large irrigation schemes that the plan becomes feasible only by an equal distribution of the cost over an extensive area.

In the submission of the questions propounded, the Commissioner of Indian Affairs states that the provisions of the act of January 24, 1923, *supra*, do not definitely tie the reimbursement of construction costs up with the act of May 18, 1916, *supra*. The act of January 24, 1923, provides that the expenditures are to be "reimbursed under such rules and regulations as the Secretary of the Interior may prescribe." Under the terms of this decision he may prescribe that the cost per acre on the Satus unit for Class "B" lands shall be equal to the per-acre cost on the remainder of the project, and similarly for the Class "A" lands.

It is my conclusion that the lien provided in the act of May 18, 1916, would extend to the Satus unit of the Wapato project.

To summarize, it is my opinion: (1) That lands under the Satus unit should be considered as a part of the Wapato project for all purposes in connection with distribution of waters and construction costs; (2) That 40 acres of each Indian allotment under the Satus unit are entitled to an "A" water right and are subject to a lien for construction charges in the same amount as all other lands on the project receiving the same water right; (3) That all lands in excess of 40 acres in each allotment under the Satus unit shall be considered as having a "B" water right and shall be required to pay their *pro rata* share of the construction charge of the project, including the cost of the water right, and (4) That the lien provided in the act of May 18, 1916 (39 Stat. 123, 153), extends to the lands of the Satus unit of the Wapato project.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

TAX EXEMPTION OF LANDS IN OKLAHOMA PURCHASED WITH FUNDS FROM DISPOSAL OF RESTRICTED LANDS OF FIVE CIVILIZED TRIBES

Opinion, March 30, 1932

INDIAN LANDS—ALLOTMENT—PURCHASE—TAXATION—FIVE CIVILIZED TRIBES—OKLAHOMA.

The exemption from taxation granted by the act of March 2, 1931, of lands purchased under the supervision of the Secretary of the Interior for restricted members of the Five Civilized Tribes in Oklahoma with the proceeds derived from disposals of their restricted, nontaxable lands in accordance with the terms of that act, is limited solely to the confines of that State.

FINNEY, Solicitor:

You [Secretary of the Interior] have requested my opinion upon a question arising out of the act of March 2, 1931 (46 Stat. 1471), which reads—

That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes is sold to the State of Oklahoma, or to any county or municipality therein, for public improvement purposes, or is acquired, under existing law, by said State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived and such restrictions to appear in the conveyance.

The foregoing enactment provides in plain terms for the exemption from taxation of lands purchased under the supervision of the Secretary of the Interior for restricted members of the Five Civilized Tribes in Oklahoma with the proceeds derived from disposals of their restricted, nontaxable lands notwithstanding the fact that the lands so purchased are, at the time of acquisition, subject to all State taxes. Subject to the limitations contained in the statute, the authority so conferred clearly extends to such lands as may be selected and purchased within the boundaries of the State of Oklahoma. It appears, however, that one Jessie Henderson, nee Buzzard, a full-blood, Cherokee Indian, Roll No. 17450, desires to dispose of her restricted, nontaxable lands in Oklahoma and use the proceeds therefrom, not in the purchase of other lands in that State, but in the purchase of residential property located in the city of Omaha, Nebraska.

The question thus presented is whether the act of March 2, 1931, *supra*, authorizes the withdrawal of taxable lands in States other

than Oklahoma from the taxing power of those States when purchased in the manner provided for in the statute.

The statute does not in express terms limit the selection of lands to be purchased with the proceeds from disposals of the nontaxable lands of these Indians to lands located in the State of Oklahoma. The language is that the Indian with the sanction of the Secretary of the Interior may invest such funds "in other lands selected by said Indian and such land so selected and purchased shall be restricted as to alienation * * * and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived." This language standing alone lends some support to the view that the new selections are not confined to lands in the State of Oklahoma. But particular words and phrases can not thus be separated from the context so as to give a meaning not supported by other parts of the same statute, which must be construed as a whole (*Peck v. Jenness*, 7 How. 612, 48 U. S. 611, 622), and in the light of its obvious policy (*Levin-*dale Lead and Zinc Mining Co. v. Coleman*, 241 U. S. 432).*

The act of March 2, 1931, conferred no new authority upon the State of Oklahoma. It was competent for that State or any of its political subdivisions prior to such enactment to acquire by condemnation or purchase restricted, nontaxable lands belonging to Indians of the Five Civilized Tribes for public improvement purposes. (See section 1, act of May 27, 1908, 35 Stat. 312; see also section 3, act of March 3, 1901, 31 Stat. 1058, 1083.) New lands purchased with the proceeds from the lands so taken could be lawfully restricted against alienation (*Sunderland v. United States*, 266 U. S. 226), but no authority existed for exempting the same from taxation (*Shaw v. Oil Corporation*, 276 U. S. 575; *Work v. Mummert*, 29 Fed. (2d) 393). The taking of the Indian lands by the State or its political subdivisions for public purposes thus operated to deprive the Indian of his exemption from taxation even without his consent where the lands are acquired under condemnation. To take the Indian's property in this way for the benefit of the State and to permit the State to tax the property purchased with the proceeds is manifestly unfair to the Indian, and the plain purpose of Congress in enacting the act of March 2, 1931, was to correct this inequality. This is shown by the fact that the legislation as originally introduced (H. R. No. 263), would have been operative only where it became necessary for the State of Oklahoma or some county or municipality thereof to take the nontaxable lands of the restricted Indians in that State for public purposes. The benefits of the proposed legislation being confined to the State of Oklahoma and to Indians in that State, it was the evident intent to confine its burdens

also to that State. The bill was broadened by an amendment (see Senate Report No. 1695, 71st Congress, 3d Session) so as to extend the provisions of the statute to include the reinvestment of the proceeds derived from sales to private parties of the nontaxable lands. But this amendment affords no basis for imputing an intent to Congress to permit the nontaxable selections to be made from lands in States other than Oklahoma. It was apparent on the contrary that the lands so disposed of to private parties would immediately become taxable by the State of Oklahoma and that being so, justice and equity dictated that the proceeds therefrom when invested in other lands in that State should be protected from taxation.

To permit the investment of these funds in lands in other States would not only impose an unjust burden upon those States for the benefit of Oklahoma and Oklahoma Indians, but in view of the various prior enactments of Congress, which make the Oklahoma laws applicable to lands of the Indians of the Five Civilized Tribes in certain particulars, the transfer of the exemption from taxation and the existing restrictions against alienation to lands in other States would produce such incongruities that that part of the statute declaring that the new lands should be held upon the "same terms and conditions" as the old could not well be applied. Section 2 of the act of April 12, 1926 (44 Stat. 239), makes the statutes of limitations of the "State of Oklahoma" applicable to all restricted Indians of the Five Civilized Tribes, the same as any other citizen of the "State of Oklahoma." Section 6 of the act of May 27, 1908 (35 Stat. 312), makes the persons and property of minor allottees subject to the jurisdiction of the probate courts of the "State of Oklahoma." Section 23 of the act of April 26, 1906 (34 Stat. 137), as amended by section 8 of the act of May 27, 1908 (35 Stat. 312), provides that certain wills of members of said tribes shall not be valid unless executed before one of certain specified officers, among those mentioned being a judge of the United States Court for the Indian Territory, and a judge of a county court of the State of Oklahoma. That was continued in force by the act of May 10, 1928, until April 26, 1956. Also said act of May 10, 1928 (45 Stat. 495), by section 3 thereof, provided that the production of minerals from such restricted lands should be subject to taxation the same as those produced from lands owned by other citizens of the "State of Oklahoma." Section 4 of that act also provided that all such lands in excess of 160 acres shall be subject to taxation by the "State of Oklahoma under and in accordance with the laws of that State."

These rights are indigenous to the soil of Oklahoma. That State came into the Union burdened with the favors accorded by Federal laws to the Indian owners, and in its Constitution express recogni-

tion was given to the authority of the United States to legislate in respect to the Indians, their lands, property, or other rights. No injustice is done that State if exempted property be sold and other like property be bought with the proceeds and exempted from taxation. But it is a grave injustice to a State not so burdened to transfer the burden from Oklahoma to such other State. Congress has not clearly indicated its intention to permit such injustice, but on the contrary, has so frequently referred to the State of Oklahoma in its legislation on this subject as to plainly indicate its intention that such transactions for the benefit of the Five Civilized Tribes are to be confined to that State.

Under section 4 of the act of May 10, 1928 (45 Stat. 495), as amended by the act of May 24, 1928 (45 Stat. 733), the nontaxable lands of members of the Five Civilized Tribes were limited to not exceeding 160 acres selected and designated as therein provided, the exemption running for a period co-extensive with the period of restrictions against alienation which expires in 1956. Where such lands are disposed of in the manner provided for in the act of March 2, 1931, the investment of the proceeds therefrom in new nontaxable selections is in my opinion confined to lands in the State of Oklahoma.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

REGULATIONS GOVERNING APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS SUBJECT TO UNIT OPERATION

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 4, 1932.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Attached are regulations under which the issuance of oil and gas prospecting permits, suspended since March 13, 1929, may be resumed. They have as their objectives, first, equality of opportunity for small as well as large interests; second, actual development in lieu of speculative conditions prevailing prior to March, 1929; third, rational control of production and protection of correlative rights through unit operation; fourth, ratable sharing of market outlet by all permittees on a structure; and fifth, recognition of a preference right in favor of those applicants and permit holders whom the order of March 13, 1929 affected.

These regulations will be promulgated immediately. However, a 60-day preference period is provided for permittees and applicants whose claims were pending on March 13, 1929, and were rejected under the order of that date.

Since March 13, 1929, no prospecting permits have been issued or extended unless equities existed prior to that date and then only on condition of restricted drilling, and consequently the public domain has not contributed to the conditions of over-drilling and potential overproduction which the oil-producing states have been endeavoring to correct during this period. The department's action was sustained by the United States Supreme Court.¹

However, during this period legislation authorizing unit operation has been enacted. It has now had several months' working trial, and our experience under it affords a basis for renewed exploration on the public domain without injuring conservation of our irreplaceable oil and gas resources.

In general, the attached regulations require that certain stipulations accompany any application for a prospecting permit. These stipulations do not impair the permittee's privilege to drill immediately, if he so desires, but do require that prior to the expiration date of the permit a cooperative development plan for the entire structure be submitted, and that when and if production is obtained, the area be produced under a unit plan of operation which, under the direction of the permittees, themselves, and under the general supervision of the Secretary of the Interior, will insure a ratable share of production to all of them on the same structure, and, at the same time, insure against over-production and consequent waste. It is anticipated that many permittees will voluntarily work out their cooperative plan in advance and prospect in accordance with it.

The permittees will also be bound by certain other stipulations, including compliance with both Federal and State conservation laws.

RAY LYMAN WILBUR,
Secretary.

REGULATIONS

1. Stipulations to accompany permit applications.—Registers of the district land offices will receive applications for oil and gas prospecting permits when tendered in accordance with existing regulations, Circular No. 672 (47 L. D. 437), and in addition containing the following stipulations:

The applicant consents and agrees that any permit or lease issued under his application shall be subject to the following additional provisions which shall bind himself, his successors, assigns and all others claiming under or through him.

¹ See *United States v. Wilbur* (283 U. S. 414).—Ed.
18607—32—vol. 53—41

(a) *Cooperative prospecting development and unit plans:* The applicant agrees to submit to the Secretary of the Interior for his approval within two years from the date of the permit an acceptable plan for the prospecting and development as a unit of the pool, field or area affecting the permit land, with evidence either that such plan has been agreed to by the parties in interest and will insure effective unit operation if oil or gas is discovered, or that in the event of failure to so agree the parties will conform to such plan as the Secretary may prescribe, which shall adequately protect the correlative rights of all permittees and other parties in interest, including the United States.

(b) *Leases:* The applicant agrees that in the event of a discovery of oil or gas he will promptly apply for leases on the entire permit area.

(c) *No production except under unit operation or other cooperative plan:* The applicant agrees that no oil or gas in commercial quantities shall be produced except pursuant to a plan of unit operation, or other cooperative plan approved by the Secretary of the Interior.

(d) *Operating methods:* The applicant agrees to conform to regulations of the Secretary, which may likewise be incorporated in any cooperative or unit plan of development or operation approved, as to location and spacing of wells, time and method of drilling, well casing and production programs as may in the opinion of the Secretary be necessary to secure the conservation or increased ultimate recovery of oil and gas.

(e) *State and Federal Conservation Laws:* The applicant agrees to comply with all State and Federal laws, regulations and orders and to conform to any allowance of production fixed for the field, pool or area by the State in which the permit land is situated and to proration of market outlet equitably among all producers of said field, pool or area.

(f) *Drainage:* The applicant agrees on demand, to protect the United States currently against loss of royalty through drainage from the permit area (except such loss as may be occasioned by operations under a cooperative or unit plan regularly adopted and approved, of which the permit is a part), the amount of such drainage and the loss of royalty resulting therefrom to be fixed monthly by the supervisor of oil and gas operations subject to the right of appeal to the Secretary of the Interior, whose decision shall be final.

(g) *Assignments:* The applicant agrees to make no assignment or other disposal of interest, whether royalty, working, or otherwise, except with the approval of the Secretary of the Interior.

2. Preferences in permit applications.—Permit applications conforming to section 1, above, filed within 60 days from the date of

these regulations by persons or corporations who, on March 13, 1929, held permits embracing the same lands, but which were cancelled pursuant to order of that date, or had filed applications therefor which were otherwise in good standing on that date, but which have been heretofore rejected pursuant to said order, shall be accorded preference over any other applications received during said 60-day period.

3. Failure to file satisfactory plan.—If, within two years from the date of the permit, the holder has not submitted to the Secretary of the Interior a plan with showings conforming to section 1 hereof, or if such plan is rejected in the public interest, the permit will be subject to cancellation.

4. Determination of geological structure.—Upon the request of any permittee, for the purpose of formulating a cooperative or unit plan hereunder, the area logically subject to unitization with the holdings of that permittee will be designated by the United States Geological Survey.

5. Outstanding permits.—Holders of outstanding permits which have been extended on conditions restricting drilling may be relieved of said conditions upon execution and filing of the stipulation specified in section 1 hereof, and approval thereof by the Secretary of the Interior.

Approved: April 4, 1932.

RAY LYMAN WILBUR,

Secretary.

OIL AND GAS PROSPECTING PERMITS SUBJECT TO UNIT OPERATION

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 5, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

The Secretary of the Interior telegraphed you to-day as follows:

Pending receipt regulations approved April four, you will receive applications for oil and gas prospecting permits in usual form with agreement inserted therein that applicant accepts all terms and conditions of new regulations.

Your particular attention is called to the first paragraph of section 1 of the regulations approved April 4, 1932 (53 I. D. 641), which authorizes you to receive applications only when they are prepared and submitted in accordance with paragraph 4 of Circular No. 672 (47 L. D. 437), and subject to the stipulations set out in section 1 of

these regulations. Any applications which have been received or executed prior to the receipt of these instructions must be supplemented by stipulations in the form required by the regulations of April 4, 1932, and applications executed after the receipt of these instructions must contain in full the stipulations required by the said regulations of April 4, 1932.

All applications received in conformity with these regulations, including those involving land in rejected applications or canceled permits described in section 2 of said regulations, will be noted on your records and transmitted promptly by special letter to this office with report of the status of the land. All applications will be adjudicated by this office.

Under section 5 of the regulations no special form of application is required. Holders of outstanding permits who desire to receive the benefits of the regulations of April 4, 1932, may file for consideration and adjudication appropriate applications containing all the stipulations specified under section 1.

THOS. C. HAVELL,

Acting Commissioner.

Approved:

RAY LYMAN WILBUR,

Secretary.

HAZEL, ASSIGNEE OF PATTERSON

Decided April 14, 1932

DESERT LAND — RECLAMATION — IRRIGATION — WATER RIGHTS — WITHDRAWAL — PURCHASE

A desert-land entryman who has met all the requirements which he could possibly meet and has his entry ready for irrigation, but who through no fault of his own has been unable to effect reclamation as required by law because of his inability to obtain a sufficient water supply within the lifetime of the entry, or within any extension of time that could have been granted under existing law, may be permitted to purchase the land under the relief act of March 4, 1929, notwithstanding that the land is within a first form withdrawal in connection with a reclamation project for which a water supply is to be provided.

EDWARDS, *Assistant Secretary:*

This is an appeal by Minnie Belle Hazel, assignee of William E. Patterson, from decision of the Commissioner of the General Land Office dated January 2, 1932, denying an application, Los Angeles 039525, for the privilege of perfecting her desert-land entry by purchase under the provisions of the relief act of March 4, 1929 (45 Stat. 1548).

The entry was made June 25, 1918, for N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 28, T. 5 S., R. 8 E., S. B. M., California, and was assigned to the appellant November 22, 1918. It was planned to irrigate and reclaim the land by sinking wells and installing a pumping plant. The necessary yearly proofs were filed, and final proof was submitted June 26, 1922, showing that the land had been extensively improved and that several thousand dollars had been expended in an effort to effect reclamation. Said final proof was rejected by the Commissioner June 6, 1923, on the basis of a special agent's report showing that none of the land had been actually reclaimed. Thereafter, entrywoman was granted three extensions of time of three years each, under the acts of March 28, 1908 (35 Stat. 52), April 30, 1912 (37 Stat. 106), and February 25, 1925 (43 Stat. 982). The last and final extension for the making of final proof expired June 25, 1931, and that was the ultimate limit of time allowable under existing law.

Shortly before the last extension expired, entrywoman applied for relief under the provisions of the act of March 4, 1929, *supra*, and upon the basis of a favorable report from the chief of field division the application was approved by the Commissioner April 10, 1931. Subsequently it was brought to the Commissioner's attention that the land is within a first form reclamation withdrawal made October 19, 1920, in connection with the Yuma project for which a water supply is to be derived from the Colorado River through the All-American Canal system. By reason thereof, the decision under review revoked the previous order of April 10, 1931, and held that the entry should be suspended and remain suspended in consonance with the department's unreported decision of October 11, 1923 (A-5580), in the case of *Maggie L. Havens*, involving desert-land entry El Centro 06, embracing the N $\frac{1}{2}$ Sec. 1, T. 17 S., R. 12 E., S. B. M., which land is also embraced in said first form reclamation withdrawal of October 19, 1920.

In the *Havens case* just referred to, the department directed that said entry "and all other entries similarly situated should be suspended, and remain suspended until water for the irrigation of the lands covered by it and them becomes available, or until it shall be found advisable to revoke the suspension for any sufficient reason hereafter arising." Said order of suspension is predicated upon the following statement:

In view of the fact that the entrywoman has fully met all the requirements which she could possibly meet, and has 160 acres ready for irrigation; that this land is worthless without irrigation; that its present first form reclamation withdrawal would prevent the land from being appropriated to the use of, or entered by others if this entry should be canceled, and of the fact that its continued segregation under this entry will not injuriously affect the Government, or others under present conditions it is believed that no good end could

be served by the cancellation of the entry, or by forcing the entrywoman to acquire the land under the relief act.

Upon mature consideration, the department is of the opinion that the order of suspension issued in connection with the *Havens case* should not be construed to prevent the allowance of relief when invoked in proper cases. In said *Havens case* entrywoman's contemplated source of water supply had failed; she had been unable to effect reclamation within the lifetime of the entry as extended, and opposed the suggestion that she perfect her entry by invoking the relief act of March 4, 1915 (38 Stat. 1138, 1161). In her appeal to the department, Mrs. Havens specifically requested that her entry be permitted to remain intact until it was finally determined whether water for the irrigation of her land would become available from the projected All-American Canal system. The order of suspension was intended to afford the same protection to other entries similarly situated where the claimant is not disposed to invoke the provisions of the relief act, and it should not be applied in cases where the entryman desires to acquire title and can make an acceptable showing under the relief act.

The instant case is plainly within the terms of the relief act of March 4, 1929, *supra*. Said act is merely supplementary to the act of March 4, 1915, *supra*, which was passed for the purpose of affording relief to those persons who had made and prosecuted desert-land entries in good faith, and who, without fault on their part, had been unable to effect reclamation as required by law, provided they could show that there was no reasonable prospect of obtaining water sufficient to effect reclamation within the lifetime of the entry as extended or as it might be extended under existing laws.

For the reasons stated, the action of the Commissioner is

Reversed.

RAYMOND BARBER ET AL.

Instructions, April 20, 1932

OIL AND GAS LANDS—LEASE—OPERATING AGREEMENTS—PAYMENT.

The approval by the Secretary of the Interior of operating, drilling, or development contracts without regard to acreage limitations under the fifth proviso to section 27 of the leasing act, as amended by the act of March 4, 1931, leaves both the legal and equitable title in the permittee or lessee and makes him chargeable with the full acreage involved.

First Assistant Secretary Dixon to the Commissioner of the General Land Office:

In your [Commissioner of the General Land Office] letter of March 12, 1932, you recommend authorization for the issuance of leases to

Raymond Barber *et al.* as a reward for discovery of gas on the land embraced in oil and gas prospecting permit, Evanston 08338, containing 2560 acres. You stated that an operating agreement between the permittees and the Mountain Fuel Supply Company had been approved by the department; that the operator was not chargeable with any acreage under the act of March 4, 1931 (46 Stat. 1523); and that the lessees would be charged with 4½ per cent, or 28.80 acres of the (a) lease acreage and two per cent, or 38.40 acres, of the (b) lease acreage.

The Director of the Geological Survey has declined to concur in your letter and has submitted the record to the department for instructions.

It is clear that neither under the general leasing act nor under the said act of March 4, 1931, can leases be granted without full charge of the acreage leased. Under the practice which has been followed in cases arising under the general act and not under the act of 1931 operators have been charged with the percentage of their interest reduced to an acreage basis and the permittees or lessees have been charged in acres with the interest retained or the royalty reserved. Such charges of leasehold interests are necessary in the administration of the general act when operating agreements are in effect partial assignments of interests. See *Associated Oil Company* (51 L. D. 241, 308).

In its instructions under the act of 1931, approved June 4, 1931, Circular No. 1252 (53 I. D. 386), the department says (par. 4)—

The provision of Sec. 27, authorizing the Secretary of the Interior to approve operating, drilling, or development contracts without regard to acreage limitations is primarily intended to permit pipe-line companies or other operators to enter into contracts with permittees and lessees in numbers sufficient to justify operations on a large scale for the discovery, development, production, or transportation of oil or gas and to finance the same.

Such contracts must be submitted to the Secretary and approved by him in advance of being considered effective. Manifestly, the Secretary can not approve any such contracts on any theory other than that they are purely and simply operating, drilling, or development contracts or agreements, leaving in the permittees or lessees the full title, both legal and equitable.

Inasmuch as contracts approved under the fifth proviso to section 27 of the leasing act as amended by the act of March 4, 1931, leave the legal and equitable title to the leasehold interest involved in the permittee or lessee he must be held chargeable with the full acreage of the permit, or lease, or leases.

The record is returned without approval of your letter in order that change may be made in accordance with the foregoing views.

A. PAUL GABBERT

Decided April 30, 1932

CITIZENSHIP—EVIDENCE—HOMESTEAD ENTRY.

Where no record of naturalization can be produced evidence that one had declared his intention of becoming a citizen and had alleged under oath in an application to make entry of public land that he was a citizen of the United States is sufficient to warrant the holding in a land case that he had been duly naturalized as a citizen: *Boyd v. Thayer* (143 U. S. 135).

EDWARDS, Assistant Secretary:

By decision of February 25, 1932, the Commissioner of the General Land Office held for rejection the homestead application, G. L. O. 03483, of A. Paul Gabbert for the fractional SE $\frac{1}{4}$ Sec. 17, T. 1 S., R. 9 W., 4th P. M., Illinois, for the reason that the applicant had failed to furnish evidence that he was a citizen of the United States.

The applicant has informally appealed. It appears that he was born in Germany; that he came to the United States when he was a minor; and that he believes that his father was naturalized while he was a minor, so that he thereby became a citizen. But he has been unable to furnish documentary evidence other than that his father declared his intention to become a citizen in 1871. The applicant states that for nearly 60 years he has believed and held himself out to be a citizen by virtue of his father's naturalization.

The records of the General Land Office show that on August 20, 1877, August Gabbert made a timber-culture entry for land in Kansas, alleging under oath that he was "a citizen of the United States." It is shown that this entry was relinquished on October 3, 1881. The applicant swears that said August Gabbert was his father.

It may be presumed that August Gabbert was not swearing falsely when in 1877 he alleged that he was a citizen of the United States. His son, this appellant, was then residing with him and was a minor. It is held established that the appellant is a naturalized citizen through naturalization of his father.

In the case of *Boyd v. Thayer* (143 U. S. 135) the court said (p. 180)—

It is true that naturalization under the acts of Congress known as the naturalization laws can only be completed before a court, and that the usual proof of naturalization is a copy of the record of the court. But it is equally true that where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen.

See also *Conover v. Old* (80 N. J. Law 535, 77 A. 1070), and *In re Sielcken* (51 Cal. App. 538, 197 Pac. 668).

The decision appealed from is reversed and the record is returned to the General Land Office for appropriate action on the application. It appears that the land involved is adversely claimed by another person.

Reversed and remanded.

FRANK C. ROBIE

Decided May 9, 1932

NAVAL SERVICE—HOMESTEAD ENTRY—RESIDENCE.

The fact that a soldier or sailor was dishonorably discharged from a subsequent reenlistment will not defeat his right to credit toward residence on a homestead entry under section 2304, Revised Statutes, as extended by the act of February 25, 1919, for service of ninety days or more during a prior enlistment from which he received an honorable discharge.

PRIOR DEPARTMENTAL DECISION VACATED.

Case of *Fred B. Rogers* (47 L. D. 325), vacated.

EDWARDS, Assistant Secretary:

This is an appeal by Frank C. Robie from a decision of the Commissioner of the General Land Office dated February 3, 1932, denying him any credit for his naval service, and rejecting the final proof submitted October 22, 1931, on his homestead entry, made August 19, 1930, for N $\frac{1}{2}$ of lot 1 of NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31, T. 2 N., R. 9 E., S. B. M., California.

According to the final proof, entryman resided on the land from September 1, 1930, until May 15, 1931, and the improvements are of the value of more than \$1,000. In his testimony entryman stated that he had served in the United States Navy from April 18, 1917, until May 27, 1919.

The Bureau of Navigation, Navy Department, has reported that entryman enrolled in the National Naval Volunteers on April 18, 1917, at Mare Island, California, and reported for active duty the same day; that he was issued a "good discharge," under honorable conditions, on October 19, 1917, from the U. S. S. *St. Louis*; that he enlisted in the Navy on October 20, 1917, on board the same vessel, and was issued an honorable discharge on May 27, 1919, from the receiving ship at Mare Island, California; that he again enlisted on September 11, 1919, at the Navy Recruiting Station, Los Angeles, California, and was issued a dishonorable discharge on July 28, 1920—

in accordance with sentence of general court martial from the naval prison, Navy Yard, Portsmouth, New Hampshire, on account of disobeying the lawful order of his superior officer and drunkenness on duty.

The Commissioner held that entryman's last discharge from the Navy, being dishonorable, vitiated his entire naval record in so far as credit in the matter of his homestead entry is concerned, citing *Fred B. Rogers* (47 L. D. 325).

In the case cited, involving the right to make a soldiers' additional entry, the soldier deserted while serving his second enlistment during the Civil War, and the department held that the ruling in the case of *Leroy Moore* (40 L. D. 461) did not apply.

In the *Moore case*, *supra*, and in the case of *Natalbany Lumber Co. Ltd.* (40 L. D. 225), it was held that an enlisted man who deserted from the service of the United States, but subsequently enlisted again and served for a term of 90 days or more and received an honorable discharge from such enlistment, is deemed to be honorably discharged within the meaning of section 2304, Revised Statutes.

The act of February 25, 1919 (40 Stat. 1161), provides that, subject to the conditions therein expressed as to length of service and honorable discharge, the provisions of sections 2304 and 2305, Revised Statutes, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies.

Section 2304, Revised Statutes, provides that every private soldier or officer who served in the Army of the United States during the rebellion for 90 days and who was honorably discharged, and every seaman, marine, and officer who served in the Navy or in the Marine Corps during the rebellion for 90 days and who was honorably discharged, shall be entitled to make homestead entry and be credited with his term of service as residence thereon.

In the case under consideration, the soldier served in the Navy for more than two years during the war with Germany and her allies and was honorably discharged. One hundred and seven days later he again enlisted in the Navy, but was later dishonorably discharged. His last period of service was in no way connected with the first, and to now impose the proposed penalty for misconduct during his second enlistment would be without authority of law. The military court before which he was tried for his offenses during the second period of service prescribed the punishment, and it is not within the province of the department to add to the penalty imposed by the court even were it disposed to do so.

In the cases of *Leroy Moore* and *Natalbany Lumber Co. Ltd.*, *supra*, each claimant was given the benefit of an honorable discharge from his subsequent enlistment after desertion during his first enlistment. The conclusions reached in the two cases could properly have been based on a holding that the two services in each case were

entirely distinct and in no way connected, and that the service of more than 90 days from which the soldier was honorably discharged brought him within the provisions of section 2304, Revised Statutes. The same holding must be applied to Robie; and as he had completed one year's residence on the land prior to final proof, his entry will pass to patent, final certificate having issued October 29, 1931.

The rule announced in *Fred B. Rogers, supra*, will no longer be followed.

Reversed.

GEORGE WASHINGTON BIRTHPLACE NATIONAL MONUMENT

Opinion, May 11, 1932

NATIONAL MONUMENTS—CEMETERIES—TRANSFER—HEIRS.

Conveyances by the heirs to the Wakefield National Memorial Association and by the latter to the United States of the family burial ground on the Wakefield property, since designated as the George Washington Birthplace National Monument, constituted a dedication to the public as a national memorial, and alienation by the heirs for such purpose is not prohibited by the laws of the State of Virginia. *Colbert et al. v. Shepherd* (89 Va. 401, 16 S. E. 246).

FINNEY, *Solicitor*:

The Director of the National Park Service has requested my opinion regarding the status of the title to the lot, approximately 30' x 30', at Wakefield, Virginia, used as a family burial ground and which, with other lands, was included in the deed to the United States dated June 22, 1931, from The Wakefield National Memorial Association, a corporation organized and existing under the laws of the State of Virginia. The deed was accepted by the department on behalf of the United States October 14, 1931.

The memorandum submitted by the Director reads in part as follows:

At a recent meeting of the trustees of the Wakefield National Memorial Association in the rooms of the Fine Arts Commission, there was some discussion regarding the status of the title to the grave yard plot which is within the Wakefield property at the George Washington Birthplace National Monument conveyed by said Association to the United States under date of June 22, 1931. A copy of the deed of conveyance is attached hereto in which the grave yard plot is described as "Tract Number One".

In the discussion referred to, some of the trustees inferred that under the Virginia law grave yards cannot be alienated and that title therein must remain in the heirs of the deceased, if there be any living, or in the State. It appears that the Wakefield National Memorial Association acquired the grave yard plot under a deed of conveyance dated December 22, 1927, copy of which is attached hereto, from Mary Washington Keyser, *et al.*, on condition that said Association restore or cause to be restored the burial vault

on said property in the form of a suitable memorial structure of a permanent character and would improve the ground around said vault and the land immediately adjoining the same in a suitable and appropriate manner within a period of ten years. It is provided further in the said deed of conveyance that upon completion of said restoration and improvements, either by the Association or the United States, or upon reasonable assurance by the United States within said period, that said restoration and improvements will be made by the United States, that title to the property shall be conveyed by the Association to the United States upon further assurance to permanently preserve and maintain the property in good condition.

Prior to the conveyance of this property to the United States, the burial vaults were restored by the Wakefield National Memorial Association and improvements made and the ground around the vault improved. Attached hereto is a report from Mr. Charles Moore, Vice President of the Association, setting out the work done by the Association in the exploration and restoration of the cemetery property, together with a circular of this Service containing a photograph of the property as restored.

The deed from Mary Washington Keyser, *et al.*, to the association referred to in the memorandum contains recitals of the sources of the grantors' title, the purposes of the conveyance, and the conditions imposed. These are substantially as stated in the memorandum with a provision for reverter to the heirs in the event of the failure of the association to complete or cause to be completed the restoration and improvements within a period of ten years or upon failure of the United States to give assurance satisfactory to the grantors looking to the completion of said restoration and improvements within a reasonable time thereafter. The conditions imposed apparently have been complied with and title vested in the association and its transferee, the United States, in the absence of some legal bar not apparent on the face of the record.

Attention is called to the recital to the effect that by deed dated September 1, 1858, the ancestor of the grantors conveyed the "burying ground" to the State of Virginia, subject to certain conditions of fencing in and marking by suitable tablets as described in the deed and that because of failure of the State of Virginia to comply with the conditions imposed the title reverted to the heirs of the grantor. It thus appears that the failure on the part of the State of Virginia to comply with the conditions subsequent, imposed by the deed, resulted in the divesting of its title under the conveyance and reversion to the heirs who appear to have been in possession at the time conveyance was made to the association.

The question for consideration under the reference, therefore, is whether under the Virginia laws the title to the burying ground must remain in the heirs, if there be any living, otherwise in the State of Virginia.

The provisions of the Virginia Code of 1930 relating to cemeteries and burial grounds have been examined and nothing has been

found therein which appears to prevent the heirs from making the conveyance to the association for the purposes specified in the deed and no law or authority has been brought to my attention which would render the conveyance invalid.

It is, of course, well-established generally that cemetery lots or burial grounds where interments have been made can not be made the subject of trade or commerce and various restrictions against alienation and encumbrance, designed to prevent their desecration, have been imposed, although they may be condemned under certain conditions where the public interest requires. But none of the elements proscribed by the law or decisions are present in this case. On the contrary, the purposes of the conveyances involved here are to preserve and protect the burial ground and to dedicate it to the public as a national memorial to the ancestors of the Country's most distinguished citizen.

That such dedication would be effective to vest title in the association which was instrumental in preserving the ground as a public memorial and set it apart from surrounding lands has been expressly recognized by the Virginia Courts in the case of *Colbert et al v. Shepherd* (89 Va. 401; 16 S. E. 246), decided November 17, 1892, by the Supreme Court of Appeals of that State. The case involved the tomb of Mary Washington, the mother of George Washington, located near Fredericksburg, Va.

It appears that in that case the defendant gave the plaintiffs certain option papers agreeing to sell a tract "containing about two acres of land with the Mary Washington monument and large marble shaft thereon." The action was one for damages for the alleged breach of written contract to convey the said monument.

It appears from the facts in the case that in 1789 Mrs. Washington was buried on land which was then the property of her son-in-law, Colonel Fielding Lewis. The further material facts are recited in the decision as follows:

* * * About the year 1831,—42 years after Mrs. Washington was buried,—an association was organized to erect a monument to her memory over her grave; and Gen. Andrew Jackson, the renowned president of the United States, who had been compatriot in arms with her great son, and whose youthful blood had been shed in the Revolutionary war for the independence of their common country, was invited to lay the corner stone. And on the 7th day of May, 1833, with civic ceremonies and military pageant worthy of the occasion, the venerated chief magistrate of the United States, who, the illustrious Thomas Jefferson said, "had filled the measure of his country's glory," in the name and in behalf of all the people of this great country, performed the signal act of public gratitude and affection, and laid the corner stone of the monument which marks the grave of the mother of the "Father of his Country," and thus, in the most solemn and impressive manner, dedicated to public and pious uses, forever, the consecrated spot where the remains of this honored woman had reposed for 45 years in the grave where the pious duty and

reverence of her children had laid her. From that day to this no right or claim of private ownership has ever been exercised over it or made to it. In *Beatty v. Kurtz*, Judge Story said: "It (the lot) was originally consecrated for a religious purpose. It has become a repository of the dead, and it cannot now be resumed by the heirs of Charles Beatty." In *Cincinnati v. White*, the court said: "There is no particular form or ceremony necessary in dedication to public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes." *Beatty v. Kurtz*, 2 Pet. 566; *Cincinnati v. White*, 6 Pet. 431.

In the case under consideration, the manifest purpose of the heirs was that the premises should be dedicated to public uses and they not only have given their consent but in order to make more certain its dedication have conveyed the premises to an association organized for a public purpose, which in turn has made conveyance in due form to the United States.

The conditions imposed have been duly complied with and the United States has accepted the premises on behalf of the people.

I find no legal bar to the vesting of title in the United States and it is, therefore, my opinion that the Government now holds good title under the aforesaid conveyances.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

RITA D. KUNZ

Decided May 17, 1932

REPAYMENT—WATER EXPLORATION PERMIT—FEES AND COMMISSIONS—APPLICATION—RELINQUISHMENT.

An application for repayment of fees tendered with an application for a water exploration permit filed after the permit application was rejected but before adverse decision had been declared final, does not amount to a voluntary withdrawal or relinquishment of the application for permit so as to bar repayment of the fees. *John J. Kottkin* (49 L. D. 344), and *J. G. Hofmann* (53 I. D. 254).

ACCOUNTS.

Moneys paid in connection with a claim for public lands should not be deposited in the Treasury as earned until the claim has been allowed.

EDWARDS, *Assistant Secretary:*

On February 4, 1929, Rita D. Kunz applied for a permit under the act of October 22, 1919 (41 Stat. 293) to explore for water beneath the surface of Secs. 10 and 15, T. 28 S., R. 63 E., M. D. M., Nevada, for which she paid the usual fee of one cent per acre, amounting to \$12.80.

The application was transmitted to the General Land Office for consideration, and by letter of March 7, 1929, the Commissioner of the

General Land Office held the application for rejection because of defects in the proof, with opportunity to cure such defects within thirty days from notice. The applicant, finding herself unable to supply the required additional proof, filed application on April 21, 1930, for return of the fee. Thereupon she was required to submit an affidavit setting forth why she did not complete her application for permit. At the same time she was advised that her application for repayment was considered as a withdrawal of her application for permit, and accordingly the case involving the permit application was closed.

By decision of March 10, 1932, the application for repayment was rejected on the theory that the application did not have the status of a rejected application, but that of one withdrawn or relinquished. This theory is untenable. The application was incomplete, as expressly held in the decision calling for additional evidence. Furthermore, it is noted that it conflicted with a patented mineral entry as to a part of the land in Sec. 15. No relinquishment of the permit application was filed prior to its final rejection nor at the time the first application for repayment was filed, and even though a relinquishment was thereafter submitted on the form prepared for filing in connection with applications for repayment, that condition does not operate to prevent repayment, as was held by the department in the case of *J. G. Hofmann* (53 I. D. 254).

The relinquishment in this case was filed only for the purpose of completing the application for repayment, and it was not filed until after the application for permit had been finally rejected and closed.

The application for permit was not allowable for reasons above stated, and the fact that the applicant applied for repayment before the permit application was finally rejected, but after it had been held for rejection, is no reason for denying repayment. *John J. Kotkin* (49 L. D. 344).

It is deemed appropriate in this connection to call attention to the general rule that moneys paid in connection with claims for public lands should not be deposited in the Treasury as earned until the claim has been allowed. It is directed that appropriate instructions¹ be prepared covering cases of this kind such as now obtain in respect to permits under the mineral leasing act. See Circular No. 1004, approved May 2, 1925 (51 L. D. 138).

The decision appealed from is reversed and the case is remanded for further appropriate action as indicated herein.

Reversed and remanded with instructions.

¹ See instructions of June 1, 1932, p. 656.—Ed.

**IRRIGATION OF ARID LANDS IN NEVADA—FILING FEE—ACT
OCTOBER 22, 1919**

INSTRUCTIONS¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 1, 1932.

REGISTER, CARSON CITY, NEVADA:

Hereafter the filing fee of one cent an acre tendered with applications for permits under the act of October 22, 1919 (41 Stat. 293), shall not be applied until receipt of the permit for delivery to the permittee.²

THOS. C. HAVELL,

Assistant Commissioner.

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

**WHITE LESSEES OF ALLOTTED AND TRIBAL INDIAN LANDS—
HUNTING AND FISHING PRIVILEGES**

Opinion, May 17, 1932

INDIANS—INDIAN LANDS—LEASE—NON-INDIANS:

The general rule, as established by decisions of the courts is that laws, treaties, and policies relating to the Indians are not intended by implication or otherwise to extend to white men. *United States v. Higgins* (110 N. W. 609).

INDIAN LANDS—LEASE—NON-INDIAN LESSEE—HUNTING AND FISHING PRIVILEGES.

The leasing of lands by or for Indians does not change their trust character or take them out of the exclusive jurisdiction of the United States, and a lease of allotted or tribal lands for farming and grazing purposes does not confer upon a white lessee any of the hunting, trapping, and fishing rights and privileges possessed by the Indian lessor prior to the lease.

FENNEY, *Solicitor:*

Upon request of the Commissioner of Indian Affairs, you [Secretary of the Interior] have asked my opinion as to whether or not white lessees of Indian allotted or tribal lands have the right to hunt and trap on said lands. The inquiry arises in connection with Sioux Indian lands on the Pine Ridge Reservation in South Dakota.

The question submitted relates to farming and grazing lands. Congress has at various times enacted legislation authorizing the

¹ For order directing issuance of these instructions see case of *Rita D. Kunz*, p. 654.—Ed.

² For prior instructions on this subject see paragraph 3, Circular No. 666, approved April 8, 1927 (52 L. D. 67, 68).—Ed.

leasing of both allotted and tribal or unallotted Indian lands and these leases are usually taken by white men.

The general rule as established by court decisions is that laws, treaties, and policies relating to the Indians are not intended by implication or otherwise to extend to white men. Furthermore, no right or jurisdiction rests in the United States to remove white men from the operation of State laws to which they are ordinarily amenable, any more than the State has the right or power to subject restricted Indians to its laws, from which they are exempt, either directly or indirectly.

The hunting, trapping, and fishing rights of the Indians are in their nature immemorial and are reserved in their treaties with the Government. They were intended exclusively for the benefit of the members of the Indian tribes. The leasing of Indian lands, either tribal or allotted, by white men does not make them members of the tribe or entitle them to the special rights and privileges reserved for the Indians; these rights and privileges do not run with the leased lands—they are personal and not assignable. The leasing of lands by or for the Indians does not change their trust character or take them out of the exclusive jurisdiction of the United States. It was said in the case of *United States v. Higgins* (110 Fed. 609, 611)—

* * * It has been held that a white man adopted into an Indian tribe by the rules and regulations thereof did not lose his status as a white man, or acquire that of an Indian. * * * By Indian polity he might, by them, be classed as an Indian, but not by the Constitution and laws of the United States.

The form used in leasing Indian lands was apparently drawn to safeguard Indian rights, privileges, and conditions not usually present in the case of ordinary leases. The lease form submitted here in specific terms restricts the use of the lands "for farming and grazing purposes *only*". [Italics supplied.] The lessee agrees that he "will use the land *solely* for the purposes for which herein leased * * * and that he will not use or allow to be used the premises for any *other* purpose than that authorized in the lease." [Italics supplied.] The lessor and lessee each for themselves further agree among other things that if the lessee shall "use the same for any purpose save that hereinbefore authorized and agreed upon * * * this lease shall thereupon expire at the option and election of the lessor, etc."

In view of the fact that some question has been raised as to the situation, it might be well to incorporate an appropriate clause in the lease in order to remove any doubt.

My opinion is that white lessees of Indian lands have only such rights as are granted them under the terms of their lease and that in any event they do not succeed to or have any of the hunting, trapping, and fishing rights and privileges on the leased premises possessed by the Indian lessors prior to the lease.

Approved:

Jos. M. DIXON,

First Assistant Secretary.

GLEN L. KIMMEL AND GOSHEN IRRIGATION DISTRICT

Decided May 19, 1932

RECLAMATION HOMESTEAD—IRRIGATION DISTRICTS—JUDICIAL SALE—PURCHASE—ASSIGNMENT—LIMITATION AS TO ACREAGE—PATENT.

An irrigation district may bid in lands within reclamation entries sold for charges assessed by the district under the authority conferred upon it by the acts of August 11, 1916, and May 15, 1922, without limit as to acreage and assign them to persons qualified to acquire them under the act of June 23, 1910, as amended, but patents can not be issued to the district pursuant to such sales.

RECLAMATION HOMESTEAD—LIMITATION AS TO ACREAGE—IRRIGATION DISTRICTS—JUDICIAL SALE—PURCHASE.

The prohibition in section 3 of the act of August 9, 1912, against holding lands within reclamation entries in excess of 160 acres acquired by descent, will, or foreclosure for a longer period than two years has no application to irrigation districts bidding in lands under the acts of August 11, 1916, and May 15, 1922, but section 6 of the former act fixes the procedure as to them.

IRRIGATION DISTRICTS—ELIMINATION OF LAND FROM RECLAMATION PROJECT—JUDICIAL SALE—PURCHASE—ASSIGNMENT.

The elimination of land from a reclamation project after its sale for charges assessed by the irrigation district within which it is situated would not deprive the district of its rights, as purchaser under the sale, but the district will be allowed a limited time within which to assign the land to a qualified purchaser or to show cause why it should not be eliminated as not susceptible of reclamation.

EDWARDS, *Assistant Secretary:*

The Commissioner of the General Land Office has submitted for consideration by the department the record involving the homestead entry made under the reclamation act of June 17, 1902 (32 Stat. 388), by Glen L. Kimmel on October 6, 1921, for farm unit "C" or lot 4 and SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 4, T. 23 N., R. 62 W., 6th P. M., Wyoming, Cheyenne series 031787, containing 81.05 acres.

It is shown that by letter of June 6, 1924, the entryman was notified that his final proof, submitted March 18, 1924, had been examined and found sufficient as to residence, cultivation, and improve-

ments required by the ordinary provisions of the homestead law; that further residence was not required in order to obtain a patent; and that patent would issue upon proof that at least one-half of the irrigable area in the entry, as finally adjusted, had been reclaimed and that all charges, fees and commissions had been paid; or, if patent was desired before all charges against the land had been paid in full, the patent would issue upon proof of reclamation and payment of all charges due at the date of the submission of such proof, the Government retaining a lien for the unpaid charges as provided by the act of August 9, 1912 (37 Stat. 265), as amended by the act of August 13, 1914 (38 Stat. 686).

On June 12, 1926, there was filed in the Cheyenne land office a tax deed executed on May 17, 1926, whereby the treasurer of Goshen County, Wyoming, transferred the said land to the Goshen Irrigation District. Said instrument recited that the land was assessed for taxes for the year 1923 in the amount of \$91 which had not been paid; that the land was offered at a public sale on July 14, 1924, and was sold to the Goshen Irrigation District for the amount of the taxes; that 18 months having elapsed since the date of sale, and the property not having been redeemed as provided by law, the land was accordingly deeded to the said Goshen Irrigation District. The deed is noted as having been recorded on the records of Goshen County on May 20, 1926. No further action is shown to have been taken in the matter, and the case is presented for consideration as to the legal status of the land and the relative rights of the parties.

The record does not show the nature of the tax nor under what law it was assessed and enforced. At the time of this assessment and sale there was no legal authority for taxation for general purposes by the State or county officers in respect to land having the status of the tracts here involved. *Irwin v. Wright* (258 U. S. 219). Later legislation by the act of April 21, 1928 (45 Stat. 439), as amended by the act of June 13, 1930 (46 Stat. 581), permitting such taxation would not legalize prior unauthorized assessments. It will be assumed, however, for the purposes of this decision that the assessment in this case was not one for general purposes but was an assessment for irrigation costs as authorized under the act of August 11, 1916 (39 Stat. 506), it being shown that the land is within the boundaries of the Goshen Irrigation District and became subject to said act pursuant to designation under date of April 28, 1923. That act permits such district to levy and collect taxes on unpatented land for the purpose of raising funds with a view to the construction, operation, and maintenance of the irrigation system, but does not grant the right to tax generally or for any purpose not definitely connected with the construction and maintenance of the irrigation works, and such assessments may be enforced by sale of the en-

tered lands. That part of section 2 of said act which particularly applies to lands within reclamation projects reads as follows:

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 seventeenth, nineteen hundred and two, and Acts amendatory thereto, and making the payments required by said Acts.

The specific question presented is whether the district as holder of the tax title shall be recognized as an assignee so as to be in position to obtain patent upon the showing that the land has been reclaimed. If the above-quoted provisions stood alone, there would be no required qualifications to be shown for recognition as an assignee, but there are other provisions of law which require qualifications to be shown. A purchaser at such sale acquires the rights and privileges of an assignee under the provisions of the act of June 23, 1910 (36 Stat. 592), which act expressly provides that all assessments thereunder shall be subject to the limitations, charges, and conditions of the reclamation act. Furthermore, the amendatory act of August 9, 1912 (37 Stat. 265), provides that no person shall at any one time or in any manner, except as therein otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the reclamation act and acts supplementary thereto, prior to payment of all reclamation charges in excess of one farm unit nor in any case in excess of 160 acres. That act further provides, however, that any such excess

lands acquired in good faith by descent, by will or by foreclosure of any lien may be held for two years and no longer after its acquisition. That act also permitted patent to issue upon proof of the required residence, reclamation and cultivation and the payment of all charges due at the time of the submission of such proof, but a lien was retained by the United States for the payment of all reclamation costs. But such lien was abrogated under certain conditions by the later act of May 15, 1922 (42 Stat. 541), in cases where contracts are made as therein provided whereby irrigation districts contract to be responsible for the payment of the reclamation charges. It appears that such a contract with the Goshen Irrigation District has been made.

Reverting to the act of August 11, 1916, *supra*, it is noted that section 6 thereof, which contains certain provisions applicable only to lands not subject to the reclamation act, expressly provides that such lands sold in the manner therein provided may be patented to the purchaser or his assignee at any time after expiration of the period of redemption (no redemption having been made) upon payment of \$1.25 per acre or such other legal price as may be fixed by law, together with the usual fees and commissions, and upon 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 the application for patent have the qualification of a homestead entryman or desert-land entryman, and not more than 160 acres of said land shall be patented to any one purchaser under the provisions of said act. It is also stated therein that these limitations shall not apply to sales to irrigation districts, but shall apply to purchasers from irrigation districts of such land bid in by such district. Such purchaser or his assignee is allowed a period of 90 days after the expiration of the redemption period within which to show his qualifications and make the necessary payments, and if he fails to do so within that time then any other person having the necessary qualifications may be subrogated to the rights of the purchaser, for not more than 160 acres, upon making the necessary payments, including the sum for which the land was sold "or bid in by the district."

Upon careful consideration of all of the pertinent provisions of law, the department is of opinion that it was not contemplated that the district should be given patents pursuant to such sales, but that it was intended that the district could bid in such lands without limit of acreage and assign them to persons qualified to acquire them in harmony with the provisions of law above referred to. It is not believed, however, that the two-year limitation mentioned in the act of August 9, 1912, *supra*, for the holding of excess lands, has any application in cases where lands have been bid in by irriga-

tion districts under the acts of August 11, 1916, and May 15, 1922, *supra*. The procedure in that respect is sufficiently provided in section 6 of the Act of August 11, 1916, and may be applied with equal propriety in regard to lands bid in by the district under section 2 of that act. This view is reflected in the contract with the Goshen Irrigation District which contains the following provision:

Payment of construction charges on account of lands acquired by the district on account of payment delinquency shall be suspended until such lands are sold or leased by the district: Provided, however, that the period of suspension shall not exceed three years from the date the lands are so acquired or for such longer period than three years as the Secretary may deem advisable.

A report from the Bureau of Reclamation on this case states that the said district has furnished a list of approximately 15 tracts of land, tax title to which the district has acquired; that from time to time the district advises when it has disposed of any of the lands so acquired and such lands are then returned to the paying status; that the suspension of charges exists only during the period when the district holds title; that about one-half of the tracts listed by the district are unpatented homestead entries, but that the district has not applied for patent for any of the lands. It is further stated that the lands in the Kimmel entry are not shown upon the farm unit plats, which means that they are not susceptible of reclamation; that no construction charges are being assessed or paid, and that patent may not issue under the reclamation law; that the usual practice in such cases is to restore the land from the reclamation withdrawal which would permit issuance of patent under the ordinary provisions of the homestead law.

Even if this land should be eliminated from the reclamation project as suggested, it does not appear that such action should be effective to destroy the rights of the district under the sale which took place while the land was a part of the project. See case of *Marshall Humphrey* (46 L. D. 370). It is believed, therefore, that the district should be allowed a certain limited time within which to assign the land to a qualified purchaser and to show cause, if any, why the land should not be eliminated from the reclamation project as not susceptible of reclamation. In the absence of such showing the land will be so eliminated, and if a qualified assignee applies for patent the land will be patented to him upon paying the usual filing fee and commissions without further homestead requirements. If the land be eliminated from the project, and if no assignee applies for patent within the time allowed, then the land may be patented to any other qualified applicant upon paying to the district the amount of \$91 and the interest thereon allowed by law. A period of 90 days from notice hereof is allowed within which to comply with the terms of this

decision, and the case is remanded to the General Land Office for further appropriate action as indicated herein.

Remanded with instructions.

EXTENSION OF PERIOD FOR SUBMISSION OF FINAL PROOF ON HOMESTEAD ENTRIES—ACT OF MAY 13, 1932

INSTRUCTIONS

[Circular No. 1269]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 20, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

The act of May 13, 1932 (47 Stat. 153), entitled "An Act to extend the period of time during which final proof may be offered by homestead entrymen," reads as follows:

That the Secretary of the Interior is hereby authorized to extend for a period of not to exceed two years the period during which final proof may be offered by any homestead entryman upon public lands of the United States if the date requiring the submission of such final proof by any such entryman under existing law falls within the period beginning July 1, 1931, and ending December 31, 1933: *Provided*, That any such entryman shall be required to show that it is a hardship upon himself to meet the requirements incident to final proof upon the date required by existing law, due to adverse weather or economic conditions.

Sec. 2. The Secretary of the Interior is authorized to make such rules and regulations as are necessary to carry out the purposes of this Act.

The act applies to those homestead entrymen whose entries expired by limitation on or since July 1, 1931, and to those whose entries will expire on or before December 31, 1933.

The application for relief under this act must be sworn to by the applicant and corroborated by at least one witness before an officer authorized to administer oaths and using a seal, or if sworn to before an officer who does not use a seal his official acts must be attested by some proper officer. It must describe the entry and show the date thereof and of establishing residence on the land and the cultivation and improvements performed by the applicant. It must set forth fully the facts relative to the adverse weather or economic conditions or both which rendered it a hardship for the applicant to submit final proof on his entry within the statutory period and give the date on which he believes he will be able to submit satisfactory final proof, which must be not later than two years after the date on which the statutory life of the entry expired or expires under prior existing law.

You will promptly forward all applications for relief hereunder to this office by special letter after making notation thereof on your records and advise the claimant that his entry will be suspended to await action on his application and that he will be given due notice of the time when he will be required to submit final proof.

W. C. MOORE, JAMES W. MOORE, SECRETARIES
C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

**CONFIRMATION IN STATES AND TERRITORIES OF SCHOOL LANDS
CONTAINING MINERALS—AMENDATORY ACT OF MAY 2, 1932**

INSTRUCTIONS

[Circular No. 1270]¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 20, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of Congress approved May 2, 1932 (47 Stat. 140), entitled "An Act to amend the Act entitled 'An Act confirming in States and Territories title to land granted by the United States in the aid of common or public schools,' approved January 25, 1927," it is provided—

That subsections (b) and (c) of section 1 of the Act entitled "An Act confirming in States and Territories title to land granted by the United States in the aid of common or public schools," approved January 25, 1927, be amended to read as follows:

"(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the States of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

"(c) That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or

¹For instructions under the act of January 25, 1927 (44 Stat. 1026), see Circular No. 1114 (52 L. D. 51), and instructions of February 1, 1928 (52 L. D. 273).—Ed.

included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

SEC. 2. This amendatory Act shall take effect as of January 25, 1927; and in any case in which a State has selected lieu lands since such date under the Act approved February 28, 1891 (26 Stat. 796), and still retains title thereto, such State may, within ninety days after the date of the enactment of this Act, relinquish to the United States all right, title, and interest in such lands and shall thereupon be entitled to all the benefits of the Act of January 25, 1927, as amended by this Act.

It will be noted that subsection (b) of the act of January 25, 1927 (44 Stat. 1026), deals only with the disposition by the States of such granted mineral lands.

By the act of January 25, 1927, which grants to the States certain school section lands that are mineral in character, it is provided by subsection (c) of section 1 that where such lands are embraced within an existing reservation at the date of said act of 1927, they are thereby excluded from the grant made by said act.

Under the amendatory act of May 2, 1932, it is provided that in the event of the restoration of the lands from such reservation, the grant to the State of such mineral school section lands will thereupon become effective.

Hereafter, adjudications in connection with the State's title to school sections will be governed by the provisions of this amendatory act of May 2, 1932.

As provided in section 2 of this amendatory act, where a State has selected indemnity lands since January 25, 1927, in lieu of school sections or parts thereof, which, under the provisions of the amendatory act would have vested in the State under the act of January 25, 1927, if such indemnity had not been selected, the State may, within 90 days after the date of the amendatory act, relinquish to the United States all right, title, and interest in such selected lands, and take title to the base lands under the act of January 25, 1927, as amended.

Consideration must be given, however, as to whether or not any valid claim has attached to such base lands while they may have had the status of public lands of the United States. Such adverse claims may have attached in some instances, for the reason that, upon restoration of the base lands from a reservation after the State had received indemnity lands in lieu thereof, the school section lands assigned as base would be subject to disposition as public lands of the United States, either under the mining laws or other applicable public land laws.

It must be understood, therefore, that the status of the school section lands assigned as base must be determined, as to whether or not there is any valid claim adverse to the right of the State, where such indemnity selections have been approved and the selected lands certified to the State, before relinquishment may be made of the indemnity school land selection with a view to acquiring title to the base land under the provisions of the amendatory act of May 2, 1932; and, furthermore, that such relinquishments are applicable only where school section lands of known mineral character were within a reservation at the date of the act of January 25, 1927, and have since been restored from such reservation.

Where such indemnity selections have been approved and the selected lands certified to the State, such relinquishment must be in the form of a quitclaim deed, prepared in accordance with the laws of the State in which located governing the conveyance of real property, and must be accompanied by certificates of the proper State officer and of the proper county recorder, showing that said lands have not been sold or otherwise disposed of or encumbered by the State.

When, upon examination in this office, such relinquishment or reconveyance is found to be in accordance with the amendatory act of May 2, 1932, and with these instructions, and is accepted by this office, title to such base lands assigned to the selection as come within the meaning of the act of May 2, 1932, will thereupon vest in the State, in accordance with the act of January 25, 1927, as amended.

The beneficiaries of the grant made by the act of January 25, 1927, and by the amendatory act of May 2, 1932, are the States of Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. The grant also extends to the unsurveyed school sections reserved, granted, and confirmed to the State of Florida by the act of Congress approved September 22, 1922 (42 Stat. 1017).

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant-Secretary.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

Decided May 24, 1932

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—DEFAULT—RESUMPTION OF WORK—CHALLENGE

The form of challenge on behalf of the United States to the valid existence of an oil shale mining claim which to be valid must precede a resumption

of assessment work is a challenge of default in the performance of such work, not other challenges that have no relation or connection with the performance of such work.

WILBUR, Secretary:

The Virginia-Colorado Development Corporation has appealed from a decision of the Commissioner of the General Land Office dated January 20, 1932, wherein the Mt. Mamm oil shale placers, Nos. 12 to 17, inclusive, were held void for failure of the said corporation to deny a charge against the claims that the annual assessment work had not been performed upon each or any one of the claims for the year ending July 1, 1931, and that such work had not been resumed when challenge to the validity of the claims by the United States had been posted thereon September 4, 1931.

In substance, the corporation averred in reply that the failure to do the work subjected the claims only to relocation; that the leasing act has no application to the claims; that the Government can not take advantage of defaults in doing assessment work; that the Secretary of the Interior has no jurisdiction to challenge the valid existence of the claim for such a cause. It did not deny the truth of the charge but merely asked that the Commissioner's decision be set aside.

The corporation seeks to sustain its position by its interpretation of the language of the Supreme Court in *Wilbur v. Krushnic* (280 U. S. 306), and assails the interpretation by the department of the meaning of that opinion in *The Federal Shale Oil Company* (53 I. D. 213), decided November 11, 1930, cited and followed by the Commissioner in his decision. The brief and argument filed on appeal repeats for the most part only such contentions as were fully argued by the claimants and considered by the department in *The Federal Oil Shale Company case*, and contains nothing new, and it seems only necessary to state the reasons why appellant's interpretation of opinion in the *Krushnic case* is not considered tenable.

Appellant's brief quotes the following language of the court in the *Krushnic case, supra*, on pages 317 and 318—

* * * and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.

and adds—

That the challenge referred to in the expression of the Court under discussion relates to the *valid existence* of the claim at the time the Leasing Act went into effect, is evident when the whole opinion of the Court is considered.

It is obvious from the above-quoted expression of the court that the validity of the challenge depends upon whether it preceded the

resumption of work. Let it be assumed that the character of the challenge must be that which counsel for appellant asserts.

The question then suggests itself what form of challenge to the valid existence of the claim at the date of the leasing act could properly be made that would have any relation or connection with resumption of work, with which the court connects the challenge. It is not questioned that defaults in the doing of assessment work prior to the leasing act would not constitute a valid challenge. For illustration such a challenge might be made for any of the following reasons: that the land was withdrawn from mining location or reserved, or that title of the Government had passed at the date of location; that the land was classified coal land and valuable for coal at such date; that the location was fraudulent, having been made in the names of "dummies"; that it was a mere paper location without discovery or actual possession in search of mineral or markings of boundaries, or abandoned at the date of the leasing act. Neither these grounds for challenge, nor any others of which the department is aware, to valid existence of the claim at the date of the leasing act have anything to do with assessment work and their validity would not be affected by the fact whether the owner of the claim did or did not do the assessment work. But if we adopt the interpretation of appellant then resumption of work would bar all of such challenges and render the claim not only impervious to any form of attack by the Government, but from any other quarter as oil shale lands were no longer open to location under the mining laws after the passage of the leasing act, the court in its opinion recognizing the fact. (Page 314.)

The language of the opinion must be read in the light of the facts recited therein. Krushnic in that case had a valid existing claim at the date of the leasing act, and it was of the owner of such a claim that the court was speaking. Hence a baseless challenge that it was not so valid and existing would have no effect on the owner's right of resumption, whenever made, and the language of the court can not be taken to have that meaning.

Counsel quotes also this language of the same opinion in support of his position (p. 317)—

Prior to the passage of the leasing act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever \$500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted.

and laboring in certain cases should be considered as a possibility and

And in effect says that it means "prior to and after the passage of the Leasing Act," but we see nothing that follows justifying that inference.

For the reason stated the Commissioner's decision is

Affirmed.

CHICHAGOFF EXTENSION MINING COMPANY

Decided May 26, 1932

MINING CLAIM—ADVERSE CLAIM—ADVERSE PROCEEDINGS—JUDGMENT—CONTIGUITY—ELECTION—APPLICATION.

Where in an adverse suit brought under the mining law it is the judgment of the court that neither the adverse claimant nor the applicant for patent is entitled to the possession of the area in controversy, such judgment is conclusive and the patent proceedings are at an end as to such area and, if as a result of such judgment outlying segments of different locations embraced in the application do not form one contiguous body of land, the applicant will be required to elect which of such incontiguous tracts he will retain in his application, but outlying segments of one or more claims which form one body of land may be embraced in one application.

MINING CLAIM—IMPROVEMENTS—TUNNELS—EXPENDITURES—PUBLIC LANDS—CONDEMNATION—ALASKA.

Where a tunnel is run upon unappropriated public land in Alaska, the laws of which Territory recognize the right to condemn land for mining purposes, and the tunnel is made for the purpose and is a means of developing a mining claim, the value of the tunnel may be credited as acceptable expenditure in support of a patent application for such claim as though the tunnel were located within the claim.

MINING CLAIM—APPLICATION—PATENT—PUBLICATION—REPUBLICATION—CONTIGUITY—ELECTION—ADVERSE PROCEEDINGS.

Republication and posting anew for outlying segments of mining claims, not lost in an adverse suit, which the applicant for patent may elect to retain in his application will not be required where defects in the application are curable by supplemental showings and no adverse rights by a stranger can be acquired to those tracts by relocation.

MINING CLAIM—ADVERSE CLAIM—ADVERSE PROCEEDINGS—APPLICATION—PATENT—ASSESSMENT WORK.

After the commencement and during the pendency of adverse proceedings against a mining claim the applicant for patent is not obligated to maintain annual assessment work.

EDWARDS, Assistant Secretary:

March 13, 1925, the Chichagoff Extension Mining Company filed application, Anchorage 06374, for patent to the Delta, Jim Long, Chichagoff Extension No. 3, and Chichagoff Extension No. 4 lodes in Sitka Mining District, Alaska. On April 9, 1929, the Commissioner of the General Land Office canceled the final certificate issued November 20, 1925, because it was prematurely issued and had there-

tofore held it for rejection for other defects in patent procedure not material here to state. On July 12, 1926, the Alaska Handy Gold Mining Company filed adverse claim, and on March 13, 1926, adverse suit. The adverse claimant alleged prior valid and subsisting locations named Handy and Andy, conflicting in part with applicant's four claims, and in the suit, but not in the adverse claim filed in the local office, adverse claimant alleged relocation January 16, 1916, of the Handy and Andy as Juneau Nos. 1 and 2, and conveyance thereof to it.

Decree was entered by the District Court for the Territory of Alaska in the adverse suit that neither plaintiff nor defendant was entitled to possession of the land in conflict. Its decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, *Chichagoff Extension Gold Mining Co. v. Alaska-Handy Gold Mining Co.* (45 Fed. (2d) 553), and certiorari was denied by the Supreme Court (283 U. S. 850). Certified copy of the decree and judgment roll was filed by the applicant for patent. From the opinion of the Court of Appeals it appears that the four claims of the Chichagoff Company were held invalid as to the land in suit because made during the assessment year ending July 1, 1924, during which the Handy and Andy continued to be valid existing claims; that as no assessment work had been done on the Handy and Andy for the year ending July 1, 1924, these claims had then lapsed; that the validity of the Juneau Nos. 2 and 3 were not in issue as they were not made the subject of adverse notice prior to the institution of the suit.

The record shows that the discoveries on the four claims of the Chichagoff Company are on that portion of those claims not in controversy in the adverse suit, but that the work and improvement sought to be accredited and apportioned among the four claims as meeting the statutory requirement that \$500 in work and improvement must be expended on each claim, consists of a tunnel entirely within the area which the court held neither party was entitled to possess under their respective locations in suit. It appears from the original field notes of survey, completed June 16, 1924, that this improvement was nonexistent at that time, but was returned by supplemental report of the deputy mineral surveyor as an improvement made prior to May 16, 1925, the date of last publication of the application for patent, and as "in an advantageous position for the economical development of this ground of claims" and valued at \$2500.

By decision of October 31, 1931, the Commissioner rejected the application of the Chichagoff Company to the extent of its conflict with the land in suit as set forth in the judgment roll, and finding

the common improvement mentioned to be within such area held that it could not be applied as patent expenditure and also laid order for applicant to show cause why the application should not be rejected in its entirety. Upon further petition, that the claims proceed to patent, the Commissioner by decision of January 23, 1932, held that the expenditures for patent must be made on that portion of the claims free of conflict prior to the expiration of the publication period, and to accomplish this, applicant would be required to republish and report notice of application, furnish proof thereof and of continuous posting on the claims for the statutory period of publication, but even if this showing be made, as the judgment had destroyed the contiguity of the claims, applicant must elect to proceed to patent on only one of the three segments, namely (1) Chichagoff Extension Claim Number Four and Jim Quartz, or (2) Chichagoff Extension Claim Number Three, or (3) Delta; new proceedings being required for those segments not retained in the present application.

The Chichagoff Company has appealed contending that it "is entitled to all the ground within the interior boundaries of the group under its application, except such parts thereof as to which other parties have prior rights or as to which the location was not effective, and it should not be required to elect what segments it will go to patent on," citing as authority for its proposition, *Hustler and New Year Lode Claims* (29 L. D. 668), *War Dance Lode Claim* (29 L. D. 256).

The effect of the judgment of the court is conclusive as to the possessory right of the Chichagoff Company under their asserted locations to the area in conflict with the Handy and Andy claims, and its patent proceedings are at an end as to that area. *Brien v. Moffitt et al.* (35 L. D. 32), *Perego v. Dodge* (163 U. S. 160, 167-168). The judgment further establishes that the outlying portions of its claims, which may be considered valid, are not contiguous as the application of the company does not embrace one piece or body of land held and worked in common ownership, as required by section 2325, Revised Statutes. See *Wagner Assets Realization Corporation*, decided March 11, 1932, (53 L. D. 614). The proposition that these noncontiguous segments of different claims may be embraced in one application is not supported by *Hustler and New Year Lode Claims, supra*, or by any principles in *Del Monte Mining Co. v. Last Chance Mining Co.* (171 U. S. 55). These last-mentioned cases only go so far as to hold that a junior location may be legally located over a valid senior location so as to acquire surface rights to the nonconflicting area and rights to the lodes or veins which may apex therein, though such area may be divided by the senior location into detached

portions. The only benefit this principle is to the Chichagoff Company is that the Delta Quartz claim should be considered valid as to a small area west of the Handy lode as depicted on the plat of survey, whose continuity is broken with that part of the Delta Quartz claim, north of Handy lode, by the latter's overlap. This small segment of the Delta claim is contiguous to what is left of the Chichagoff Extension Claim No. Three, so that the Delta Quartz and Chichagoff Extension Claim No. Three outside the area involved in the adverse suit may be considered contiguous and may be embraced in one application.

In accordance with these views, it is held that the Commissioner properly rejected the application as to the area formerly embraced in the Handy and Andy claims. The company's locations being void to that extent they can not hereafter be used as a basis for patent in any new application. Furthermore, the company must elect if it wishes to proceed with its application to eliminate therefrom either the outlying portions of the Delta Quartz and Chichagoff Extension Claim Number Three, as one piece of land, or the outlying portions of the Jim Long and Chichagoff Extension Claim Number Four, as another piece of land, the two pieces being, as stated, incontiguous.

With respect to the availability of the value of the tunnel work of \$2500 located on the land involved in the adverse suit as common improvement work for the valid segments of the four claims, it may be assumed from the official report and field notes of the mineral surveyor that the work tends to develop all the claims in question and was done between the time of the completion of the original survey, June 16, 1924, and the date of the expiration of the period of publication, May 16, 1925; a period of time after the Handy and Andy claims had lapsed, and before the relocated junior claims were made, which latter are of no effect as no adverse claim based upon them was filed. It would seem therefrom that the tunnel was run on unappropriated public land. The act of February 11, 1875 (18 Stat. 315), amending section 2324, Revised Statutes, applicable to Alaska (Sec. 154, Comp. Laws, Alaska, 1918), provides—

That where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, * * * and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

Moreover, the rule is well settled that work done outside of a claim or group of claims, if not done in trespass and if done for the purpose

and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries, and may be done on patented land or public land. Lindley on Mines, section 631; Mines and Minerals, section 274, 40 C. J. 831-832. Condemnation proceedings for the running of tunnels for mining purposes is recognized in Alaska, section 633 (5), Comp. Laws, 1918.

Underneath public land not claimed by anyone he (the mining claimant) could undoubtedly prosecute such work and acquire an easement at least when the work was completed and in States where mining is a public use, condemnation proceedings would enable him to secure his right of way and thus render it possible to prosecute work outside the claims and entitle it to be credited. (Lindley on Mines, Sec. 631.)

It is therefore held that the Chichagoff Company is entitled to credit for the tunnel as common development work for the claims to which it is sought to be apportioned, nothing appearing to indicate it was not done in good faith under claim of right.

Prima facie, the Chichagoff Company being entitled to credit for the tunnel improvement, which was made before the period of publication had expired, and such other defects in the application as have been specified by the Commissioner appearing to be curable by supplemental showings, no good ground is perceived for requiring the company to begin publication and posting anew for the outlying segments of the claims which he may elect to retain in the application. No adverse rights by a stranger could be acquired to such area by relocation, for admitting that the final certificate was issued without authority of law and therefore void on its face, nevertheless, after the commencement and during the pendency of the adverse proceedings the applicant for patent is not obliged to keep up the annual assessment work. *Marburg Lode Mining Claim* (30 L. D. 202, 211).

The conclusions herein reached are predicated upon the matters of fact alleged in the record and do not preclude the institution of proceedings upon the report of the mineral inspector who examined the land, questioning the verity of the discoveries alleged and the adaptability of the tunnel work as a common improvement as to certain claims involved, should the Commissioner deem such proceedings warranted.

As modified herein, the Commissioner's decision is affirmed and the case remanded for further proceedings in harmony with the views above expressed.

Affirmed and remanded.

**FUR FARMING IN ALASKA—RENTALS—CIRCULARS NOS. 491 AND
1108, AMENDED**

INSTRUCTIONS

[Circular No. 1271]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 1, 1932.

REGISTER AND CHIEF OF FIELD DIVISION, ANCHORAGE, ALASKA;

REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA:

The paragraph of Circular No. 1108 (52 L. D. 27, 29), and paragraph 6, page 18 of Circular No. 491, relating to rentals under the regulations governing fur farming in Alaska, issued in pursuance of the act of July 3, 1926 (44 Stat. 821), are hereby amended to read as follows:

Every lessee under this act shall pay to the lessor in advance a minimum rental of \$5 per annum on leases for all tracts up to and including 10 acres, a minimum of \$25 annual rental on all leases of tracts over 10 acres and not exceeding 640 acres, and a minimum of \$50 annual rental on leases of tracts exceeding 640 acres, and shall pay a maximum rental equal to a royalty of 1 per cent on the gross returns derived from the sale of live animals and pelts, if the amount thereof exceeds the minimum rental mentioned, such yearly rental to be credited against the royalties as they accrue for that year.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,

Assistant Secretary.

**RIGHTS OF WAY WITHIN MOUNT MCKINLEY NATIONAL PARK,
ALASKA**

Opinion, June 6, 1932

RIGHTS OF WAY—POWER PROJECTS—RESERVOIRS—NATIONAL PARKS—ALASKA.

Rights of way for power projects and for the storage and carriage of water authorized by the act of February 15, 1901, can not be granted within the boundaries of the Mount McKinley National Park, Alaska, as originally established by the act of February 26, 1917, except upon specific authorization by Congress, but permits for purposes other than the storage or carriage of water or development or transmission of power authorized by the act of 1901 may be granted without such specific authority.

RIGHTS OF WAY—PERMITS—LICENSES—LAND DEPARTMENT—NATIONAL PARKS—ALASKA.

The authority of the Land Department to issue permits and licenses without first obtaining consent from Congress within those portions of the Mount McKinley National Park, Alaska, added to the park by the acts of January 30, 1922, and March 19, 1932, are restricted to such projects as are not inhibited by the act of March 3, 1921.

RIGHTS OF WAY—PERMITS—LICENSES—LEASE—FEDERAL WATER POWER ACT—
NATIONAL PARKS—ALASKA.

The act of March 3, 1921, which amended the Federal Water Power Act so as to prohibit the granting of permits, licenses, leases, or authorizations for any of the purposes specified therein within any national park as then constituted without first obtaining specific authority from Congress, is applicable to those portions of the Mount McKinley National Park, Alaska, added by the acts of January 30, 1922, and March 19, 1932.

FINNEY, *Solicitor*:

The Director of the National Park Service has submitted for consideration and opinion certain questions which have arisen in connection with a proposed letter of instructions prepared by the General Land Office regarding rights of way within the area added to Mount McKinley National Park, Alaska, by the act of March 19, 1932 (47 Stat. 68), extending the boundaries of the park.

The following is quoted from the memorandum submitted:

These instructions as prepared would subject the entire area within the Mount McKinley National Park to applications for location of rights-of-way under the act of February 15, 1901 (41 Stat. 790), for electrical plants, irrigation and other purposes. There is also attached to the file some memoranda reflecting a difference of opinion as to whether or not the prohibition against the location of rights-of-way for electrical plants, irrigation, and similar purposes contained in the act of March 3, 1921 (41 Stat. 1353), would apply to this park as extended.

The Mount McKinley National Park was originally established by the act of February 26, 1917 (39 Stat. 938). Boundary extensions of the park have been provided for by the act of January 30, 1922 (42 Stat. 359), and the recent act of March 19, 1932 (47 Stat. 68), which is the subject of the present proposed instructions of the General Land Office. After considering the memoranda attached to this file it would appear that the arguments in favor of the view that the act of February 15, 1901, *supra*, permits the location of rights-of-way in the park, can have application, if determined to be correct legally, only to lands added to the park since the enactment of the act of March 3, 1921, *supra*, which prohibits authorizations in national parks then existing and within boundaries as then constituted, for electrical plants, irrigation and similar purposes.

In order to clarify the position of the Service in this matter, it is therefore respectfully requested that the following questions be submitted to the Solicitor for consideration and his opinion thereon.

1. Whether the language of Section 2 of the act of March 19, 1932, reading "all acts supplementary to and amendatory of said acts are made applicable to and extended over lands hereby added to the park" may be legally construed to extend the prohibition of the act of March 3, 1921, over the area added to the park by said act of March 19, 1932.

2. If the language of the act of March 19, 1932, quoted in question 1 is not deemed sufficient to extend the prohibition of the act of March 3, 1921, to the lands added to the park by that act, whether the provisions of the act of March 3, 1921, still apply to the areas in the park:

(a) As originally established in 1917.

(b) The lands added in 1922.

(c) The lands added in 1932.

Section 2 of the act of March 19, 1932, *supra*, reads as follows:

That the provisions of the Act of August 25, 1916, entitled "An Act to establish a national park service, and for other purposes," and the Act of February 26, 1917, entitled "An Act to establish the Mount McKinley National Park, in the Territory of Alaska," together with all Acts supplementary to and amendatory of said Acts are made applicable to and extended over the lands hereby added to the park.

The act of March 3, 1921, *supra*, provides—

That hereafter no permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the river and harbor appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed.

The act of February 26, 1917, *supra*, which originally established the national park, and the provisions of which were expressly extended to the area added to the park, provided in section 2 that nothing in the act shall affect any valid existing claim, location, or entry, existing under the public land laws prior to February 26, 1917. In section 3 it was provided that whenever consistent with the primary purposes of the park, the act of February 15, 1901, "applicable to the location of rights of way in certain national parks and national forests for irrigation and other purposes, shall be and remain applicable to the lands within the park," and in section 4 it was further provided that "nothing in this act shall in any way modify or affect the mineral land laws now applicable to the lands in the said park."

Section 2 of the act of March 19, 1932, quoted in full above, expressly made the provisions of the above act, together with all acts "supplementary to and amendatory of" said act, applicable to the area added to the park.

It thus seems clear that it was the intention of Congress to make applicable to the added area the above-quoted provisions of the act of February 26, 1917, together with other provisions of said act and any supplemental provisions added by later legislation, except insofar as such provisions have subsequently been amended, modified, or repealed.

The questions presented in the Director's memorandum concern particularly the effect of subsequent legislation upon the provision in section 3, that wherever consistent with the primary purpose of the

park, the act of February 15, 1901, "shall be applicable to the lands within the park."

The scope of the act of February 15, 1901, and the subject matter covered thereby is plainly stated in the act, which reads as follows:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof; or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits, shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided, further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

By section 1 of the act of February 1, 1905 (33 Stat. 628), the Secretary of Agriculture was vested with jurisdiction to pass upon all applications under the act of February 15, 1901, for permission to occupy and use lands in national forests.

The jurisdiction of the several departments with respect to rights of way for power development and transmission, however, was affected by the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). The effect of this legislation was discussed by the Attorney General in an opinion dated March 3, 1921 (32 Ops. Atty. Gen. 525), where, at page 528, he says—

The comprehensive character of this Act is indicated by its title, which reads:

"An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes." (41 Stat. 1063).

This Act provides a complete and detailed scheme for the development and operation under public control of all the water-power resources of the public domain, reserved and unreserved, and of all the navigable rivers under the jurisdiction of the United States. It creates a new body called the Federal Power Commission and places in its hands authority to investigate all the water-power resources of the United States and control their development in so far as the Government has jurisdiction either by reason of ownership of lands or control over waters; and it expressly repeals "all Acts or parts of Acts inconsistent with this Act." (41 Stat. 1077).

It seems clear that it was the purpose of Congress to bring under this Act all future power development within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries.

And in 51 L. D. 41, it was held by this department (syllabus)—

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

It thus appears to be well established that the Federal Water Power Act superseded the act of February 15, 1901, insofar as all projects on public lands and reservations are concerned, which involve the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, or other project works for the development, transmission, and utilization of power, with few exceptions.

It will be seen that by the act of March 3, 1921, *supra*, hereinbefore quoted in full, the Federal Water Power Act was amended so as to prohibit the granting of permits, licenses, leases, or authorizations for any of the purposes specified therein within any national park as then constituted without specific authority of Congress. The language is broad and clearly includes all permits or authorizations of the specified character within the purview of the Federal Water Power Act. It follows that no such permits or authorizations could lawfully be issued for lands within the Mount McKinley National Park as constituted March 3, 1921, by the Federal Power Commission without specific authority of Congress. It is also noteworthy that section 4 of Regulation 1 of the Federal Power Commission excepts national monuments and national parks from the definition of "Reservations" as used in the regulations.

The question then remains as to the extent the authority of this department under the act of February 15, 1901, for the granting of permits or authorizations for rights of way other than those within the purview of the Federal Water Power Act was or is affected by the amendatory act of March 3, 1921, *supra*.

This act primarily was an amendment of the Federal Water Power Act but its applicability to an application for purposes other than power was considered by this office under date of April 23, 1924 (50 L. D. 388), involving an application by the Arbuckle Reservoir Company for extension of an irrigation easement in Rocky Mountain National Park under the act of March 3, 1891 (26 Stat. 1095). In that case the view was expressed that the inhibition in the act of March 3, 1921, against the granting thereafter of any permit or other authorization for reservoirs or other works for the storage or carriage of water within the limits of any national park or national monument without specific authority of Congress, is applicable to such works for irrigation purposes as well as for power purposes and precludes the granting of an extension of a right of way over such lands for an irrigation reservoir constructed pursuant to the act of March 3, 1891. The following is quoted from the opinion (p. 390):

The language of this law is comprehensive and absolute. It expressly prohibits the granting thereafter of any permit or other authorization for reservoirs or other works for storage or carriage of water within the limits of any national park or national monument without specific authority of Congress. The inhibition applies to such works for irrigation purposes as well as for power purposes. That such is the letter of the law can not be questioned, and the safeguard thus provided is just as appropriate in the one case as in the other. If a storage reservoir or a canal be regarded as objectionable and inconsistent with the purpose of the reservation when such structures are intended for use in connection with power development, it is difficult to see wherein they would be unobjectionable if intended for irrigation.

The language of the act of March 3, 1921, is broad in its scope and the inhibition includes permits, licenses, leases, or authorizations for dams, conduits, reservoirs, power houses, transmission lines, or other works for the storage or carriage of water, or for the development, transmission, or utilization of power. Though the act was primarily an amendment of the Federal Water Power Act, the prohibition applies to permits or authorizations for reservoirs or other works of the character specified, but it clearly does not apply to permits or authorizations included in said act of February 15, 1901, for purposes other than storage or carriage of water or development or transmission of power.

Answering the questions submitted, I am of the opinion that as to hydro-electric projects involving the generation and transmission of power formerly authorized under the act of February 15, 1901, *supra*, but afterwards included within the purview of the Federal Water Power Act, and other works for the storage and carriage of water as authorized by the act of 1901, no permits, licenses, leases, or authorizations may be granted or made without specific authority of Congress within the boundaries of Mount McKinley

National Park, as originally established in 1917. As to the lands added to said park in 1922 and in 1932, it is significant that the Federal Power Commission in its regulations has expressly excepted national parks and monuments from the class of "reservations" over which it is authorized to grant permits and licenses, and it is clear that this department was without authority to grant permits or authorizations for power purposes under the act of February 15, 1901, since the passage of the Federal Water Power Act. As to other projects, the authority of this department to grant permits without specific authority of Congress is restricted to projects which are not within the purview of the act of March 3, 1921, *supra*. Concerning such projects, it does not appear necessary to promulgate special regulations either as to the area included within the original boundaries of the park or the areas subsequently added thereto. Any applications submitted may appropriately be disposed of under existing regulations.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

TRUST PATENTS FOR ALLOTTED LANDS WITHIN POWER SITE WITHDRAWALS ON THE COLVILLE INDIAN RESERVATION

Opinion, June 6, 1932

COLVILLE INDIAN LANDS—ALLOTMENT—TRUST PATENT—WITHDRAWALS FOR POWER AND RESERVOIR SITES—FEDERAL WATER POWER ACT.

Section 24 of the Federal Water Power Act of June 10, 1920, providing for the issuance of patents on locations, entries, selections, or filings theretofore made on lands reserved as water power sites, subject to the limitations and conditions therein contained, has no application to tribal Indian allotments embracing lands on the Colville Indian Reservation withdrawn for power or reservoir sites under section 13 of the act of June 25, 1910.

INDIAN LANDS—INDIANS—PUBLIC LANDS—STATUTES.

Congress has almost universally made matters relating to Indians and Indian reservations the subject of acts separate and distinct from those relating to the public lands, and it is well settled that general laws do not include them unless an intention to do so is manifest.

WITHDRAWALS—POWER SITES—RESERVOIR SITES—IRRIGATION—INDIAN LANDS— PUBLIC LANDS.

The act of June 25, 1910, authorizing the President to temporarily withdraw public lands for power sites, irrigation, classification, or other public purposes, and section 13 of another act of the same date authorizing the Secretary of the Interior to reserve lands within any Indian reservation valuable for power or reservoir sites or needed for use in connection with any irrigation project were intended to be separate and distinct as to the sphere of operation, the former relating exclusively to public lands, the latter to Indian lands.

FEDERAL WATER POWER ACT—RESERVATIONS—WORDS AND PHRASES.

The term "reservations of the United States," as defined in the Federal Water Power Act of June 10, 1920, embraces tribal lands in Indian reservations, but it does not include Indian allotments.

COLVILLE INDIAN LANDS—ALLOTMENT—WITHDRAWAL—POWER SITES—RESERVOIR SITES—SECRETARY OF THE INTERIOR.

The Secretary of the Interior has full power to revoke withdrawals made by him under section 13 of the act of June 25, 1910, for power and reservoir sites embracing allotted lands on the Colville Indian Reservation.

COLVILLE INDIAN LANDS—ALLOTMENT—TRUST PATENT—WITHDRAWAL—POWER SITES—RESERVOIR SITES—IRRIGATION—IMPROVEMENTS—DAMAGES.

Trust patents may be issued for allotments on the Colville Indian Reservation embracing lands withdrawn by the Secretary of the Interior under section 13 of the act of June 25, 1910, for power and reservoir sites, where no irrigation project has been authorized, such patents to be subject only to the provisions of section 14 of that act which empower that official to cancel patents should the lands be required under authority of Congress for the purposes for which they were reserved, in which event the allottees are to be reimbursed for their improvements out of any moneys for the construction of the irrigation project.

FINNEY, *Solicitor*:

My opinion has been requested in the matter of issuing trust patents for certain lands allotted to Indians of the Colville Reservation, Washington, especially those allotments where the issuance of trust patents was suspended because the lands were included in Power Site Withdrawals Nos. 211 and 212 under section 13 of the Act of June 25, 1910 (36 Stat. 855, 858). These withdrawals are along the Nespelem and San Poil Rivers within said reservation and were approved by the Secretary of the Interior on November 7 and 13, 1911, respectively.

The allotment selections were made a number of years ago and the Indians have all along manifested a strong desire to secure trust patents. In response to a request by the Indian Office on February 7, 1929, for opinion as to whether the lands might not be eliminated from the power site withdrawals, the Geological Survey has stated that favorable recommendation in the matter had been made to the Federal Power Commission. It was believed that the commission would favor the issuance of trust patents if they were made to contain a reservation of the right of the United States or its permittees to use the lands for power site purposes in accordance with the provisions of section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063, 1075).

Action on the request for opinion was deferred to await a further field examination which it was desired to have on the Colville Reservation and report thereon by the Geological Survey, both of which were made some time ago. In addition to the withdrawals on the

San Poil and Nespelem Rivers, the report also refers to withdrawals on Hall Creek, within that reservation.

In the request for opinion, after referring to section 13 of the act of June 25, 1910 (36 Stat. 855, 858), under which the power site withdrawals in question were made; section 24 of the Federal Water Power Act of June 10, 1920; to the [unreported] case of Agatha Stensgar, an allottee on the Colville Reservation; to the repeated attempts that have been made to obtain legislation in the premises; and to an [unpublished] opinion rendered by the Solicitor for this department, approved January 28, 1924, in accordance with which limited trust patents were issued to numerous Indians on the Flathead Reservation, Montana, for lands within power site withdrawals on that reservation, the Indian Office concludes as follows:

In view of the foregoing and as the views heretofore expressed in regard to the matter are conflicting, it is desired to have the opinion of the Solicitor for the Interior Department as to whether or not the Solicitor's opinion of January 28, 1924 (M. 11410), concerning the issuance of trust patents for Flathead Indian allotments involving lands withdrawn for power site purposes should be adhered to, and if so, whether said opinion is applicable in regard to similarly allotted Indian lands in general, especially those allotments on the Colville Reservation where the issuance of trust patents has been suspended because the lands are involved in Power Site Withdrawals Nos. 211 and 212.

The apparent conflict between the views set forth in the Solicitor's opinion of 1924 and those of the department expressed both before and after said opinion renders it expedient to review somewhat that phase of the matter. That opinion concluded as follows:

Viewing the several statutes herein mentioned in the light of their manifest policies, I am of the opinion that there is ample authority under existing law for the issuance of limited patents of the character indicated for the lands referred to.

The above refers to the limited patents called for by section 24 of the Federal Water Power Act of June 10, 1920.

In a letter addressed to the Secretary of the Interior on March 2, 1921, the Commissioner of the General Land Office held in regard to issuing a trust patent to one Agatha Stensgar, an allottee on the Colville Reservation, for land included in a power site withdrawal—

There is no authority for issuing trust patent on the allotment of Stensgar with a reservation of power site and related privileges under the act of June 10, 1920. As no authority exists for issuing a patent on this allotment, with reservation of such power site privileges to the United States, a patent can not be issued to the Indian while the present reservation is intact.

The reply of the department, under date of March 7, 1921, to the above letter concluded as follows:

After consideration of the subject, I concur in the conclusion reached by you, but believe the department should consider the advisability of securing legislation which will permit such allotments to be patented, subject to a water

power reservation similar to that contained in the said act of June 10, 1920, rather than to undertake to cancel the allotments, particularly if the Indians desire to retain same.

Appropriate bills were from time to time prepared and submitted to Congress but no legislation on the subject was ever enacted. In submitting a proposed bill under date of February 20, 1922, providing for the amendment of section 13 of the act of June 25, 1910 (36 Stat. 855, 858), the department said—

The necessity for this amendment is due to the fact that in the opinion of this department there is no law authorizing the issuance of patent to an Indian on an allotment embracing tribal lands withdrawn under section 13 of the act of June 25, 1910, *supra*, for power or reservoir sites.

Section 24 of the act of June 10, 1920 (41 Stat. 1063, 1075), providing for the issuance of patents on locations, entries, selections or filings theretofore made on land reserved as water power sites, subject to the limitations and conditions contained in the said section 24, is held not to apply to tribal Indian allotments covering lands withdrawn under section 13 of the said act of June 25, 1910.

The bill, if passed, will enable the issuance of patent with proper reservation on a large number of allotments embracing lands withdrawn for power site purposes which have been suspended in the General Land Office.

In reporting on the introduced bill under date of March 18, 1922, the department, after stating, among other things, that these provisions would enable patents to issue to a considerable number of Colville Indians whose allotments had been suspended, said—

It is considered that administration of the lands allotted to Indians which are valuable for power site or reservoir purposes and are withdrawn under section 13 of the act of June 25, 1910, *supra*, relating to Indian matters should be entirely under the direction of the Secretary of the Interior, who is by law intrusted with the charge of matters relating to Indians, as was evidently the purpose of the act, the same having been passed upon the same day as the act (36 Stat. 847) which provided for the like withdrawal of public lands.

Matters relating to Indian reservations have almost universally been made by Congress the subject of acts separate and distinct to those relating to public lands, and it is believed that this distinction and policy is a beneficial one which should be maintained.

In May, 1926, the department approved a recommendation of the Indian Office for issuance of trust patents in connection with certain selections which were excepted from approval in 1922 on a schedule of allotments made to Indians on the Blackfeet Reservation in Montana. The suspended allotments were for lands within an area withdrawn under section 13 of the act of June 25, 1910 (36 Stat. 855, 858).

In a communication from the General Land Office which the department approved July 8, 1926, it was said—

The lands in question having been withdrawn under section 13 of the act of June 25, 1910 (36 Stat. 858), being needed in connection with the St. Mary's Storage Unit of the Milk River Project and being in an Indian reservation

which has not been restored to the public domain, there is no authority to issue a patent with a reservation comprising the withdrawals in question such as is provided for in section 24, of the Federal Water Power Act (41 Stat. 1063) so that in default of additional legislation, such as contained in S. 665, 68th Congress, trust patents could not be issued for those subdivisions of the allotments embraced in said withdrawals.

It may be stated here that on December 16, 1931, the Indian Office, referring to the above Blackfeet allotment selections, sought the advice of the Geological Survey as to "whether or not any of the above described lands might be released from the reserves created for power site purposes." The Director of the Geological Survey, under date of January 9, 1932, submitted the matter to the Secretary of the Interior with the following statement and request:

An examination of the records indicates that these lands have value for power purposes, but the time of development is probably remote because of lack of market. Development when made will probably be by conduit so that there will be little interference with the use of the land for grazing, which is the most probable use other than power development.

I am informally advised that the Federal Power Commission if requested would probably make a determination to the effect that the value of the lands for power-site purposes would not be injured or destroyed by the approval of allotment selections and subsequent patenting subject to the provisions of section 24 of the Federal Water Power Act.

Before this matter and similar cases are submitted to the Federal Power Commission an opinion by the Solicitor is requested as to the applicability of section 24 of the Federal Water Power Act to Indian allotments.

The above communication from the Geological Survey was not formally referred to the Solicitor for opinion and no action has as yet been taken in the matter. The recognition which is given by the Geological Survey to the supposed authority of the Federal Power Commission in the premises is apparently due to the views expressed in the Solicitor's opinion of January 28, 1924, relating to Flathead withdrawals and allotments.

There are two well-defined acts of date June 25, 1910, for the withdrawal of lands for power site purposes; the first being an act entitled "An Act to authorize the President of the United States to make withdrawals of *public lands* in certain cases." [Italics supplied.] (36 Stat. 847), section 1 of which provides as follows:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the *public lands of the United States* including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reserves shall remain in force until revoked by him or by an act of Congress. [Italics supplied.]

The other act of date June 25, 1910, which authorizes the Secretary of the Interior to withdraw lands within any *Indian Reservation* valuable for power or reservoir sites is found in section 13 of said act (36 Stat. 855, 858), and reads as follows:

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress: *Provided*, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with this Act.

The act of June 10, 1920 (41 Stat. 1063), is entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the *public lands* in relation thereto * * *." [Italics supplied.] In section 3 the words "public lands" as used in the act are defined to mean such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. The act also applies to tribal lands in Indian reservations, but not to Indian allotments.

Section 4 provides for issuing licenses for the construction purposes enumerated "upon any part of the public lands and reservations of the United States," provided that it is determined that the license will not interfere with the purpose for which the reservation was created or acquired.

Section 24 provides as follows:

That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of

competent jurisdiction, said bond to be in the form prescribed by the commission.

The proviso to the above section, which reads, "that locations, entries, selections, or filings heretofore made for lands reserved as water power sites or in connection with water power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained," is of significance in connection with any question as to whether this act applies to allotments covering lands withdrawn under section 13 of the act of June 25, 1910 (36 Stat. 855, 858). The lands on Flathead Reservation involved in the Solicitor's opinion of January 28, 1924, were withdrawn by the President under the act of June 25, 1910 (36 Stat. 847), which expressly refers to "public lands," no mention whatever being made of "Indian lands," whereas withdrawals for power site purposes on the Colville Reservation were made by the Secretary of the Interior under section 13 of the act of June 25, 1910 (36 Stat. 855, 858), which expressly refers to lands on Indian reservations. This constitutes a major distinction between the Flathead and Colville situations, referring to which it was said in the Solicitor's opinion of January 28, 1924, that it "can make but little difference for in either event these lands are now available for development under the subsequent legislation by Congress"—which means under section 24 of the water power act of June 10, 1920. In its request for that opinion on December 10, 1923, the Indian Office said—

It is desired to have an expression of the opinion of the Solicitor for the Interior Department as to whether or not the lands in Power Site Reserve No. 397 were correctly withdrawn under the act of June 25, 1910 (36 Stat. 847), and if not properly withdrawn, whether trust patent to Indian allottees may properly be issued in accordance with the provisions of section 24 of the Federal Water Power Act of June 10, 1920, *supra*.

That Office had previously stated in its request, after referring to the two acts of June 25, 1910—

If this withdrawal was properly made under the public land withdrawal act of June 25, 1910, *supra*, there is no doubt but that section 24 of the Federal Water Power Act will apply, but if the reserve was not so properly withdrawn, the operation of this section over the lands involved can not be legally sustained.

It is not believed that the withdrawal was properly made under the act providing for the withdrawal of *public lands*.

It was stated in the letter of the General Land Office dated March 2, 1921, hereinbefore mentioned, referring to section 24 of the act of June 10, 1920—

In so far as any inference can be drawn from the title and body of the act, such inference points to the view that this is an entirely distinct act and

is not intended to include or affect the prior withdrawal act of June 25, 1910. It is believed that if Congress had intended to provide for the issuance of patents to Indian allottees for tribal lands, with a reservation under this act, it knowing that there was an act providing for the reservation of lands valuable for power site purposes on Indian reservations and over Indian allotments, would have especially included such allotments among the forms of disposition which could proceed to patent under the act, with the reservation provided.

Acts of Congress relating to the public domain are not held to apply to Indian reservations. The mineral laws do not apply unless extended thereto by special act. The laws relating to surface rights have not been made to apply to Indian reservation lands. On the day, June 25, 1910, that the act authorizing power sites on the public lands (36 Stat. 847), was passed, the act authorizing withdrawals for such purposes (36 Stat. 855, 858) on Indian reservations was also passed. In short the two classes of lands have been kept distinct and legislation of a mixed character affecting both has been unusual. The intention of Congress in such cases must be clearly expressed.

It will be observed that there has been more or less confusion as to the applicability of the Federal Water Power Act of 1920 to Indian reservations, especially as to allotments on the Colville Reservation. The allotments on the Flathead Reservation involved in the Solicitor's opinion of 1924 are said to have been made from unallotted or unsold lands of that reservation, that is ceded lands. For that reason such lands are treated in said opinion as "public lands" within the purview of the act of June 25, 1910 (36 Stat. 847), under which they were withdrawn for power site purposes, and the position is also taken that for the same reason the water power act of June 10, 1920, is applicable, under section 24 of which limited trust patents may be issued to Flathead allottees.

It was said in the case of *Ash Sheep Company v. United States* (252 U. S. 159) (syllabus): "Whether or not by a cession of lands from an Indian Tribe the United States becomes trustee for the Indians or acquires an unrestricted title depends in each case upon the terms of the agreement or treaty by which the cession is made." The court held that the lands in that case were not "public lands of the United States" but were Indian lands. In that case, the United States undertook to sell the lands and apply the proceeds for the benefit of the Indians. The same was true as to the Flathead lands involved in the Solicitor's opinion of 1924. It was said there, however, that lands within an Indian reservation which have been opened to public settlement and entry then become *public lands* "to the extent at least that they are available for settlement under our public land laws. Such lands, however, may remain 'Indian lands' insofar as the application of the proceeds derived therefrom is concerned." It is clear, however, that there can be no proceeds until the lands are sold and, therefore, until sold they remain *Indian lands*.

It was said in the case of *State v. Cloud* (228 N. W. 611), after referring to *Minnesota v. Hitchcock* (185 U. S. 373) (p. 612)—

* * * That case holds that, in the cession made under and pursuant to the Nelson Act, the Indians did not cede the lands to the United States absolutely, but only in trust to be disposed of for the benefit of the Indians in the manner therein provided; and that the lands so ceded remained subject to the right therein reserved to the Indians by that act and did not become public lands.

The court also stated in the case of *Ash Sheep Company v. United States*, *supra* (p. 166)—

Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R. R. Co. v. Harris*, 215 U. S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus, we conclude, that the lands described in the bill were "Indian lands."

The conclusion in the Solicitor's opinion of 1924 that there was ample authority under the existing law for issuing a limited patent in the particular case there under consideration ultimately turned on the point that—

* * * the treaties and special acts of Congress dealing with a particular Indian tribe or reservation, and the several acts and parts of other acts dealing with the Indians generally together form a code of laws relating to the Indians which, like any other code, must be considered in its entirety. Hence the strict letter of one provision is not to prevail where such would result in defeating the intention of the legislation as a whole.

This conclusion is based primarily on section 2448, Revised Statutes, a law relating to public lands and declaring that where a patent is issued in the name of a deceased person the title to the land shall inure and become vested in the heirs, devisees, etc. The courts have held that the statute is also applicable to lands allotted to Indians. If there were but one act or statute involved in the instant matter there might be room for adopting a similar rule but we have here two separate and distinct acts, one expressly authorizing the President to withdraw "public lands" for power site purposes and the other authorizing the Secretary of the Interior to withdraw Indian lands for similar purposes. The distinction between the two acts is emphasized by the fact that they were passed on the same date. Not only the title and section 1 of the act of June 25, 1910 (36 Stat. 847), but other provisions of the act, show conclusively that it was intended

to apply only to public lands and this taken in connection with the express provisions of section 13 of the act of June 25, 1910 (36 Stat. 855, 858), relating exclusively to "Indian lands," leaves little or no doubt in the premises and no occasion for resorting to such a rule as was applied in section 2448, Revised Statutes. The two acts of June 25, 1910, were each intended to have a different sphere of operation. It is not only significant that they were passed on the same date as stated but it is also significant that it was deemed necessary for the department to obtain legislation in order to issue limited patents to allottees whose allotment selections are within power site withdrawals on the Colville Reservation, under section 24 of the Federal Water Power Act of June 10, 1920, which act itself relates to "public lands." Lands in an Indian reservation are not "public lands of the United States" (*Forty-Three Cases Cognac Brandy*, 14 Fed. 539). "Public land" does not include an Indian Reservation (*Northern Pacific Railroad Company v. Hinchman*, 53 Fed. 523). An Indian Reservation is not a reservation of the United States. As defined in the Federal Water Power Act of 1920, the term "reservation of the United States" embraces national monuments, national parks, national forests, *tribal* lands embraced within Indian Reservations, military reservations, etc. set aside to serve some governmental purpose of the United States. It does not embrace Indian allotments.

The policy of Congress long has been to legislate specifically as to the Indians and their property; and it is well settled that general laws do not include them unless an intention to do so is manifest. (*Elk v. Wilkins*, 112 U. S. 94, 100.)

It is a serious question whether the power site withdrawals on the Flathead Indian Reservation were properly made under the act of June 25, 1910 (36 Stat. 847), as it has been held that ceded Indian lands are not "public lands of the United States." If they are not "public lands" for the purposes of the said act, then they are not "public lands" for the purposes of the Federal Water Power Act of June 10, 1920, and, therefore, the withdrawals were unauthorized, inoperative, and can be treated in no other light than an invasion of the Indians' rights.

However, it may be inadvisable to disturb the Solicitor's opinion of January 28, 1924, relating to withdrawals on the Flathead Reservation under the act of June 25, 1910 (36 Stat. 847), even though such action might be warranted, especially in view of the fact that the Indian allottees concerned there have elected in writing to receive the limited patents called for by section 24 of the Federal Water Power Act of June 10, 1920. In any event, the situation on Flathead differs materially from that on Colville and to the extent

of this difference the said opinion is not controlling on the latter reservation for the reason, among others, that the withdrawals on that reservation were made by the Secretary of the Interior under section 13 of the act of June 25, 1910 (36 Stat. 855, 858), which expressly authorizes him to make withdrawals for power site purposes within Indian reservations. Therefore, so far as any conflict exists between the Flathead and Colville situations, the rule laid down in the Solicitor's opinion of 1924 should not be regarded as controlling in respect to the latter reservation, or other reservations similarly situated as to power site withdrawals.

Two investigations have been made by the Geological Survey of the water power resources of lands within the Colville Indian Reservation. The first was made in May and June, 1911, with a view to withdrawing lands available for power sites, on which a report was submitted in September of that year. On the basis of this report, Power Site Reserves Nos. 211 and 212 on the Nespelem and San Poil Rivers were approved by the Secretary of the Interior in November, 1911, as hereinbefore stated. Reserve No. 346 on Hall Creek was approved in 1913 on the basis of a field examination and report made in 1912. In order to obtain a detailed classification of the power values of the lands included in the above power site reserves, a further field examination was made by the Geological Survey in May and June, 1929, on which a report was submitted in 1930. It appears from this report that "present and future irrigation demands on the waters of Hall Creek and San Poil and Nespelem Rivers will limit the flow available for power." It is stated in a summary of findings—

The size and location of the Hall Creek and Nespelem River sites render them of minor value except for the supply of local market induced by agriculture, mining or lumbering. The San Poil sites may have considerable value as future feeders to transmission line systems which are gradually being extended into nearby territory. While not feasible at present unit cost of San Poil power compares favorably with steam generated power in a region where water power is plentiful.

It was stated by the Geological Survey in connection with Reserves Nos. 211 and 212 that the principal value of the waters of the Nespelem and San Poil Rivers is for irrigation rather than power; but that the irrigable possibilities could be conserved by means of the withdrawals pending a further and more complete recognition. It appears that these withdrawals were intended to be from all forms of disposition "except allotment to Indians entitled," and that they were made primarily "to protect the water rights of the Indians by preventing any diversion of the waters by prospective white settlers." A question also arose as to the relative value of the lands for allotment or power site purposes and it was suggested

that the withdrawal of lands from allotment would work a material hardship to the Indians. In fact, the special allotting agent strongly recommended against withdrawals, on the ground that the greater portion of the lands it was proposed to withdraw were occupied as their homes by individual Indians who were self-supporting; that practically all the lands withdrawn had been apportioned among the Indians in allotment, although the schedules had not been submitted for approval; that if the withdrawals were made and these tentative allotments were canceled there would be no other available lands that could be allotted to them; and that the number of claimants for allotment was so great that practically all of the lands suitable for agricultural or grazing purposes on the entire reservation would be acquired.

In a letter to the Indian Office dated January 16, 1929, the supervising engineer of the United States Indian Irrigation Service, referring to the power site withdrawals made along the Nespelem and San Poil Rivers on the Colville Reservation, said, among other things—

Our attention was called to the fact that this withdrawal was retarding the development of many allotments along the streams as the allottees do not care to develop the land if they can not get title to the same, or sell it and derive the benefits from their improvements. I believe these allottees have some grounds for their complaints. I have failed to note any feasible power site possibilities along the San Poil River that would justify their development. * * * There are apparently no reservoir sites.

Referring to an unsigned and undated report entitled "Preliminary report of water reserves of Colville Indian Reservation, Washington," based on data collected in 1911, the supervising engineer further stated—

They show three possible reservoir sites. * * * I doubt very much if even the best one of the three is feasible or will ever be constructed.

I believe the Indians should be encouraged in the development of their allotments, and if this withdrawal for power sites prevents such development it should be confined to only those points where such development appears feasible.

I, therefore, recommend that the matter of reducing the area be investigated so that all unwarranted withdrawals for power sites may be restored on both the San Poil and Nespelem Rivers.

It was on the above letter of the supervising engineer that the Indian Office based its letter of February 7, 1929, hereinbefore mentioned, to the Geological Survey for information as to whether the lands on the Colville Reservation might not be eliminated from the power site withdrawals of 1911. Although the withdrawals for power sites on Colville were made as long ago as that, there has been no construction begun on any of the sites and none apparently is contemplated in the near future. From different sources the

same information has come, namely, the value of the proposed sites is negligible, they are not included in any constructed or contemplated irrigation system, and their development is not justified at this time. It is said that Hall Creek presents an attractive power site but only for local agriculture market. There seem to be more possibilities on San Poil River, which is the largest stream in Colville Reservation. However, the size and isolated location of all the sites cause them to be of minor value so far as supply for tested market is concerned. It is reported in that connection that there are a number of large sites on Columbia River and Clark Fork on Columbia River where power can be developed more cheaply than on the San Poil River. The evidence as a whole leads to the conclusion that none of the lands involved are particularly valuable for power site purposes and that any scheme of water power development might seriously interfere with the irrigable diversion of the waters.

Attention is also invited to two letters attached to the record, one dated May 6, 1932, from the supervising engineer, Indian Irrigation Service, and the other dated May 9, 1932, from the Assistant Director of that Service, both of which confirm the previous reports as to the power site possibilities of lands on the Colville Reservation.

It has been recommended that the power site withdrawals in question on Colville Reservation should be revoked and the lands restored to their former status, thus opening the way to the issuance of trust patents to the Indians for their allotment selections without reservation or limitation. As the position has been taken that in the absence of legislation there is no authority to issue patents to Colville Indians with the limitations provided for in section 24 of the Federal Water Power Act, there would seem to be no occasion for referring the matter to the Federal Power Commission. At no time has the Federal Power Commission actively entered into the situation and apparently there has been no occasion for its doing so.

As the power site withdrawals on the Colville Reservation were made by the Secretary of the Interior under the authority conferred upon him by section 13 of the act of June 25, 1910 (36 Stat. 855, 858), he has full power to revoke such withdrawals of lands embraced in Indian allotments, since the Federal Water Power Act has no application to such lands.

I express no opinion as to whether, as a matter of administrative policy, the withdrawals should be revoked. However, it is my opinion that it is unnecessary to do so for the purpose of issuing trust patents to the Colville Indians in question. No irrigation project has been authorized as to such lands and under these circumstances the act provides that the Secretary of the Interior may, in his discretion, reserve the sites covered by the present withdrawals pend-

ing future legislation by Congress. It is my opinion also that trust patents may properly be issued to the Indians subject only to the provisions of section 14 of said act of June 25, 1910, which are as follows:

That the Secretary of the Interior, after notice and hearing, is hereby authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: *Provided*, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: *Provided further*, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project.

Approved.

JOS. M. DIXON,

First Assistant Secretary.

WATER RIGHTS ON LOWER KLAMATH LAKE

Opinion, June 9, 1932

LOWER KLAMATH LAKE—DRAINAGE—WATER RIGHTS—FLOWAGE.

The United States has the authority to use the bed of Lower Klamath Lake and the public lands surrounding it for flowage purposes or to drain the lake and to use the lands thus uncovered for agricultural purposes.

LOWER KLAMATH LAKE—WATER RIGHTS—OREGON—IRRIGATION—FLOWAGE.

The right conferred upon the United States by the State of Oregon to appropriate unappropriated waters in that State for agricultural purposes was plenary as to its use unaffected by lack of diligence on the part of the Government in completing its project or by the fact that all the waters are not required to irrigate the lands served by its ditches, but no appropriation for flooding lands in Lower Klamath Lake was authorized.

KLAMATH LAKE—KLAMATH RIVER—WATER RIGHTS—WATER POWER CONTRACTS—OREGON—CALIFORNIA POWER COMPANY—OREGON

The contracts between the United States and the Oregon-California Power Company contemplated that the waters stored in Klamath Lake and the natural flow of Klamath River would be used for agricultural purposes and for the development of power; and if a different use, detrimental to the rights of the power company or definitely changing the use contemplated under the Oregon law, be desired, such changed uses must be first agreed to by the power company and by the State.

BIRD RESERVES—FEDERAL MIGRATORY BIRD LAW—CONDEMNATION.

The United States may acquire by condemnation lands within a State which it desires for the purpose of creating refuges for wild fowl under the Federal Migratory Bird Law.

LOWER KLAMATH LAKE—KLAMATH DRAINAGE DISTRICT—SETTLERS—BIRD RESERVES—FLOWAGE—WAIVER OF DAMAGES.

The waiver of damage clause in the contract made with the settlers owning lands in Klamath Drainage District does not permit the Federal Government to flood their lands for bird refuge purposes without just compensation as contemplated by the Constitution.

FINNEY, *Solicitor*:

You have submitted to me for opinion the following questions in connection with the waters of Lower Klamath Lake and the drainage area surrounding the lake:

1. As to the sufficiency of the cessions of both land and water made by Oregon and California in 1905 to permit a change from agricultural use.
2. Whether the water appropriations made by the Reclamation Service in Oregon are plenary so far as use is concerned, or may be considered subject to restriction.
3. As regards contracts between the Reclamation Service and the California-Oregon Power Company whether diversion of use of water to refuge purposes would give the power company any priority of right as compared with the contemplated use of the same water for irrigation purposes.
4. Oregon having passed an enabling act authorizing federal acquisition of lands for migratory bird refuges, does any power of condemnation exist in the event that some land owner in the Klamath Drainage District should demand an unreasonable price, or as an alternative, would waivers of damages heretofore executed by settlers permit the flooding of such lands without prior condemnation.
5. If legislation is desirable on any of the above points, a very brief outline of what it should cover.

In connection with the development of the Klamath irrigation project, Oregon-California, a plan for reclaiming the marshlands of Lower Klamath Lake was adopted in 1907 which involved the construction of the California and Northeastern Railway embankment as a levee with controlling works at Klamath Strait to regulate the passage of water through the strait. Lower Klamath Lake is a navigable body of water about 18 miles long and half as wide, lying partly in California and partly in Oregon. It receives its main supply of water from Klamath River which is in Oregon. Water flows into Lower Klamath Lake through a branch of the Klamath River, sometimes called Klamath Strait. The lake has practically no drainage area and its water supply is obtained by a flow of water from Klamath River through the strait when the Klamath River is in flood and when the river is lowered by natural causes during the dry season the water flows out of Lower Klamath Lake. The controlling works (gates) were placed in the railway embankment for the purpose of controlling the inflow and outflow of water to and from Lower Klamath Lake.

The Klamath Drainage District in Oregon was organized in 1915. It included 20,000 acres of private and 7,000 acres of public land. On November 30, 1917, a contract was entered into between the district and the United States whereby the latter agreed to close the gates in Klamath Strait and keep them closed. This would prevent water flowing into the lake and evaporation would eventually lower the water level and uncover lands that would be then subject to cultivation and use. On August 24, 1921, the United States and the Klamath Drainage District made a supplemental contract providing for the sale of water for the district lands whereby the district was to pay \$50,000 in 10 annual installments. The district began construction of its irrigation system in 1922.

February 24, 1917, a contract was made between the United States and the California-Oregon Power Company whereby the company constructed for the United States a dam at the outlet of Upper Klamath Lake which would control the flow of water in Klamath River. To some extent this controls the possible flow of water into Lower Klamath Lake. This contract was amended June 25, 1930. The purpose of the contract with the power company, so far as it was concerned, was the development of power near the dam site and securing of a regulated flow of the Klamath River for the benefit of the company's power plant a considerable distance below the confluence of Klamath River with Klamath Strait.

The answer to the first question propounded involves laws of Oregon, California, and the United States. Since these laws involve rights in real property to comprehend their effect it is desirable to quote them in full.

On January 20, 1905, the Legislative Assembly of the State of Oregon passed a law found at page 63 of the General Laws of Oregon, 1905, which law is quoted as follows:

SECTION 1. That for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service of the United States established by the act of Congress approved June 17, 1902 (32 Stat. 388), known as the reclamation act, the United States is hereby authorized to lower the water level of Upper Klamath Lake, situate in Klamath County, Oregon, and to lower the water level of or drain any or all of the following lakes: Lower or Little Klamath Lake and Tule or Rhatt Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon, and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

SEC. 2. That there be, and hereby is, ceded to the United States all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels or by the drainage of any or all of said lakes not already disposed of by the State; and the lands hereby ceded may be disposed of by the United States, free of any claim on the part of this State

in any manner that may be deemed advisable by its authorized agencies, in pursuance of the provisions of said reclamation act.

On February 3, 1905, the Senate and Assembly of the State of California passed the law found at page 4, California Statutes, 1905, quoted as follows:

SECTION 1. That for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service of the United States, established by the act of Congress approved June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), known as the reclamation act, the United States is hereby authorized to lower the water levels of any or all of the following lakes: Lower or Little Klamath Lake, Tule or Rhett Lake, Goose Lake, and Clear Lake, situated in Siskiyou and Modoc Counties, as shown by the map of the United States Geological Survey, and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

SEC. 2. And there is hereby ceded to the United States all the right, title, interest, or claim of this State to any lands uncovered by the lowering of the water levels of any or all of said lakes not already disposed of by this State; and the lands hereby ceded may be disposed of by the United States free of any claim on the part of this State in any manner that may be deemed advisable by the authorized agencies of the United States in pursuance of the provisions of said act: *Provided*, That this act shall not be in effect as to lakes herein named, which lie partly in the State of Oregon, until a similar cession has been made by that State.

To carry out these laws Congress passed the act approved February 9, 1905 (33 Stat. 714), as follows:

That the Secretary of the Interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation act.

The act of May 27, 1920 (41 Stat. 627), sometimes called the Raker Act, authorizes the restoration of certain lands reserved for a bird reservation pursuant to an Executive order issued in 1908. This act also was in furtherance of a plan of reclamation of the lands around Lower Klamath Lake by the Klamath Drainage District.

The laws of the States of California and Oregon, quoted above, making cessions to the United States were the subject of an opinion by the department under date of June 25, 1919, *State of California* (47 L. D. 207), in which it was decided that the lands for which survey and patent were asked are areas lying between the precipitous banks in the lower portion of the Lower Klamath Lake area and the high ground. It was held that under the act of the State of California of February 3, 1905, these lands were ceded to the United

States and are now held subject to disposition only under the general reclamation laws; that the department is without authority to recognize or entertain any claim on the part of the State therefor under the swamp-land act or under any other existing law, and that the title of the United States to these lands can be divested only by act of Congress. See also the decision of the Supreme Court of California in the case of *Churchill Company v. Kingsbury* (174 Pac. 329), which case gives the history of the title to the lands.

By the act of Congress approved March 3, 1923 (42 Stat. 1438), consent was granted to the State of California to institute in the Supreme Court of the United States a suit to determine the interest of the State to certain lands in Siskiyou County, California, alleged to have been ceded by the State to the United States. Suit has not been instituted under this consent law.

It is my conclusion that the land in the bed of Lower Klamath Lake and also Government land surrounding the lake could be used by the United States for flowage purposes, or it could be uncovered by physical and natural causes and used for agricultural purposes.

The right to the use of the water necessary to fill Lower Klamath Lake involves the water right obtained from the State of Oregon by reason of notices filed by the United States pursuant to the Oregon laws and also the contracts made with the Oregon-California Power Company.

This leads to the second question propounded which involves section 47-1201 of the Oregon Code, 1930. This section provides—

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the state engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice and unappropriated at the date of the filing thereof shall not be subject to further appropriation under the laws of this State, but shall be deemed to have been appropriated by the United States; provided, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State engineer for his information; and provided further, that within four years from the date of such notice the United States shall authorize the construction of such proposed work. No adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State except as for such amount of said waters described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized which release shall also be filed in the office of the State engineer. In case of failure of the United States to file such plans or authorized construction of such works within the respective periods herein provided, the waters specified in such notices, filed by the United States, shall become subject to appropriation by other parties. Notice of the withdrawal herein mentioned shall be published by the State engineer in a newspaper published and of general circulation in

the stream system affected thereby, and a like notice upon the release of any lands so withdrawn, such notices to be published for a period not exceeding thirty days.

This section of Oregon law was considered by the Supreme Court of Oregon in *Re Waters of Umatilla River* (88 Oreg. 376; 168 Pac. 922; 172 Pac. 97), in which it was held that the right of the United States through compliance with this act to all the waters not then appropriated is not affected by its lack of diligence in completing its project or by the fact of all the waters not being required to irrigate the lands served by its ditches, these matters not being conditions of the statute. The appropriation made was for agricultural purposes and the general plan of the irrigation works indicate that the water rights were for agricultural and power development. There has been no appropriation for flooding lands in Lower Klamath Lake and the appropriation made could not be perverted to include this purpose.

Turning our attention to question No. 3, it is apparent that we must consider the rights obtained by the California-Oregon Power Company in its contracts with the United States. The contracts with the power company were made with the plan in mind that the waters stored in Klamath Lake and the natural flow of Klamath River would be used for agricultural purposes and for the development of power. If a different use is contemplated and such use would be detrimental to the rights of the power company or definitely changes the use contemplated under the appropriations made under the Oregon law, then such changed uses could only be accomplished with the consent of the power company and by proper arrangement with the State of Oregon.

Question No. 4 involves the right of the United States to acquire lands for migratory bird refuges in the State of Oregon. The Legislative Assembly of the State of Oregon passed a law, approved February 13, 1931, found at page 41, Oregon Laws, 1931, authorizing the Federal Government to acquire lands for the purpose of creating refuges for migratory wild fowl and fish culture stations. The act refers to an act of Congress approved February 23, 1931 (46 Stat. 1242, 1265). The act of the State legislature permits the United States to acquire by purchase, gift, or lease lands and waters within the State of Oregon for the development and maintenance of refuges for migratory wild fowl. It is my opinion that the Federal Government could acquire land in Oregon by condemnation, if required under the migratory bird law. The waiver of damage clause in the contract made with the settlers owning lands in the Klamath Drainage District would not permit the flooding of the lands for bird refuge purposes without just compensation as contemplated by the Constitution.

It is suggested that an outline of legislation be made which is deemed necessary if the plan for making a bird refuge out of Lower Klamath Lake is pursued to fruition. It is my opinion that it would be necessary to repeal the act of March 3, 1923, *supra*, consenting to the State of California bringing suit against the United States to determine the title to lands ceded by the act of the Legislature of California, approved February 3, 1905, *supra*; repeal the act of February 9, 1905, authorizing the disposition of lands ceded by Oregon and California under terms and conditions of the national reclamation act; repeal the so-called Raker Act, approved May 27, 1920; consents of the States of Oregon and California by legislative expression to the use of land ceded for purposes other than contemplated by the reclamation act or specifically for use by the United States as a bird refuge; consent by the State of Oregon by legislative enactment to the use of the water for purposes other than reclamation; Congressional sanction of the plan to abandon as a reclamation unit the Lower Klamath Lake area with some arrangement for reimbursing the reclamation fund for its expenditures for investigation and reclamation of the lands adjacent to Lower Klamath Lake. In addition to this legislation it will be necessary to arrange with the Klamath Drainage District for cancellation of its two contracts with the United States and for reimbursement to the district of moneys paid by it. Agreement must be reached with the Oregon-California Power Company for the amendment of its contracts with the United States dated respectively February 24, 1917, and June 25, 1930. With all of these things to be accomplished it is manifestly impracticable to draft the legislation which will be required.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

WALTER KEARIN AND LEGATEES OF PETER FERN

Decided June 10, 1932

COAL LANDS—PROSPECTING PERMIT—LEASE—APPLICATION.

Where an applicant for a coal prospecting permit dies, one who was copermitttee with the applicant in a previous permit which had expired including the same land and also a colessee and copartner under a coal lease for adjacent land has no rights cognizable by the Land Department in connection with the application.

COAL LANDS—PROSPECTING PERMIT—APPLICATION—ASSIGNMENT—DESCENT AND DISTRIBUTION.

Mere rights to receive a prospecting permit under the leasing act are not assignable, nor are they subject to testamentary disposition, but the right

to pursue the course necessary to obtain the permit passes upon the death of the applicant to the personal representatives for the benefit of the estate.

COAL LANDS—PROSPECTING PERMIT—APPLICATION—BONDS—DESCENT AND DISTRIBUTION.

Upon the death of an applicant for a coal prospecting permit, persons to whom the deceased applicant undertook to devise it will not be allowed to obtain the permit in their names because of the provisions of the applicant's will, but the executors of the deceased applicant will be allowed to file a permit application and bond, whereupon the permit may issue to the estate.

EDWARDS, *Assistant Secretary*:

March 5, 1927, a coal prospecting permit, Pueblo 051217, was granted to Walter Kearin and Peter Fern, covering N $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 23, T. 29 S., R. 69 W., 6th P. M., Colorado. The permit expired March 4, 1931, and thereafter, on April 18, 1931, Fern filed a like application, 054697, for the same land solely in his own name. By Commissioner's letter of June 15, 1931, Fern was required to file bond within 30 days from notice thereof as prerequisite to the grant of the permit. In behalf of certain legatees of Fern, the Commissioner was notified of the death of Fern on June 19, 1931, and inquiry was made whether the permit might not issue in the names of those legatees to whom by the will of Fern it was specifically bequeathed. In response, by letter of August 13, 1931, the Commissioner suggested that the "heirs" join in the application to have the names of all or certain of the "heirs" substituted as permittees. Acting upon this suggestion, application was filed September 26, 1931, in the names of Willie Fern, Peter McQuade, Mrs. John Clawson and Rose Russell Herrmann, but not signed by Willie Fern, setting forth the date of Peter Fern's death, and such death as excuse for not timely filing the bond and requesting permit be issued to the applicants named. Copy of the will of Peter Fern and the order of court admitting it to probate accompanied the application.

It appears that the will of Peter Fern contains a bequest "to Willie Fern, my adopted son; to Peter McQuade, my nephew; to Rose Russell Herrmann, my niece; and to Mrs. John Clawson, my niece, in equal shares my land in Oklahoma and my lease and permit on coal lands in Huerfano County, Colorado", to which is attached a proviso for the forfeiture of the interest of Willie Fern should he not carry out certain wishes expressed by the testator therein, and the reversion of such interest to the other legatees named. The three legatees who signed the application for substitution of their names in the permit filed bond for \$1,500 on October 23, 1931.

On November 5, 1931, Walter Kearin filed a protest against the grant of any coal prospecting permit for the land to anyone but himself, or, as an alternative, he requested that permit 051217 be con-

tinued in his name jointly with that of the executrix or the heirs of Peter Fern. In support of his protest and petition, he alleged a coal mining partnership theretofore existing between Fern and himself, the grant of coal lease Pueblo 046044 to them jointly covering land adjoining the permit area, and the permit theretofore held by them jointly for the land in question, the pendency of a suit brought by Fern to dissolve the partnership which involved the coal lease, and the liability he was under for lease rental that was, or would become, due. This rental he expressed a willingness to pay if the permit were issued to him, signifying he would look to the estate of Fern for the payment of the latter's share of rent, should the permit be issued to him. He further averred that the coal deposits in the lease and permit area could only be worked economically as one property or mine and that it was unjust and inequitable for Fern to have applied for the permit only in his own name, the operations on both lease and permit areas being a joint undertaking.

One P. G. Cameron, who had filed on November 10, 1931, coal prospecting permit application 054856, involving the land above described, also filed objections to the recognition of any rights to the permit in the legatees of Fern or in Kearin.

By letter of January 8, 1932, the register of the local office was instructed by the Commissioner to notify Willie Fern to show cause why the permit should not be issued to McQuade, Herrmann, and Clawson, and by letter of January 27, 1932, Kearin was held to have no equities or interest in the permit application, and his protest was dismissed. Cameron, in another letter, was invited, if he had valid objections to the issuance of the permit to other persons, to file a formal protest stating his objections.

On March 5, 1932, Kearin filed what he styled a "Motion for Rehearing and Review." The Commissioner has treated and transmitted the same to the department as an appeal. Kearin, as further reason entitling him to rights as permittee, states, in substance, that he has paid the sum of \$350 due as rentals on the lease 046044, and that Fern's estate is claimed to be insolvent, and that the beneficiaries under the will declare their inability to reimburse him for their share of the liability.

On February 2, 1932, Cameron also filed protest against issuance of permit to the heirs of Peter Fern, to which Willie Fern filed answer March 25, 1932.

The Commissioner properly dismissed the protest of Kearin. Permit 051217, with permissible extension under the act of March 9, 1928 (45 Stat. 251), has long since expired, and there is no authority for its revival. For the recognition or enforcement of any claims, legal or equitable, growing out of his relationships as copartner and

colessee of Peter Fern he must look to the local courts. Such claims give rise to no rights cognizable in the department in connection with the personal application of Peter Fern, 054697.

As to the protest of Cameron, the record substantiates his admission that he amended his application 054856 so as to eliminate all conflict with like application 054697, against which he protests. He, therefore, can not be prejudiced by any action taken on the latter and is without interest in the proceeding. As to other objections which in his opinion affect the legality or validity of a grant of a permit to Willie Fern or his colegatees, under the view hereinafter expressed that the department takes of the action of the Commissioner in recognizing a testamentary disposition of a mere application for a prospecting permit as effective to transfer an interest therein, no discussion of these objections is necessary, and his protest is dismissed.

An application for a permit to prospect for mineral, pursuant to the provisions of the act of February 25, 1920 (41 Stat. 437), is a mere request that a license be granted and confers upon the maker of such application no interest in the land described or the mineral deposits therein. *Enlow v. Shaw et al.* (50 L. D. 339, 340). In its inception a prospecting permit is a mere license conveying no estate in the land. *Witbeck v. Hardeman* (51 Fed. (2d) 450, 452). Paragraph 12½ of the oil and gas regulations, Circular No. 672 (47 L. D. 437), provides as follows:

Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable.

It was held, and it is believed correctly, by the District Court of Appeal, First District, Division 1, California, in *Alford v. Hesse* (279 Pac. 831), that this regulation has the force of a statute, and that assignments of an application for such a permit are invalid. Fern, at the time of his death, had applied for a right to prospect the land, but had not complied with all the conditions necessary to the grant thereof. The principle is clear that a testator can dispose only of property which he owns or over which he has power of disposition. Page on Wills, Vol. 1, section 198. It seems clear that the permit application was not subject to testamentary disposition. In *Haynes v. Smith, On Petition* (50 L. D. 208), the department held that the rights of an applicant for an oil and gas permit under section 13 of the leasing act, on the death of the applicant pass to his or her personal representatives in the same way as other personal property. But this means no more than the right to obtain the permit or to pursue the course necessary to obtain it passes to the personal representatives for the benefit of the estate.

Even upon the assumption that the character of Fern's interest as a permit applicant was such as to be disposable by will, then under the laws of Colorado as elsewhere, specific legacies on deficiency of certain other assets of the estate are subject to the prior claim for funeral and administration expenses and his provable debts, and under section 8023, Courtright's Mills Annotated Statutes, the legatees are not entitled to demand the legacy until the court so orders. *Cobb v. Stratton's Estate* (56 Colo. 278; 138 Pac. 35). The Commissioner was therefore plainly in error in giving immediate effect to the provision of the will quoted by allowing the persons mentioned therein to apply for it.

In accordance with the views expressed, proceedings looking to the issuance of the permit to applicants McQuade *et al.* will be set aside, and the executrix of the estate as such should be allowed 30 days from notice thereof to file a proper and sufficient coal prospecting permit application and bond for the land, in which event permit may be issued to the Estate of Peter Fern, deceased. Should the executrix fail to comply with this requirement within the period mentioned or within such further period as may be extended by the Commissioner on a sufficient showing of necessity, the application of Fern will be finally rejected without further notice. As modified, the Commissioner's decision is

Affirmed.

SUSPENSION OF ANNUAL ASSESSMENT WORK ON MINING CLAIMS

INSTRUCTIONS

[Circular No. 1273]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 16, 1932.

REGISTERS, UNITED STATES LAND OFFICES:
CHIEFS OF FIELD DIVISIONS:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to Public Resolution No. 23, approved June 6, 1932 (47 Stat. 290), providing for the suspension of annual assessment work on mining claims held by location in the United States and Alaska, and reading as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed, or improvements aggregating such amount to be made

each year, be, and the same is hereby suspended as to all mining claims in the United States, including Alaska, during the fiscal year from July 1, 1931, to July 1, 1932.

It will be observed that the act is self-operating and does not require any filing of notice by claimants, and that the suspension is only for the present year ending July 1, 1932.

C. C. MOORE, *Commissioner*.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

**POTASH PERMITS—EXTENSIONS OF TIME UNDER ACT OF MAY 7,
1932—CIRCULAR NO. 926, MODIFIED**

INSTRUCTIONS

[Circular No. 1274]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 20, 1932.

REGISTERS, UNITED STATES LAND OFFICES:

By the act of Congress approved May 7, 1932 (47 Stat. 151), the Secretary of the Interior was authorized to grant an extension of time for a period of two years on any potash prospecting permit issued under the act of February 7, 1927 (44 Stat. 1057).¹ The act of 1932 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved February 7, 1927, entitled "An Act to promote the mining of potash on the public domain," is hereby amended by adding thereto a section, to be numbered 7, reading as follows:

"SEC. 7. Any prospecting permit issued under this Act may be extended by the Secretary of the Interior for a period not exceeding two years, upon a showing of satisfactory cause."

Accordingly, a permittee who has been unable to complete prospecting and who desires to prosecute further prospecting, may, if he shows satisfactory cause, be granted an extension of time for not exceeding two years from the date of expiration of the two years for which the permit was granted, upon filing an application therefor, accompanied with his own affidavit setting forth what efforts, if any, he has made to comply with the terms of his permit and the

¹ For regulations under the act of February 7, 1927 (44 Stat. 1057), see Circular No. 1120 (52 L. D. 84).—Ed.

reasons for failure fully to comply therewith, such showing to be corroborated by the affidavit of at least one disinterested person having actual knowledge of the facts.

In any case where the permittee is required to maintain a bond under his permit, he must furnish with his application for extension a properly executed assent by the surety to the extension of his bond to cover the life of the permit as it will be extended if an extension is granted, or furnish a new bond.

The application for extension should be filed in the local land office having jurisdiction over the land involved prior to the expiration of the two years for which the permit was issued. The application should show how much additional time is considered necessary to complete prospecting work. Extensions will be limited to such period, not exceeding the two years authorized, as may be determined to be justifiable under the circumstances in each particular case.

The said act does not automatically extend the life of the permit but authorizes the Secretary of the Interior to extend it for a period not exceeding two years upon a showing of satisfactory cause. Therefore, unless an application for extension has been filed prior to the expiration of the two-year period for which granted, the permit expires and is no longer a bar to the allowance of other filings for the land embraced therein. Where an application for extension of a permit has been filed within the time stated, no other applications for the same land will be allowed but they may be received and filed awaiting the outcome of the action on the application for extension. If the application for extension be allowed any other applications filed during its pendency will be finally rejected. If such application for extension be not allowed, any applications filed for the same land will then be considered in the order of their filing. Circular No. 926 (50 L. D. 364; 52 L. D. 516), is hereby modified in so far as it is in conflict herewith.

You will give to the regulations the widest publicity possible without expense to the Government.

C. C. MOORE, *Commissioner.*

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

**OPENING TO LOCATION AND ENTRY UNDER THE MINING LAWS
OF PUBLIC MINERAL LANDS WITHDRAWN UNDER THE RECLAMA-
TION LAW—ACT OF APRIL 23, 1932**

INSTRUCTIONS

[Circular No. 1275]

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

REGISTERS, UNITED STATES LAND OFFICES:

An act approved April 23, 1932 (47 Stat. 136), provides as follows:

That where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws, reserving such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate, including the right to take and remove from such lands construction materials for use in the construction of irrigation works, and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests. Such reservations or contract rights may be in favor of the United States or irrigation concerns cooperating or contracting with the United States and operating in the vicinity of such lands. The Secretary may prescribe the form of such contract which shall be executed and acknowledged and recorded in the county records and United States local land office by any locator or entryman of such land before any rights in their favor attach thereto, and the locator or entryman executing such contract shall undertake such indemnifying covenants and shall grant such rights over such lands as in the opinion of the Secretary may be necessary for the protection of Federal or private irrigation in the vicinity. Notice of such reservation or of the necessity of executing such prescribed contract shall be filed in the General Land Office and in the appropriate local land office, and notations thereof shall be made upon the appropriate tract books, and any location or entry thereafter made upon or for such lands, and any patent therefor shall be subject to the terms of such contract and/or to such reserved ways, rights, or easements and such entry or patent shall contain a reference thereto.

SEC. 2. The Secretary of the Interior may prescribe such rules and regulations as may be necessary to enable him to enforce the provisions of this Act.

This act authorizes the Secretary of the Interior in his discretion to open to location, entry and patent under the general mining laws with reservation of rights, ways and easements, public lands of the United States which are known or believed to contain valuable de-

posits of minerals and which are withdrawn from development and acquisition because they are included within the limits of withdrawals made pursuant to section 3 of the reclamation act of June 17, 1902 (32 Stat. 388).

The opening of such lands to location, entry and patent under the general mining laws will be governed by the following regulations:

(1) Application to open lands to location under the act may be filed by a person, association or corporation qualified to locate and purchase claims under the general mining laws. The application must be executed in duplicate, be under oath and filed in the United States land office of the district in which the lands are situated, must describe the land the applicant desires to locate, by legal subdivision if surveyed, or by metes and bounds if unsurveyed, and must set out the facts upon which is based the knowledge or belief that the lands contain valuable mineral deposits, giving such detail as the applicant may be able to furnish as to the nature of the formation, kind and character of the mineral deposits.

(2) The register will assign a current serial number to the application, note his records and forward the original and duplicate application to the General Land Office with report of record status of the land.

(3) When the application is received in the General Land Office, if found satisfactory, the duplicate will be transmitted to the Bureau of Reclamation with request for report and recommendation.

In case the Commissioner, Bureau of Reclamation, makes an adverse report on the application, it will be rejected subject to right of appeal.

If in the opinion of the Commissioner, Bureau of Reclamation, the lands may be opened under the act without prejudice to the rights of the United States, he will in his report recommend the reservation of such ways, rights and easements as he considers necessary or appropriate, and/or the form of contract to be executed by the intending locator or entryman as a condition precedent to the vesting of any rights in him, which in his opinion may be necessary for the protection of the irrigation interests.

(4) Upon receipt of a favorable report from the Commissioner, Bureau of Reclamation, containing the necessary data, the Commissioner of the General Land Office will submit the application to the Secretary of the Interior with appropriate recommendation that the land be opened to location, entry and patent under the mining laws, subject to such reservations, and/or contract to be entered into by the intending locator.

(5) Orders opening lands under the act will be promulgated by the General Land Office, notations thereof made on the tract books

of that office, and copies of such orders furnished to the Bureau of Reclamation.

(6) Upon receipt of such an order in the local land office, the register will file the same in his office, note on his tract books the date and number of the order and the reservations therein provided for, or the necessity of executing the prescribed contract, and will notify the applicant that the lands are subject to location in accordance with the terms and conditions of the order opening the same thereto.

Such applicant will be further advised that any location of the lands will be subject to such ways, rights and easements over or to such lands as are reserved in the order opening the lands to location, including the right to take from such lands construction materials for use in the construction of irrigation works; and/or, if the order opening the lands so requires, that before he can acquire any rights under location, he must execute, acknowledge and record in the county records and in the United States local land office the contract prescribed by such order, and that the location must also be made and maintained in accordance with the United States mining laws and regulations thereunder.

THOS. C. HAVELL,
Acting Commissioner.

I concur:

ELWOOD MEAD,
Commissioner, Bureau of Reclamation.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

**SCHOOL LANDS—NORTH DAKOTA, SOUTH DAKOTA, MONTANA,
AND WASHINGTON—ACT OF MAY 7, 1932**

INSTRUCTIONS

[Circular No. 1276]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 27, 1932.

REGISTERS, UNITED STATES LAND OFFICES,
NORTH DAKOTA, SOUTH DAKOTA, MONTANA, AND WASHINGTON:

By the act of Congress approved May 7, 1932 (47 Stat. 150), it is provided—

That section 11 of the act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.

"The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

SEC. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed.

This amendatory act pertains principally to the disposition by the States of the lands granted by the act of February 22, 1889 (25 Stat. 676), such States being North Dakota, South Dakota, Montana, and Washington.

The last part of the first amendatory paragraph, however, provides for the exchange of lands granted to said States by the act of February 22, 1889, for other lands, public or private, with the stipulation that where the exchange is made for public lands of the United States, they shall be limited to the surveyed, nonmineral, unreserved public lands within the State.

Applications for public lands sought in exchange as provided by this act will be governed by the following rules and regulations:

1. Applications for public lands sought under the provisions of this act must be filed, by the proper officers of the State, in the local

land office of the district in which such public lands are situated, accompanied by the following affidavits and certificates:

(a) An affidavit as to the nonmineral and nonsaline character of the land applied for, and showing that said land is unappropriated and is not occupied by and does not contain improvements placed thereon by any Indian.

(b) A certificate of the selecting agent showing that the selection is made under and pursuant to the laws of the State.

(c) A corroborated affidavit must be furnished relative to springs and water holes upon the land applied for, in accordance with existing regulations pertaining thereto in the case of all similar State selections.

(d) An affidavit that the land relinquished and the land selected are equal in value and as near as may be of equal area.

2. The exchange authorized must be made by legal subdivisions, or by entire sections, of equal value and as near as may be of equal area, and no more than approximately 640 acres may be allowed in any one selection list, which list must describe the land to be conveyed as well as the land selected. Nothing less than a legal subdivision may be surrendered or selected.

3. Payment of fees will be required in the sum of \$2 for each 160 acres or fraction thereof.

4. The lands in any one selection list, offered in exchange, must be of lands charged to the same grant. For example, where university lands are offered in exchange, only university lands may be offered in the same selection list; where school lands are offered in exchange, only lands charged to the school-land grant may be offered in the same selection list; where lands under the normal school grant are offered in exchange, only lands charged to the grant for normal schools may be offered in the same selection list.

5. Lands which have been withdrawn or classified as coal lands, or are valuable for coal, may be selected, provided such selection is made with a view to obtaining 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, in accordance with the act of June 22, 1910 (36 Stat. 583), as supplemented by the act of April 30, 1912 (37 Stat. 105).

6. Lands withdrawn, classified, or valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals may be selected, provided the selection is made with a view to obtaining title with a reservation to the United States of the phosphate, nitrate, potash, oil, gas, or asphaltic minerals in such lands, and of the right to prospect for, mine and remove the same, in accordance with the act of July 17, 1914 (38 Stat. 509).

7. Each application for exchange under the provisions of this act must be accompanied by a deed (unrecorded), prepared in accordance with the laws of the State in which located governing the conveyance of real property, conveying to the United States all right, title, and interest in and to the lands offered in exchange, and must be accompanied by certificates of the proper State officer and of the proper county recorder, showing that the lands offered have not been sold or otherwise disposed of or incumbered by the State. In case, however, any of the lands have been sold by the State and title again acquired, an abstract of such title will be necessary.

8. If the selection appears regular and in conformity with the law and these regulations, you will assign the current serial number thereto and refer the selection to the chief of field division for field examination of both the selected and the base lands to determine whether or not their value is equal within the meaning of this act. In order that no further investigation or inquiry may be necessary as to the character of the selected land, examination will be made at the same time as to the mineral character of the selected land, and whether or not it has value for springs or water holes withdrawn in Public Water Reserve No. 107, or by Executive order of July 7, 1930, No. 5389.

9. If the chief of field division recommends the approval of the exchange, you will accept the selection if otherwise regular, and prepare notice for publication of the selected land, in accordance with the regulations governing the selection of lands by States and Territories, approved June 23, 1910 (39 L. D. 39), and transmit the list to this office with the returns. When, upon receipt in this office of proof of publication without protest or contest, and upon examination of the report of the chief of field division and other records in this office pertaining to the lands involved in the exchange sought, it is considered that the State is entitled to such exchange, the deed will be returned to the State for recordation and retransmittal to this office, and where abstract of title was required, such abstract will be returned to be brought down to show the title in the United States, free from all liens and incumbrances, including tax liens. Upon the return of the recorded deed and satisfactory abstract of title, the selections will be embraced in a clear list and transmitted to the Secretary with recommendation for approval, in the absence of other objection, with a view to the certification to the State of the selected lands.

10. Should the report of the chief of field division be adverse to the State, you will transmit the papers to this office without action. Opportunity will be given the State to amend the application or to make such showing as may be desired in the case of adverse report of the chief of field division. Notice of additional requirements, rejec-

tion, or other adverse action, will be given, and the right of appeal, review, or rehearing recognized in the manner now prescribed by the Rules of Practice (51 L. D. 547).

11. Should the application for exchange be finally rejected or the selection canceled, for any reason, the unrecorded deed and the abstract of title will be returned to the State.

THOS. C. HAVELL,
Acting Commissioner.

Approved:

JOHN H. EDWARDS,
Assistant Secretary.

SETH K. CORBETT

Decided June 28, 1932

MINING CLAIM—ADVERSE CLAIM—OPTION—DECLARATION—WAIVER.

A declaration filed by a mineral applicant, made by one having merely an option to purchase an adverse claim, setting forth that no conflict exists does not constitute a waiver of the adverse claim and does not bind the adverse claimant.

MINING CLAIM—ADVERSE PROCEEDINGS—LAND DEPARTMENT—JURISDICTION—JUDGMENT—WAIVER.

After the institution of adverse proceedings the jurisdiction of the Land Department over a mining claim subject to the controversy is restored only upon a final judgment, or a waiver by the adverse claimant of the ground in conflict, or a proper certificate showing that the adverse suit has been dismissed or was not timely instituted.

MINING CLAIM—ADVERSE CLAIM—ADVERSE PROCEEDINGS—LAND DEPARTMENT—RULES AND REGULATIONS.

The departmental ruling holding that where more than one action has been commenced, based upon separate adverse mining claims, the Land Department will await a judgment determining the rights of all the parties, does not apply to adverse claims not filed in compliance with the statute.

MINING CLAIM—ADVERSE CLAIM—ADVERSE PROCEEDINGS—SURVEY—PLAT—NOTICE.

An adverse claim filed without a plat showing conflict with the application adversely, but with a promise to file the plat when climatic conditions permit of a survey, is subject to dismissal as vitally defective, and if the adverse claimant fails to cure the defect after considerable lapse of time after due notice to do so, his adverse claim should be dismissed, notwithstanding the pendency of the adverse suit.

EDWARDS, *Assistant Secretary:*

January 27, 1922, H. Levine *et al.* filed application, Sacramento 014096, for patent to nine placer claims covering 1,440 acres and taking in parts of Secs. 9, 16, 17, 19, 20, and 30, T. 22 N., R. 10 E., M. D. M., within the Plumas National Forest. Seventeen adverse claims were timely filed and suits entered thereon. Application

014096 is still pending and a number of the adverse suits appear not to have been determined. May 4, 1928, Seth K. Corbett filed application 022901 for patent to the National Gravel Mountain Consolidated Placer which he subsequently defined as covering certain specified tracts in Secs. 19 and 30, a number of which are included in 014096. Corbett secured and filed on September 4, 1928, an absolute relinquishment by the attorney in fact under 014096 of the tracts in Corbett's claim conflicting with that application. The Commissioner of the General Land Office, however, declined to allow Corbett's application until his office was advised that all adverse claims affecting 014096 were disposed of. (Letter "N", October 1, 1928.) Corbett thereupon furnished evidence of the final disposition of certain of these adverse claims, including those which showed conflict with his application, and pointed out that certain other adverse claims showed, by description thereon, no conflict with the same. By supplemental showings he also cured certain specific defects in pursuance of requirements laid by the Commissioner, and duly published and posted his application, against which there is no pending adverse claim.

Adverse claims 014182 and 014183 against application 014096 are still pending. Examination of the respective protests and adverse claims in 014182 and 014183 discloses that no plat of survey or description by legal subdivision or in any manner are given as to the land claimed, and nothing is shown by which anyone would be notified of the boundaries and extent of the land to which adverse rights are asserted. Therein allegations are merely made that it was impracticable to make the necessary surveys and plats by reason of deep snows on the ground, which would continue during the period of publication of the application, coupled with a request to be allowed to supply the necessary plats when climatic conditions permitted a survey. The local office, nevertheless, in usual form, notified these adverse claimants of the receipt of their adverse claims and advised them to timely bring adverse suit as the statute required.

More than 10 years have elapsed since these adverse claims were filed and the defects in stating the location and position of the claims have not been cured, with the result that it can not be determined from the records in those proceedings to what extent, if any, these two adverse claims interfere with applications 014096 and 022901, or, in other words, whether there is any controversy pending in the court by reason of these adverse claims, involving land common to the last two-named applications. In letters of February 25 and June 29, 1931, the Commissioner required Corbett to furnish the necessary proof, showing that his claim did not conflict with the claims asserted under 014182 and 014183, as a prerequisite to acceptance of the relinquishment executed by applicants under

014096 and the allowance of his application. In attempted compliance with these requirements, Corbett filed certificates executed by the clerk of the United States District Court and the State court having jurisdiction over the lands above mentioned, each stating in effect that no suits were pending in their respective courts involving the right to the possession of the *National Gravel Mountain Consolidated Placer* claim. He also furnished affidavits made by one Delahunty, stating, in substance, that affiant has an option to purchase the Swift Sure, Cook and Morgan, and Swift Sure Tailings claims, being the claims asserted under 014082 and 014083; that the precise boundaries of such claims can not be located on the ground, or ascertained by any other means, but that to affiant's knowledge they are in Secs. 16, 17, 20, 21, and 29, while the National Gravel Mountain Consolidated Placer of Corbett is in Secs. 19 and 30, and there is, therefore, no conflict. Another affidavit furnished, made by Taylor, a county surveyor, corroborates Delahunty.

The Commissioner's decision of October 22, 1931, held the showings insufficient; that only description of the aforesaid adverse locations by legal subdivision or by metes and bounds survey tied to a public land corner would suffice to establish that such adverse locations did not affect any of the land relinquished by the applicant adversely.

By later decision of March 21, 1932, the Commissioner held that Corbett must furnish proof showing, under paragraphs 85 to 88 of the mining regulations (49 L. D. 15, 81), the final disposition of all adverse claims now pending against application 014096 in order that the relinquishment to the extent of conflict with 022091 might be accepted, citing as particular authority a recent decision of the department of November 23, 1931, in the case of *Henry C. Bolyard et al.* (53 I. D. 556).

Corbett has appealed and contends in effect that he is in no position as a stranger to the adverse proceedings to supply the proof required; that there is no authority to exact it from him; that as there was nothing definite in the adverse claims fixing the locus of the land claimed therein, they should never have been allowed; that application 014096 should be dismissed because of laches in prosecution; that the *Bolyard case* does not apply; that there is no warrant for burdening him with a duty of fixing the locus of the adverse claims which rests on the adverse claimants; that, under the ruling of the Commissioner, any person can tie up an immense area of land by filing an application therefor, and if nothing further is done, no *bona fide* adverse claimant within such area could ever secure a patent so long as one adverse claim remained undisposed of.

The department concurs in the Commissioner's view that under the present status of the record, the showings of Corbett are in-

sufficient to allow his entry. It is, however, plainly error to require of this applicant evidence *in pais*, showing the locus of any pending adverse claims as a basis for adjudging what lands are in controversy between applicants under 014096 and any existing adverse claimants. No evidence of this character supplied by a stranger to the controversy is binding on the adverse claimants, and any declaration that no conflict exists by one who has but an option to purchase such adverse claims, is not a waiver thereof.

The determination as to what particular ground within the patent application is claimed under adverse proceedings must be made from the showings in connection with the divers protests and adverse claims, and the only evidence that the department may recognize as restoring its jurisdiction over the areas in controversy are those prescribed by the mining law and regulations, namely, a final judgment in the adverse suits, a waiver by the adverse claimant of the ground in conflict, or a proper certificate showing an adverse suit has been dismissed, or like certificates that it was not timely brought. (Lindley on Mines, sections 759, 766, and cases there cited.) The certificates filed in this case to the effect that there is no suit pending, involving the right of possession to the National Gravel Mountain Consolidated Placer claim of Corbett do not justify the assumption that the land within his claim is not affected by the pending adverse claims. Such certificate necessarily implies an exercise of judgment of the clerk as to the subject matter involved in the pleadings and is of no conclusive effect whatsoever.

The department has held that where more than one action has been commenced, based upon separate adverse claims, it awaits a judgment which will determine the rights of all the parties. *Jamie Lee Lode v. Little Forepaugh Lode* (11 L. D. 391); *Black Queen Lode v. Excelsior No. 1 Lode* (22 L. D. 343); *Woods v. Holden* (26 L. D. 198; on review, 27 L. D. 375); *Henry C. Bolyard et al., supra*. An examination of these cases, however, reveals that they relate to circumstances where there is either a conflict or possibility of conflict, not only between the applicant for patent and an adverse claimant, but between adverse claimants for the same land included in the application.

The reason for the rule is shown in *Woods v. Holden, supra*, which states (p. 201)—

Where aduerses involving a common conflict are filed and prosecuted, that fact is necessarily shown by the records of the local office and the parties in interest are charged with notice thereof. It then devolves upon each adverse claimant to see to it that such proceedings are had as will determine his right, not alone against the applicant for patent, who is the common defendant, but also against the other adverse claimants. Until this is done, the stay of proceedings commanded by section 2326 is not relieved and the

"controversy" is not "settled or decided by a court of competent jurisdiction." The word "controversy" used in this section includes broadly the right of possession to the area in conflict against all who are contending therefor in the manner prescribed by the statute.

This statement, however, is predicated on the assumption that adverse claims such as *are contemplated by the statute* were filed. If they are not such, even though suit is commenced, the Land Department is not required to recognize the claim as adverse within the meaning of the law and stay its proceedings on account thereof (*Thomas et al. v. Elling*, 25 L. D. 495, 496); and while ordinarily, after the suit is filed, the department is disinclined to entertain an attack upon the sufficiency of the adverse claim, relegating all matters to the courts (*McMaster's Appeal*, 2 L. D. 706; *Reed v. Hoyt*, 1 L. D. 603; *Brown v. Bond*, 11 L. D. 150, 154), yet, if the defect is vital the pendency of a suit filed in pursuance of an accepted adverse claim will be disregarded. *Mattes v. Treasury Tunnel Mining & Reduction Company* (33 L. D. 553). The Land Department has power to review and set aside the decisions of the local officers relating to questions arising in the administration of the public land laws. See cases cited in 50 C. J. 1088, note 41.

Precedent exists for waiving the filing of a plat of survey of an adverse claim upon a showing that a survey is impossible on account of climatic conditions during the period of publication, provided the adverse claimant shows the nature, extent, and boundaries of his claim as near as practicable from information within his reach (*J. S. Wallace*, 1 L. D. 582). But as to adverse claims 014182 and 014183 that now stand in the way of allowance of application 022901 by the Commissioner's decision, the protests filed therein merely allege a conflict in general terms, and contain but a promise to supply data as to the boundaries and extent of the conflict.

Section 2326, Revised Statutes, requires that the adverse claim filed "shall show the nature, boundaries and extent thereof." *Anchor et al. v. Howe et al.* (50 Fed. 366); *McFadden et al. v. Mountain View Mining & Milling Company, On Review* (27 L. D. 358); *Kinney v. Von Bokern* (29 L. D. 460). The defects in this regard in the two adverses above mentioned should have been timely cured, and if not so cured, dismissed, and may yet be dismissed by the department as vitally defective. As to application 014096, the contention of Corbett that the department may dismiss it for lack of diligence in prosecuting the proceedings in the courts, is untenable, as it is settled that what constitutes diligence in such a case is for the courts. Lindley on Mines, section 759. The department will not undertake to decide it. *Davis v. McDonald* (33 L. D. 641.)

In accordance with the views expressed, the case will be remanded with instruction to call upon adverse claimants under 014182 and 014183 to file, within 60 days from notice, a plat of survey or description by legal subdivision of their respective adverse claims in accordance with paragraph 82 of the mining regulations, and should they fail to do so, their adverse claims should be dismissed. Upon the dismissal of such claims, or in the event that the data filed by the adverse claimants show no conflict with the land relinquished by the applicants under 014096, Corbett's application, if otherwise regular, may pass to entry.

As modified, the Commissioner's decision is

Affirmed.

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| See <i>Agents and Attorneys</i> , 2; <i>Secretary of the Interior</i> , 5; <i>Soldiers, Sailors, and Marines</i> . | | See <i>Alaskan Natives</i> , 1; <i>Oil and Gas Lands</i> , 22; <i>Reclamation</i> , 5, 6, 11, 12; <i>Vested Rights</i> ; <i>Water Power</i> , 2. | |
| Demurrer. | | Divorce. | |
| See <i>Mining Claim</i> , 24. | | See <i>Indians and Indian Lands</i> , 26-28, 31, 33-38, 41. | |
| Depositions. | | Double Taxation. | |
| See <i>Practice</i> , 5. | | See <i>Taxation</i> , 2. | |
| Deputy Surveyors. | | Drainage. | |
| See <i>Agents and Attorneys</i> , 1. | | See <i>Waters and Water Rights</i> , 2. | |
| Descent and Distribution. | | Easements. | |
| See <i>Coal Lands</i> , 7, 8; <i>Indians and Indian Lands</i> , 15, 17, 27, 41-46, 75, 76; <i>Mining Claim</i> , 2, 63. | | See <i>Oil and Gas Lands</i> , 12, 13; <i>Rights of Way</i> . | |
| Desert Land. | | Election. | |
| See <i>Forest Lieu Selection</i> , 1; <i>Repayment</i> , 4. | | See <i>Mining Claim</i> , 70; <i>School Land</i> , 20. | |
| 1. Instructions of May 17, 1930, relief of desert-land entrymen in Chuacawalla Valley, California, under act of April 17, 1930 (Circular No. 1223) ----- | 104 | Elections. | |
| 2. Instructions of July 30, 1930, desert-land entries within abandoned reclamation projects under act of June 6, 1930. General reclamation circular, amended. (Circular No. 1229) ----- | 151 | See <i>Irrigation Districts</i> , 3; <i>National Parks and Monuments</i> , 1. | |
| 3. Section 5 of the act of June 27, 1906, which provides that the time that a desert-land entryman is hindered or prevented from making improvements on or from reclaiming the lands in his entry by reason of the fact that the land has been within a reclamation withdrawal, shall not be computed in determining the period within which he must complete his entry, is not applicable where the method of irrigation is by the use of water to be procured from wells sunk on the land, and the failure to make timely reclamation is due solely to lack of funds. | 21 | 1. The fact that the State of Washington, in ceding jurisdiction to the United States over the Mount Rainier National Park, reserved the right to serve criminal and civil process thereon and to tax the persons and property of park residents did not have the effect of extending the election laws of the State to include persons residing within the park, but a prior qualified voter in the State did not lose his right to vote at the place of his legal residence by reason of his entering the service of the United States on the reservation ----- | 315 |
| 4. The Land Department has no authority to grant extension of time for reclamation of the land embraced within a desert-land entry beyond the period authorized by the act of February 25, 1925. | 21 | 2. The privilege of voting and the qualifications of voters are primarily determined by State laws, and however unwise or unjust they may seem, those laws are controlling if not in conflict with the limited provisions of the Federal Constitution on that subject. | 316 |
| 5. A desert-land entryman who has met all the requirements which he could possibly meet and has his entry ready for irrigation, but who through no fault of his own has been unable to effect reclamation as | | | |

Entry.
 See *Confirmation; Contest; Desert Land; Final Proof; Homestead; Mining Claim, 1; Repayment; Swamp Land, 1.*
 1. A competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceful adverse entry upon it while it is in the possession of one who has no superior right to acquire the title or hold possession----- 498

Equitable Adjudication, Board of
 See *Confirmation.*

Equitable Rights.
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Equitable Title.
 See *School Land, 4; Swamp Land, 2.*

Error.
 See *Contest, 2; Final Proof; Homestead, 4, 5; Irrigation Districts, 1; Mining Claim, 8, 20; Preference Right Claims; Repayment, 1, 3; School Land, 11.*

Eskimos.
 See *Alaskan Natives, 3.*

Estoppel.
 See *Indians and Indian Lands, 27; Mining Claim, 20, 24; School Land, 10, 11, 19.*

Evidence.
 See *Citizenship, 1; Final Proof; Homestead, 1, 3, 26, 27, 29; Indians and Indian Lands, 33, 36, 80, 81; Mining Claim, 7, 15, 17, 18, 19, 22, 23, 24, 30, 52, 53, 54, 56, 62, 63; Practice, 5; School Land, 6, 12, 13; Secretary of the Interior, 1, 3; Swamp Land, 4; Trade and Manufacturing Sites, 2; Wills.*

Exchange of Lands.
 1. Instructions of March 6, 1930, exchange of lands in San Juan, McKinley, and Valencia Counties, New Mexico, Circular No. 850, amended, Circular No. 1208----- 54
 2. The execution of a special survey for the purpose of identifying on the ground excepted right of way strips will not be required in connection with the exchange of lands in aid of the consolidation of a national forest pursuant to the act of March 20, 1922, where the possibility of the elimination of the lands from the forest is remote----- 434

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 See *Elections.*

Federal Power Commission.
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Federal Water Power Act.
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Fees and Commissions.
 See *Accounts, 1, 2; Repayment, 2, 5.*

Final Certificate.
 See *Homestead, 4, 5; Mining Claim, 63; Taxation, 1.*

Final Proof.
 See *Coal Lands, 1; Desert Land, 3; Homestead, 1, 12, 21, 22.*
 1. Where the proofs submitted in connection with an entry or selection show compliance with the applicable law and regulations, allowance of the entry or selection is not erroneous because of the existence of matters which would render it invalid but which do not then appear----- 436

Fishing Privileges.
 See *Hunting and Fishing Privileges.*

Flowage.
 See *Indian Irrigation, 3; Waters and Water Rights, 2, 3, 5.*

Forest Homestead.
 See *Homestead, 13.*

Forest Lieu Selection.
 See *Land Department, 1.*
 1. Action of a register rejecting a forest lieu selection because of conflict with a pending desert-land application, when the selection should have been merely suspended to await final determination of the latter, becomes effective by acquiescence, and failure on the part of the selector to appeal from that officer's action making the rejection final defeats all rights that he might otherwise have secured had he proceeded further... 395
 2. Land in the actual possession of another under color of title and claim of right is not "vacant public land subject to homestead entry" and is not, therefore, subject to selection under the act of June 4, 1897----- 447
 3. The county records showing a claim of title to land under mesne conveyance from a homesteader and

- Forest Lieu Selection—Cont'd.** Page
- payment of taxes by a successor in interest under the belief that he had title and the presence of improvements on the land are notice to a selector that the land was claimed and in actual possession of another under color of title and not, therefore, subject to selection----- 454
4. Where the Land Department has, in a controversy between a forest lieu selector and a homestead applicant, determined that the former had no equities by virtue of his claim and possession of the land, and adjudged the selection invalid and rejected it and allowed the homestead entry, the land, upon subsequent relinquishment of the homestead entry, becomes vacant, unappropriated public land, open to the first qualified applicant, not burdened with any asserted legal or equitable rights of the selector---- 498
- Forest Reserves.**
See *National Forests*.
- Forest Service.**
See *Practice*, 1.
- Forfeiture.**
See *Abandonment; Mining Claim*, 39, 43, 47, 48; *Rights of Way*, 3; *School Land*, 15; *Withdrawal*, 2, 3.
- Fort Hall Irrigation Project.**
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- Fraud.**
See *Homestead*, 28; *Indians and Indian Lands*, 7, 9, 80; *School Land*, 12, 13; *Wills*, 1, 3.
- Fur Farming, Alaska.**
1. Instructions of June 1, 1932, fur farming in Alaska; rentals. Circulars Nos. 491 and 1108, amended. (Circular No. 1271)----- 674
- General Accounting Office.**
See *Accounts*, 3.
- George Washington Birthplace National Monument.**
See *National Parks and Monuments*, 2.
- Government Proceedings.**
See *Mining Claim*, 6, 20, 36, 37, 39, 49; *Practice*, 1, 4.
- Grazing.**
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- Hearing.** Page
See *Homestead*, 1; *Indians and Indian Lands*, 78-81; *Practice*, 1, 5; *Swamp Land*, 2.
- Heirs.**
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- Hetch Hetchy Project.**
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- Homestead.**
See *Citizenship*, 1; *Confirmation; Forest Lieu Selection*, 3, 4; *Land Department*, 3; *Mining Claim*, 8; *Patent; Practice*, 5; *Railroad Grant*, 1; *Repayment*, 3; *Taxation*, 1; *Timber Cutting; Vested Rights*.
- Generally.**
1. The proper procedure in cases of nonmineral entries where, after the submission of acceptable final proof, the Geological Survey classifies the land as known to be valuable for oil and gas as of the date of final proof, is to allow the entrymen thirty days to furnish consent under the act of July 17, 1914, or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing if reclassification be denied, in which latter event the burden will be upon the Government to prove that the land was known to be valuable for oil and gas at the date of final proof----- 41
2. A mineral reservation and a waiver of the right to compensation which an applicant to make entry under the enlarged homestead act was required to consent to because of conflict with an oil and gas prospecting permit will be rescinded where the permit is canceled and the land classified as nonoil and nongas prior to the allowance of the homestead application----- 311
3. The allowance of a mineral application for land covered by an existing entry is in disregard of the mining regulations, and as the burden is on the mineral claimant to show the mineral character of the land, institution of a contest by the homestead entryman is not necessary----- 379
4. Where an entry, after the issuance of final certificate and payment of purchase price, was canceled for a reason afterwards demonstrated to be unsupported by the law and the facts, the land is not subject to a

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further disposal by the Government to anyone other than the homesteader----- 454

5. Departmental holding of August 11, 1931 (53 I. D. 453), that where an entry, after the issuance of final certificate and payment of purchase price, was canceled for a reason afterwards demonstrated to be unsupported by the law and the facts, the land is not subject to a further disposal by the Government to anyone other than the homesteader, extended to include one who is entitled to equitable relief by reason of having placed improvements on the land and was the holder of the greater portion of the outstanding vested interest of the homesteader----- 469

Additional.

See 30-32, *infra*.

Application.

6. Where a senior application, filed for 320 acres under the enlarged homestead act, was rejected because the land was not subject to entry under that act an allowable intervening junior application becomes the senior right and will prevail over a later settlement and claim for 160 acres under section 2289, Revised Statutes, by the original applicant.----- 23

7. The intervention of an adverse claim in the form of an application to make entry by a qualified applicant prior to the filing of an application to reinstate a properly canceled homestead entry where residence was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912, prevents the application of the rule announced in *Slette v. Hill* (47 L. D. 108)----- 75

Commutation.

See 32, *infra*.

Credit for Military Service.

8. Instructions of May 6, 1930, credit for military service in certain Indian wars, granted to homestead settlers and entrymen. (Circular No. 1218)----- 102

9. The fact that a soldier or sailor was dishonorably discharged from a subsequent reenlistment will not defeat his right to credit toward residence on a homestead entry under section 2304, Revised Statutes, as extended by the act of February 25, 1919, for service of ninety days or more during a prior enlistment from which he received an honorable discharge----- 649

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Enlarged.

See 2, 6, *supra*.

10. The enlarged homestead act is part of the general provisions of the homestead laws and is subject to the practice, regulations and decisions applicable under those laws.----- 23

11. The purpose of the segregation provided for in the enlarged homestead act was merely to protect the rights of the senior applicant for land not designated at the date of the application, but it does not prevent the filing of a junior application to be received and suspended to await action on the prior application----- 23

Final Certificate.

See 4, 5, *supra*; Taxation, 1.

Final Proof.

See 1, *supra*; 21, 22, *infra*.

12. Instructions of May 20, 1932, extension of period for submission of final proof on homestead entries under act of May 13, 1932. (Circular No. 1269)----- 663

Forest.

13. Instructions of July 22, 1930, Custer National Forest excluded from operation of forest homestead law by act of June 13, 1930. (Circular No. 1227)----- 153

Improvements.

See 5, *supra*; 31, *infra*.

Leave of Absence.

14. Instructions of May 16, 1930, prolonged absences from settlement claims on account of climatic conditions (Circular No. 1219)----- 103

15. Instructions of March 26, 1932, leave of absence from homesteads in drought-stricken areas under act of March 2, 1932 (Circular No. 1265)----- 621

16. A settler on unsurveyed public land, who has placed his claim of record as authorized by the act of July 3, 1916, and the departmental regulations of July 27, 1916, has brought his claim within the purview of section 3 of the act of March 2, 1889----- 39

17. The term "homesteader" as used in the proviso to the act of February 25, 1919, which authorized reduction of the residence requirement under the homestead law for climatic reasons, includes homestead settlers on unsurveyed lands who file in the local office notice of the approximate location of the lands settled upon and claimed----- 96

Homestead—Continued.	Page	Homestead—Continued.	Page
Occupancy.		Segregation.	
See 26, <i>infra</i> .		See 11, <i>supra</i> .	
Proprietor—Acreage Limitation.		Settlement.	
18. One is a proprietor within the meaning of section 2289, Revised Statutes, as amended, who enters into an agreement to purchase land and takes possession, notwithstanding that the contract included among the tracts a certain tract that could not be conveyed, if he accepts a deed for the tracts that were subject to purchase under the agreement. <i>Alfred R. Thomas</i> (46 L. D. 290)-----	181	See 6, 14, 16, 17, <i>supra</i> ; <i>School Land</i> , 1.	
19. The word "proprietor" as that term is used in section 2289, Revised Statutes, simply means an owner of land, that is, one who has a fee simple title or who may acquire such title by carrying out his own obligations or by enforcing a vested right. <i>Siestreem v. Korn</i> (43 L. D. 200)-----	183	Settlers.	
20. One who acquires more than 160 acres of land which by operation of law becomes community property at the moment of its acquisition, is not the proprietor of more than 160 acres within the meaning of the homestead law if his undivided interest does not exceed that amount.-----	577	See 8, 16, 17, <i>supra</i> ; <i>Timber Cutting; Waters and Water Rights</i> , 5.	
Reclamation.		Stock-Raising.	
See <i>Irrigation Districts</i> , 4, 5; <i>Taxation</i> , 1.		See 7, 20, <i>supra</i> ; <i>Community Property; Mineral Lands; Mining Claim</i> , 10, 54; <i>Railroad Lands</i> .	
21. Instructions of June 12, 1930, acceptance of proofs and payments on reclamation entries on projects within irrigation districts. Paragraph 59, general reclamation circular, amended (Circular No. 1222)---	128	24. Instructions of April 3, 1931, stock-raising homesteads within petroleum reserves under act of February 28, 1931. Prior instructions superseded. (Circular No. 1244)-----	346
22. The act of April 21, 1928, authorizing local taxation of reclamation homesteads after acceptance by the General Land Office of satisfactory proof of residence, improvements, and cultivation, is applicable to lands in the ceded portion of the Flathead Indian Reservation entered under the act of April 23, 1904, and amendatory acts thereof, including the act of July 17, 1914, after final proof and compliance with the ordinary requirements of the homestead law have been made-----	35	25. Instructions of June 6, 1931, applications by Indians to make stock-raising homestead entries. (Circular No. 1253)-----	392
23. The title to or interest in a reclamation homestead conveyed by tax sale pursuant to the act of April 21, 1928, is subject to a prior lien reserved to the United States for all unpaid reclamation charges-----	36	26. An oath in support of a stock-raising homestead application alleging that no part of the land applied for is claimed, occupied, or being worked under the mining laws, or occupied or appropriated under any other public land law except by the claimant himself, establishes a <i>prima facie</i> case that the land was unoccupied and unappropriated, and where the entry was regularly allowed the burden of proof is upon a mineral claimant asserting a right under the mining laws to establish by extrinsic evidence the illegality of the entry-----	382
Residence.		27. In a contest by a mining claimant against a regularly allowed stock-raising homestead entry, illegality of the entry is not proved by merely establishing that the land is mineral in character, but it must be shown that there existed either a prior perfected location under the mining law, or a mining location, though not perfected by discovery, yet in the actual possession of the locator who is diligently engaged in the search for mineral-----	382
See 7-9, 14-17, <i>supra</i> ; 31, 32, <i>infra</i> .		28. Where land containing a water hole was designated as of the character subject to entry under the stock-raising homestead law and no charge was preferred that the land or any subdivision thereof was valuable as a public water hole, the designation will not be vacated unless it is shown that it was erroneously induced by fraudulent statements of the entryman-----	578
		29. A stock-raising homestead entry is not invalid though embracing	

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Stock-Raising—Continued.
land claimed under mining locations where the evidence shows that the locations were made primarily to protect a developed water hole, and where the evidence is insufficient to establish that the locations were prior and valid, and where the spring or water hole is held under a claim of private right and is incapable of providing sufficient water for general use for watering purposes----- 578

Stock-Raising—Additional.
30. A regulation to the effect that one who had made a stock-raising homestead entry, whether original or additional, is not qualified to make an additional entry under section 3 of the stock-raising homestead act, even though he had not obtained the maximum acreage allowed by the stock-raising homestead law, is not authorized by that act and will no longer be applied----- 180

31. Section 4 of the stock-raising homestead act differs from section 5 of that act in that under the former section the general provisions of the homestead law as to residence either on the original or on the additional entry must be fulfilled, while under the latter section the requirements as to improvements only must be met----- 274

32. To perfect title to an additional entry made under section 4 of the stock-raising homestead act based on a commuted original entry the entryman must show compliance with the law as to residence for a period of three years either on the perfected original entry, if ownership thereof be continued during that time, or partly on the original and partly on the additional entry----- 274

Hoover Dam.

See *Accounts*, 3; *Reclamation*, 3-20; *Water Power*, 1, 2; *Workmen's Compensation Insurance*.

Hot Springs.

See *Waters and Water Rights*, 6, 7.

Hunting and Fishing Privileges.

See *Indians and Indian Lands*, 47.

1. The State has full power to regulate fishing and the killing of game on the Federal public domain within its borders, including lands allotted to Indians, from the public domain not subject to a trust growing out of a former reservation----- 350

Improvements. Page

See *Desert Land*, 2, 3; *Forest Lieu Selection*, 3; *Homestead*, 5, 31; *Indians and Indian Lands*, 21; *Mining Claim*, 20, 34-51; *Oil and Gas Lands*, 18; *Waters and Water Rights*, 5.

Indemnity.

See *Final Proof*; *Forest Lieu Selection*; *Mining Claim*, 13; *Railroad Grant*, 1, 3; *School Land*, 8-14, 20; *Secretary of the Interior*, 3; *Survey*; *Waters and Water Rights*, 1.

Indian Irrigation.

See *Damages*, 2, 3; *Indians and Indian Lands*, 21; *Secretary of the Interior*, 5; *Taxation*, 1; *Withdrawal*, 8, 9.

1. A provision in a contract for the division of the waters of Ahtanum Creek entered into between the United States on behalf of the Indians on the Yakima Indian Reservation and the white landowners outside of the reservation for the appointment of a watermaster on or before June 15 each year, contemplated that the apportionment of the waters was to be made only during the irrigation season, and not then until the watermaster had been appointed, but that his appointment could be made before that date, if desirable----- 328

2. The Department will not attempt to abrogate a contract entered into more than twenty years ago between the United States on behalf of the Indians on the Yakima Indian Reservation and the white landowners outside of the reservation under which more than fifty per cent of the waters of Ahtanum Creek were apportioned to the latter during the irrigation season each year, where the division was based upon beneficial use at the time the agreement was made and valuable rights have been acquired in reliance upon the terms of the contract, notwithstanding that the Secretary of the Interior may not have had authority at the time to bind the Indians by such agreement----- 328

3. The damages referred to in the act of February 4, 1931, authorizing the construction of the Michaud division of the Fort Hall Indian Reservation irrigation project, are the damages incident to the construction of irrigation works and become a part of the construction cost similar to the charges for the purchase or condemnation of land

Indian Irrigation—Continued.	Page	Indians and Indian Lands.	Page
required for flowage purposes or for canal rights of way-----	399	See <i>Alaskan Natives; Homestead, 22, 25; Indian Irrigation; Oil and Gas Lands; 1; Railroad Grant, 4; Water Power, 9, 10; Withdrawals, 8, 9.</i>	
4. The act of February 4, 1931, authorizing the construction of the Michaud division of the Fort Hall Indian Reservation irrigation project, does not supersede the act of February 20, 1929, with reference to the payment for damages, except that payment of specific damages enumerated in the former act must be made from the appropriation authorized by that act-----	399	Generally.	
5. Congress has by legislation determined that the Wapato irrigation project in the State of Washington comprises all of the lands on the Yakima Indian Reservation irrigated by diversion waters from the Yakima River-----	622	1. When the guardianship of the United States over Indians terminates is a political matter to be determined by Congress, and one over which neither the courts nor the States have any power-----	78
6. Seepage and waste water remaining after a lawful appropriation of water diverted from a stream continues to belong to the original appropriator so long as he does not abandon it and is able and willing to apply it to beneficial uses, notwithstanding that it had been commingled with other waters and that his possession was not at all times actual and continuous. <i>Ide v. United States</i> (263 U. S. 497)----	622	2. Congress has the power to dispose of the property of Indian tribes and to set aside lands for or to increase and decrease the size of reservations, but such power presumably will be exercised only when circumstances arise which justify the Government in disregarding treaty stipulations in the interest of the country and the Indians themselves-----	128
7. Lands under the Satus unit found to be irrigable and for which irrigation facilities were provided by the act of January 24, 1923, and subsequent acts, are to be considered as a part of the Wapato irrigation project for all purposes in connection with distribution of waters and construction costs-----	622	3. The political jurisdiction of the Federal Government for all purposes appertaining to the protection, control, welfare, and civilization of the Indians is exclusive as to offenses committed by or against them in "Indian Country"-----	349
8. Forty acres of each Indian allotment under the Satus unit are entitled to a free water right but are subject to a lien for construction charges in the same amount as all other lands on the project receiving the same water right-----	623	4. Since the repeal of section 1 of the Indian Intercourse Act of June 30, 1834, the phrase "Indian Country," as used in the Federal statutes, includes only that portion of the public domain which has been set apart as a reservation in the usual sense for the use and occupancy of an Indian tribe by treaty, act of Congress, or Executive order-----	349
9. All lands in excess of forty acres in each Indian allotment under the Satus unit shall be considered in the class subject to their <i>pro rata</i> share of the construction charge of the project, including the cost of the water right-----	623	5. While the United States, like the European nations who took possession of the North American continent, asserted dominion over and title to the lands occupied by the Indians, yet the Federal Government has, in case of actual occupancy, regarded their rights as sacred and not to be taken from them without their consent and then only upon such consideration as may be agreed upon-----	481
10. The lien imposed by the act of May 18, 1916, upon allotted lands patented in fee before all the charges authorized by the act shall have been paid, extends to the lands of the Satus unit of the Wapato irrigation project-----	623	6. Evidence is lacking to show that, prior to the time of the removal of the Walapai Indians from northwestern Arizona to the reservation created for them on the lower Colorado River, there was such use and occupancy of the lands, subsequently embraced within the reservation, separate and apart from the vast area of the public domain, as	

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Generally—Continued.

to impress upon them the status of Indian lands----- 482

7. There being no prior treaty, act of Congress, or administrative order reserving lands for the Walapai Indians, it was within the power of Congress to cause their removal from the lands occupied by them to other lands reserved by Congress for their use and benefit, and upon their removal the lands which they had previously occupied became subject to disposition under the public land laws, unburdened with any title based upon aboriginal occupancy--- 482

8. The general rule as established by decisions of the courts is that laws, treaties, and policies relating to the Indians are not intended by implication or otherwise to extend to white men. *United States v. Higgins* (110 N. W. 609)----- 656

9. Congress has almost universally made matters relating to Indians and Indian reservations the subject of acts separate and distinct from those relating to the public lands, and it is well settled that general laws do not include them unless an intention to do so is manifest.--- 680

Alienation.

See 16-18, 23, 24, 45, 51, 53, 61, 63, 66, 74, *infra*.

Allotment.

See 23, 24, 31, 32, 39, 40, 43, 44, 46, 47, 51, 54-72, 74, 76, *infra*; *Alaskan Natives*, 1; *Hunting and Fishing Privileges*; *Indian Irrigation*, 8-10; *Water Power*, 9, 10; *Withdrawals*, 9.

10. An Indian allotment on the public domain not charged with a subsisting trust in favor of the allottee by virtue of the act of Congress restoring the land from the Indian reservation is not "Indian Country" and not subject to the operation of Federal laws appertaining to the government of such country. 350

11. The acts of June 15, 1880, August 15, 1894, and June 7, 1897, which contained provisions for the allotment of lands to the Uncompahgre Utes in the State of Utah, did not exclude from allotment those mineral lands that were adaptable to agricultural and grazing purposes. 538

12. Neither the general allotment act of February 8, 1887, nor the act of May 30, 1908, which authorized allotments on the surplus lands of the Fort Peck Indian Reservation,

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Allotment—Continued.

excludes mineral lands from allotment----- 538

13. The setting aside of land in the field as an allotment and its listing on the completed schedule is such a disposition of the land as to remove it from the class of "undisposed of" land as that term is used in the act of March 3, 1927, which reserved to the Fort Peck Indians the oil and gas in the tribal lands undisposed of at the date of the act. 538

Allotment—Lease—Farming and Grazing.

14. The sole object in the amendment of section 1 of the act of June 4, 1920, by the act of May 26, 1926, was to extend to allottees thereunder a further privilege, that of leasing their allotments, or any part thereof, and the allotments of minor children for farming and grazing purposes, and not to move forward the date of the qualifications for allotment from June 4, 1920, to the date of the amendatory act.----- 550

Allotment—Lease—Oil and Gas.

See 78, *infra*.

15. Where issue born since March 4, 1906, joined with other heirs of a deceased Creek Indian allottee, with the approval of the Secretary of the Interior, in leasing the homestead for oil and gas upon a royalty basis, for the benefit of them all, the special estate created by section 9 of the act of May 27, 1908, attached to the royalties, such issue being entitled to the interest or income therefrom until April 26, 1931, but leaving the principal, like the homestead, to go to the heirs in general on the termination of the special estate----- 413

Allotment—Restrictions against Alienation.

See 23, 24, 45, 51, 53, 61, 63, 66, 74, *infra*.

16. Restrictions upon alienation of lands allotted in severalty to Indians do not constitute irrevocable covenants but are more in the nature of personal disabilities imposed by Congress under its power to enlarge or restrict as and when it sees fit.--- 48

17. The provision relating to restrictions upon alienation contained in the second proviso to section 9 of the act of May 27, 1908, which created a special estate in the homestead of a deceased member of the

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|--|------|--|------|
| Allotment—Restrictions against Alienation—Continued. | | Allotment—Trust Patent—Continued. | |
| Five Civilized Tribes in favor of the issue born since March 4, 1906, is to be construed in conjunction with the first proviso to that section, and, when so construed, the effect of the repeal of the second proviso by section 2 of the act of May 10, 1928, was, upon termination of the special estate in the homestead, to remove the restrictions only where the heirs or devisees are of less than the full-blood, and that where they are of full-blood their interests are subject to the restrictions attaching under the first proviso, that is subject to the approval of the proper local court. <i>United States v. Gypsy Oil Company</i> (10 Fed. (2d) 487), and <i>Parker v. Richard</i> (250 U. S. 235)..... | 157 | of section 14 of that act which empower that official to cancel patents should the lands be required under authority of Congress for the purposes for which they were reserved, in which event the allottees are to be reimbursed for their improvements out of any moneys for the construction of the irrigation project..... | 681 |
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| 20. A mineral reservation under the act of July 17, 1914, will not be required in trust patents to be issued for Uncompahgre Ute Indian allotments pending April 15, 1930, the date of the Executive order withdrawing oil shale deposits and lands containing them..... | 538 | 23. The effect of the issuance of a certificate of competency to a member of the Osage Tribe of Indians pursuant to section 2 of the act of June 28, 1906, was to remove the restrictions imposed upon him, while an incompetent, with respect to his surplus allotted lands, to confer upon him the privilege of receiving his full share of the tribal income, and to remove the restriction upon his power to contract debts..... | 169 |
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26. Where Indians, parties to a ceremonial marriage, both of whom were still living in tribal relations, separated with the clear intention of not living together again, such separation constitutes a valid Indian custom divorce----- 78

27. Where an Indian wife separated from her Indian husband with the clear intention of never living with him again, she is estopped from claiming any share in his estate----- 78

28. In recognizing the validity of Indian custom divorces no distinction is to be made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations----- 78

29. A marriage contracted between members of an Indian tribe, in accordance with the customs of such tribe, where the tribal relations and government existed at the time of the marriage, and there was no Federal statute rendering the tribal customs invalid, is a valid marriage for all purposes----- 79

30. An Indian custom marriage is a legal marriage according to the customs of the tribe and is, therefore, not to be treated as the equivalent of a common-law marriage among whites----- 79

31. Under the act of May 8, 1906, which amended section 6 of the act of February 8, 1887, an Indian did not become a citizen of the United States upon allotment; consequently, as to allotments thereafter made the allottee did not become subject to State laws, but his domestic re-

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32. The allotment of lands in severality to Indians does not terminate their tribal relations, but all Indian allottees remain subject to the exclusive jurisdiction of the United States until the issuance of fee simple patents, and so long as this jurisdiction continues the marriage relations of such Indians are to be determined by their tribal customs, and not by the laws of the State... 79

33. The fact that certain members of an Indian tribe who were married and lived together according to tribal custom were subsequently ceremonially married is not sufficient to raise the presumption of abandonment of tribal custom and that Indian custom marriage and divorce are no longer practiced by the tribe----- 79

34. The Department of the Interior can not hold by regulation that one particular tribe of Indians is sufficiently advanced to justify its marriage relations being henceforth regulated in accordance with the white man's law, and that other tribes are not so advanced, but it must recognize Indian custom marriage and Indian custom divorce generally until Congress fixes some other definite and uniform rule----- 79

35. A law or ordinance adopted by an Indian tribe regulating marriage and divorce is not mandatory and does not invalidate tribal custom marriage and divorce----- 80

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37. Congress alone has the power to say when Indian custom marriage and divorce shall cease to be valid----- 80

38. Congress, the courts, and the Department of the Interior have all recognized Indian custom marriage and Indian custom divorce as of equal validity with ceremonial marriage and legal divorce under State laws----- 80

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40. A deed executed and delivered by an heir in general of a deceased Creek Indian allottee, conveying his interest in the oil, gas, and other minerals underlying the homestead, with the approval of the Secretary of the Interior, subject to the special estate in the homestead of minors born since March 4, 1906, operated as of its date to transfer to the grantee all of his title and interest in and to such minerals including his interest or share in the royalties thereafter accruing and on hand on April 26, 1931, the date of termination of the special estate.----- 413

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41. The Department of the Interior has no concern with reference to the distribution of unrestricted property belonging to Indian estates regardless of the fact that the question of marriage or divorce may be involved.----- 78

42. The act of June 25, 1910, made the Secretary of the Interior a special tribunal with exclusive jurisdiction to determine the heirs of deceased Indians, and his decisions thereon are final and conclusive, and not reviewable by the courts even after the expiration of the trust period.----- 78

43. The provision in section 5 of the act of February 8, 1887, making the laws of descent of the State or Territory where the lands are situated applicable after trust patents have been issued was merely for the purpose of establishing a rule for the determination of heirship. The act does not undertake to prescribe what is necessary to constitute the legal relation of husband and wife, or of parent and child.----- 79

44. The act of February 8, 1887, is primarily an allotment act, whereas the act of June 25, 1910, is for the purpose of determining the heirs of deceased allottees, and if a conflict arises between the provisions of the two acts with reference to the determination of heirship, the latter act governs.----- 79

45. Upon the termination of the restrictions imposed upon the special estate in the homestead of a member of the Five Civilized Tribes created in favor of the issue born since March 4, 1906, by the second proviso to section 9 of the act of

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May 27, 1908, the accumulated funds derived from the homestead of the deceased allottee do not become the absolute property of such issue, but are subject to distribution among the heirs in accordance with their respective interests under the applicable laws of descent and distribution. *Parker v. Riley* (250 U. S. 66)----- 158

46. Where a Creek Indian died possessed of a homestead allotment, leaving heirs in general and also issue born since March 4, 1906, the interests of the heirs in general are present vested interests in the fee in remainder, the beneficial use or enjoyment of which is postponed until the termination of the special estate created by the proviso to section 9 of the act of May 27, 1908.----- 412

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Hunting and Fishing Privileges.

47. The leasing of lands by or for Indians does not change their trust character or take them out of the exclusive jurisdiction of the United States, and a lease of allotted or tribal lands for farming and grazing purposes does not confer upon a white lessee any of the hunting, trapping, and fishing rights and privileges possessed by the Indian lessor prior to the lease.----- 656

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58. The Secretary of the Interior is without authority, under existing law, to require non-Indian lessees of restricted allotted lands on the Yakima Indian Reservation in the State of Washington to pay certain stipulated sums additional to the regular rentals for the benefit of the local authorities in lieu of taxes which the county is not authorized to collect-----	107	64. Where no vested right of immunity from taxation of lands allotted to Indians has attached, legislation authorizing the taxation of such lands does not invade the rights of the Indians and is a proper exercise of the plenary power of Congress with respect to them-----	502
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62. All of the lands allotted to the members of the Five Civilized Tribes, made nontaxable by the provisions of the agreements under which the allotments were made, continue to be exempt in the hands of the Indian allottees from all forms of State taxation during the period specified in such agreements, irrespective of subsequent legislation by Congress purporting to subject them to taxation, including section 3 of the act of May 10, 1928-----	502	68. The act of March 2, 1929, is applicable to and extends the time of the termination of the period of exemption from taxation of homestead allotments of members of the Osage Tribe of one-half or more of Indian blood to whom certificates of competency had not been issued to January 1, 1959, where the title remains in the allottee or in his unallotted heirs or devisees of one-half or more of Osage Indian blood-----	565
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71. Section 3 of the act of May 10, 1928, is not in conflict with section 4 of that act, as amended by the act of May 24, 1928, but those two sections, when construed together, contemplate that all minerals produced from lands of the Five Civilized Tribes, whether restricted or unrestricted, shall be subject to both State and Federal taxation, the immunity from taxation extended by section 4 operating to withdraw not exceeding 160 acres in the aggregate of restricted land selected by the Indian owner as provided in that section from other forms of taxation..... 502

72. Section 3 of the act of May 10, 1928, subjected the income derived from mineral production from the restricted lands of the Five Civilized Tribes to both Federal and State taxation on and after April 26, 1931, except as to those lands allotted to members to which exemptions attached under provisions of the agreements under which allotted, such exemptions to continue for the periods specified irrespective of subsequent legislation by Congress purporting to subject them to taxation..... 606

73. The Federal and State income tax to be levied upon the income derived from the mineral production from the restricted lands of the Five Civilized Tribes under section 3 of the act of May 10, 1928, is to be based upon the net income, that is the gross income less allowable deductions, accrued after April 26, 1931, and not to be confined to interest alone..... 606

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74. The act of May 10, 1928, which extended the restrictions imposed upon homesteads of certain members of the Five Civilized Tribes in Oklahoma by the act of May 27,

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1908, likewise extended the restrictions upon the accumulated income derived from the lease of those lands, notwithstanding that the act was silent with reference to restrictions upon such funds..... 157

75. Sections 3 and 11 of the act of June 4, 1920, having been left undisturbed by subsequent legislation, remain conclusive and exclusive as to who are entitled to share in the distribution of the Crow Indian tribal funds, and the expression "to the Indians entitled" has reference only to those whose names appear on the final rolls made as provided for by that act..... 550

76. The act of May 19, 1926, as amended by the act of May 2, 1928, granted to the children of the Crow Tribe living on the former date and to those thereafter born only allotments of lands, and it did not extend the provisions of sections 3 and 11 of the act of June 4, 1920, to include them in any distribution of funds accruing subsequent to December 4, 1920..... 550

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78. Where an oil and gas lease involving tribal lands within the Navajo Indian Reservation was sold at public auction under the act of May 29, 1924, pursuant to an advertisement specifying in the language of the act that the lease should be made for a certain stated period and as much longer thereafter as oil or gas is found in paying quantities, development of the lands and the finding of paying production were conditions precedent to any extension and the Secretary of the Interior is without authority to extend the lease on any other ground..... 440

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79. The limitation in section 2 of the act of February 14, 1913, precluding the Secretary of the Interior from reopening after the expiration of one year after the death of an Indian testator a case in which he had approved a will made by such Indian, relates exclusively to fraud, and does not prevent him from reopening a case on other grounds, such as failure of the examiner to conduct properly the hearing or to correct an error independent of the fraud.-----	519	4. An irrigation district may bid in lands within reclamation entries sold for charges assessed by the district under the authority conferred upon it by the acts of August 11, 1916, and May 15, 1922, without limit as to acreage and assign them to persons qualified to acquire them under the act of June 23, 1910, as amended, but patents can not be issued to the district pursuant to such sales.-----	658
80. Where an Indian will case is reopened after the limitation in section 2 of the act of February 14, 1913, has run, the testimony must be considered in connection with the record made up at the original hearing, and evidence introduced, having for its object to prove fraud <i>per se</i> , is inadmissible and must be eliminated.-----	519		
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5. The prohibition in section 3 of the act of August 9, 1912, against holding lands within reclamation entries in excess of 160 acres acquired by descent, will, or foreclosure for a longer period than two years, has no application to irrigation districts bidding in lands under the acts of August 11, 1916, and May 15, 1922, but section 6 of the former act fixes the procedure as to them----- 658

6. The elimination of land from a reclamation project after its sale for charges assessed by the irrigation district within which it is situated would not deprive the district of its rights as purchaser under the sale, but the district will be allowed a limited time within which to assign the land to a qualified purchaser or to show cause why it should not be eliminated as not susceptible of reclamation----- 658

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1. A judgment by a court decreeing that a certain tract is public land and commanding the Secretary of the Interior "to give full legal force and effect to plaintiff's selection," does not deprive the Land Department of its jurisdiction to determine the rights and claims of other persons, not parties to the proceedings, with respect to the land in controversy----- 447

2. The functions of the Land Department in the matter of the character of land subject to the swamp-land grant are quasi-judicial, and the sole duty of the Secretary, while the title is in the United States, is to pronounce a decision upon the rights of the State----- 453

3. While the Land Department prior to the passing of the legal title to public land, has the power to make inquiry as to the equitable rights of a claimant thereto and to review or reverse any of its findings for cause, yet the existence of that power does not, in the absence of any application invoking the power to reconsider, impose a duty upon the Department, after it has finally considered and adjudged the rights of a claimant, and that correctly at the time, to reopen the record upon its own volition with the view to ascertaining whether any change in the status of the land subsequently occurring has created a situation whereby the claimant might be granted additional rights- 479

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1. In the absence of a statutory provision to the contrary, an action seeking to obtain a mandamus against an officer of the Government abates on his death or retirement from office, and his successor can not be brought in by amendment to the proceeding or on order for the substitution of the parties, even though the latter consents to have the action revived against him----- 232
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See *Soldiers, Sailors, and Marines*.
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- Medical Director, Veterans' Administration.**
See *Soldiers, Sailors, and Marines*, 2.
- Medicinal Springs.**
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- Migratory Bird Law.**
See *Bird Reserves*.
- Military Service.**
See *Homestead*, 8, 9; *Soldiers, Sailors, and Marines*.
- Mill Site.**
See *Mining Claim*, 18, 55, 56, 74.
- Mineral Lands.**
See *Coal Lands; Homestead*, 2, 3, 27; *Indians and Indian Lands*, 11-
- Mineral Lands—Continued.**
13, 19, 20, 62, 71-73, 78; *Mining Claim; Oil and Gas Lands; Potash Lands; Railroad Lands*, 1; *Recreation Lands*, 3; *Repayment*, 1; *Rights of Way*, 3, 8, 9, 10; *School Land*, 6, 7, 9, 12-21, 23; *Secretary of the Interior*, 3; *Survey; Water Power*, 6; *Withdrawal*, 7.
1. The allowance of a stock-raising homestead entry on land previously classified as mineral in character does not amount to an adjudication that the land is now nonmineral----- 264
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- Mineral Surveyors.**
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- Mining Claim.**
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Generally.
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2. An interest in a mining claim is real estate, vendible and inheritable----- 26
3. Ore when severed from the land becomes personalty, but tailings from the mine that are dumped upon non-mineral land and abandoned become, upon abandonment, a part of the realty so as to mineralize the land upon which they are placed and make it subject to mining location by the first comer----- 116
4. A perfected mining location is real estate and the same formalities for conveyancing are necessary to transmit title as in cases of other real property----- 196
5. State requirements as to location of a mining claim and description of each corner with the markings thereon are not repugnant to Federal laws, and noncompliance therewith renders the claim invalid----- 196
6. The Land Department has jurisdiction to inquire into and determine in the public interest any matter affecting a mining location with-

Mining Claim—Continued. Page

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out awaiting the filing of an application for patent, and if the charge of invalidity is established to declare the claim null and void.----- 214

7. An allegation that the object of an amended certificate of a mining location was merely to correct defects in the original certificate is not determinative of its character, but whether the certificate is a mere amendment or one taking in new or abandoned ground is a question depending upon the facts as they existed at the time it was made.----- 312

8. Where adverse proceedings have been brought against a homestead entry charging that the land is covered by valid and existing mining claims, the mineral claimant whose entry for such claims has erroneously been allowed over the existing homestead entry should be permitted to intervene in the proceedings and, should the charges be proved and the homestead entry canceled, the invalidating cause of the mineral entry is thereby removed and it will be permitted to stand.----- 379

9. Where the right of possession to a mining claim is founded upon an alleged compliance with the law relating to a valid location all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate.----- 382

10. A valid mining claim to which the owner has a vested right of exclusive possession under the mining law is not subject to entry under the stock-raising homestead act.----- 382

11. Lands containing limestone or other minerals, which under the conditions shown in the particular case can not probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law.----- 410

12. The rule enunciated in paragraph 30 of the mining regulations fixing a limitation on the length of a placer claim will not be applied where the mineral deposits are confined within a narrow strip of land in the bed and on the banks of a small stream in a canyon flanked by abrupt walls or rocky slopes on each side, containing no mineral, agricultural, or timber value.----- 431

13. Failure on the part of the holder of a valid mining location to contest a State indemnity selection

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affecting his location, of which notice by publication was given pursuant to law, is not attended with the same fatality to his possessory right as would his failure to advertise a hostile mineral application.----- 436

14. No distinction is to be made between valid mining locations in national parks and those on the unreserved public domain with respect to the acts required by the owners thereof to preserve their rights.----- 491

15. The fact that a mining claim is located at the bottom of a rugged and precipitous canyon, 50 miles from the nearest railroad point, and that the last 18 miles is over a poor and dangerous trail; that all supplies and mining tools must be conveyed from the canyon rim by pack animals, and that the mining work can not be duplicated for less than \$25 per linear foot, must be considered very material factors for a reasonably prudent person in determining whether the minerals will justify the expenditure and time in the hope of developing a paying mine.----- 492

16. A valid mining claim can not be located on lands previously reserved for power sites under the Federal Water Power Act of June 10, 1920, until a determination by the Federal Power Commission that the value of the land will not be injured nor destroyed for the purposes of power development by such location. 532

Abandonment.

See 3, 7, *supra*; 40, 64, 66, 75, *infra*; *Withdrawal*, 6.

17. To establish abandonment both the intention to abandon and actual relinquishment must be shown; mere failure to check deterioration in value that follows from lapse of time of unproductive property is not of itself conclusive as to abandonment.----- 116

18. A charge of abandonment of tailings impounded on public land on the ground that breakages in cribbing due to age and decay of the logs that retained them were not repaired, that a large amount of the tailings had escaped, and that there was an absence of any specific acts towards their conservation for a long period of time and discontinuance long ago of active mining operations by the company that placed them on the land, is refuted by the facts that about 75 per cent of the crib-

Mining Claim—Continued.

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Abandonment—Continued.

bing is still intact, that the tailings had settled to such an extent as to render cribbing protection no longer necessary, that they had been purchased as personal property at a sheriff's sale and taxes paid thereupon, that rights in the land had been invoked by the purchaser under the millsite law, and that he expected to treat them at some future time.....

116

19. Abandonment is the giving up or relinquishment of property to which a person is entitled, with no purpose of again claiming it and without any concern as to who may subsequently take possession, and does not depend upon any rules or regulations or customs of mining, but is largely, if not entirely, a matter of the locator's intention, to be determined from his acts and statements together with the circumstances of the particular case.....

195

20. Assuming that a mining claimant was dissuaded from filing his mineral application and was induced to abandon work on his locations through the advice of an officer of a local land office that his locations were invalid because of apparent conflict with a prior coal withdrawal, which advice was due to claimant's misdescription of the land claimed, he can not plead that the Government is by such advice estopped from later bringing proceedings charging abandonment.....

251

21. There is doubt whether a departmental decision holding a mining claim in a national park has been abandoned has the same conclusive legal effect on the claimant's rights as an adjudication would have that it is void on the ground that the land was nonmineral in character or that there was a lack of discovery.....

491

Adverse Proceedings.

See 13, *supra*; 36, 42-44, 46, 51, 58, 60, 69, 76, *infra*; *Oil and Gas Lands*, 18.

22. The trial of suits under section 2325, Revised Statutes, as amended by the act of March 3, 1881, is to aid the Government in determining whether either party, and, if so, which, has the exclusive right to possession arising from a valid subsisting location, and patent proceedings in the Land Department are suspended to await determination of that question.....

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Mining Claim—Continued.

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Adverse Proceedings—Continued.

23. In adverse proceedings under section 2325, Revised Statutes, as amended by the act of March 3, 1881, each party is nominally plaintiff and must show his title, and the applicant for patent can not go forward with his proceedings in the Land Department simply because the adverse claimant had failed to make out his case, if he also had failed.....

115

24. Where in a suit of adverse proceedings against a mining claim a demurrer is sustained and the action is dismissed on the merits, all facts well pleaded are admitted, and, if the facts relevant to the issue as to the validity of the claim were not determined, the Government is not estopped from fully inquiring into and determining them.....

115

25. A judgment in adverse proceedings against a mining claim simply determines the right of possession and does not preclude the Land Department from ascertaining the character of the land and determining whether the law has been complied with in good faith.....

116

26. A coowner who is not made a party to an application for a patent to a mining claim is not required to adverse or protest the application and the fact that he does not object is not sufficient warrant for ignoring the existence of his outstanding title.....

312

27. Prior to the final disposition of all adverse claims an adverse claimant will not be permitted to exclude from his application the ground in conflict and retain the portion of his mining claim not in controversy and still hold the controverted area under his possessory right.....

556

28. During the pendency of adverse proceedings pursuant to section 2326, Revised Statutes, affecting any part of a mining application, all proceedings upon the application before the Land Department, except the publication of notice and filing of the affidavit thereof, must be stayed until final disposition of the adverse proceedings.....

556

29. Elimination in an amended mining application by an adverse claimant of the portion of his claim in conflict does not in effect constitute a waiver of the adverse claim nor restore the right of the Land Department to proceed.....

556

30. A declaration filed by a mineral applicant, made by one having

Mining Claim—Continued.

Adverse Proceedings—Continued.

merely an option to purchase an adverse claim, setting forth that no conflict exists does not constitute a waiver of the adverse claim and does not bind the adverse claimant----- 712

31. After the institution of adverse proceedings the jurisdiction of the Land Department over a mining claim subject to the controversy is restored only upon a final judgment, or a waiver by the adverse claimant of the ground in conflict, or a proper certificate showing that the adverse suit has been dismissed or was not timely instituted----- 712

32. The departmental ruling holding that where more than one action has been commenced, based upon separate adverse mining claims, the Land Department will await a judgment determining the rights of all the parties; does not apply to adverse claims not filed in compliance with the statute----- 712

33. An adverse claim filed without a plat showing conflict with the application adversed, but with a promise to file the plat when climatic conditions permit of a survey, is subject to dismissal as vitally defective, and if the adverse claimant fails to cure the defect after considerable lapse of time after due notice to do so, his adverse claim should be dismissed, notwithstanding the pendency of the adverse suit----- 712

Amendment.

See 7, 27, 29, *supra*; 67, 76, *infra*.

Assessment Work.

See 20, *supra*; *Oil and Gas Lands*, 18.

34. Instructions of June 16, 1932, suspension of annual assessment work on mining claims under Public Resolution No. 23 of June 6, 1932 (Circular No. 1273)----- 703

35. An oil shale claimant under section 2324, Revised Statutes, maintains his claim after temporary default in the performance of annual assessment work within the meaning of the excepting clause of section 37 of the Leasing Act by a resumption of work, unless some form of challenge on behalf of the United States to the valid existence of the claim has intervened----- 42

36. In so far as challenging a default in assessment work required on a mining claim is concerned, the Government stands in the same po-

Mining Claim—Continued.

Assessment Work—Continued.

sition as an adverse claimant under section 2325, Revised Statutes----- 131

37. The United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to perform the annual labor required in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings, including the publication of notice, have been completed----- 131

38. Section 37 of the leasing act of February 25, 1920, effected a change in the mining law with respect to the performance of annual assessment work upon mining claims, and thereafter a default not cured by a resumption of work became ground for challenge by the United States to the valid existence of the claim. *Walbur v. Krushnic* (280 U. S. 306)----- 175

39. Where the claimant of an oil shale placer in answer to adverse charges against his claim fails to deny the charge of failure to do assessment work and that work was not thereafter resumed, and elects to stand solely on his answer denying other charges on the ground that the charge relating to mere performance of assessment work is unauthorized by law, the charge will be taken as established and the claim held void----- 179

40. Failure to do assessment work, unlike abandonment, does not cause the land to revert to the public domain, and proof merely of such failure does not suffice to establish the right of the State of South Dakota to purchase lands in the Custer State Park under the act of March 3, 1925----- 196

41. Rule 55 of the General Mining Regulations of the Land Department disclaiming its jurisdiction to determine questions as to the performance of assessment work upon mining claims has no force with respect to minerals mentioned in the leasing act----- 214

42. Dual forms of challenge as to the validity of a mining claim asserted under the mining law by institution of proceedings and by posting of notice of actual repossession of the ground are proper and consistent with the letter and spirit of the leasing act----- 214

Mining Claim—Continued.

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Assessment Work—Continued.

43. The Government is not concerned with defaults in the performance of assessment work on mining claims for minerals other than those subject to the operation of the leasing act, irrespective of how long continued or whether occurring before or after a withdrawal of the land, and such defaults can not be made the subject of adverse proceedings or a basis for an adjudication by the Land Department to declare a forfeiture----- 228

44. Posting notices on mining claims for lands containing minerals other than those subject to the operation of the leasing act, challenging their validity for defaults in the performance of annual assessment work, is not authorized by law and can not, therefore, take the place of personal service or be accepted as a substitute for statutory notice by publication, and such form of notice will not operate as a bar to the resumption of work upon those claims----- 228

45. The Government can not challenge the valid existence of mining claims situated within national parks by reason of defaults in the performance of annual assessment work----- 491

46. Rule 13 of Practice requires that an answer must specifically meet and respond to the allegations of the charge, and a denial in an answer to a charge based on mere information and belief that the required work on a mining claim was not fully performed is not sufficient to fulfill the requirement----- 572

47. To constitute a resumption of assessment work on a mining claim after default sufficient to prevent a forfeiture, the claimant must resume work in good faith and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed, that is, one year's delinquency is made up, and suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation. Sec. 654, Lindley on Mines----- 572

48. Actual, open and notorious possession of a mining claim continued from year to year without performance of the full amount of work each year required under the mining act will not prevent a forfeiture of the claim. *Honaker v.*

Mining Claim—Continued.

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Assessment Work—Continued.

Martin (27 Pac. 297), and *McCormick v. Baldwin* (37 Pac. 903)----- 572

49. The form of challenge on behalf of the United States to the valid existence of an oil shale mining claim which to be valid must precede a resumption of assessment work is a challenge of default in the performance of such work; not other challenges that have no relation or connection with the performance of such work----- 666

50. Where a tunnel is run upon unappropriated public land in Alaska, the laws of which Territory recognize the right to condemn land for mining purposes, and the tunnel is made for the purpose and is a means of developing a mining claim, the value of the tunnel may be credited as acceptable expenditure in support of a patent application for such claim as though the tunnel were located within the claim----- 669

51. After the commencement and during the pendency of adverse proceedings against a mining claim the applicant for patent is not obligated to maintain annual assessment work----- 669

Boundaries.

See 5, 12, *supra*; 61, *infra*.

Contiguity.

See 68, 69, *infra*.

Discovery.

See 21, *supra*; 72, *infra*.

52. The date of discovery given in the recorded certificate of location is not evidence of the fact of discovery of mineral in a mining claim, and if controverted must be proved independently of the recital in the certificate----- 382

53. Feeble showings of mineralization on a mining claim, some of them disclosed in underground workings, whether made before or after a reservation for a national park became effective, and occurring in thin films and seams, and showing on assay negligible values in gold, silver, and copper, are insufficient in themselves to establish a discovery that will save the claim from the operation of the withdrawal----- 492

54. Testimony as to discovery of mineral based upon an examination of a mining claim subsequent to allowance of a conflicting stock-raising homestead entry is incompetent of itself to prove a discovery that

Mining Claim—Continued. Page

Discovery—Continued.

would establish a prior valid location, nor are the declarations in the recorded location notices *prima facie* evidence of the fact of discovery ----- 578

Group Claims.

See 68, 69, *infra*.

Limestone.

See 11, *supra*.

Location.

See 1, 3-7, 9, 11, 13-16, 47, 52, *supra*; 59, *infra*; *Custer State Park*, 1; *Withdrawal*, 6.

Location Certificate.

See 7, 9, 52, *supra*.

Lode Claims.

See 72, *infra*.

Mill Site.

55. The right granted by section 2337, Revised Statutes, to a mining claimant to locate a mill site on nonmineral land is incident to the right to make mineral entry, and such location, so far as applicable to metalliferous minerals, does not come within the prohibition of a temporary withdrawal for power-site purposes under the act of June 25, 1910, as amended by the act of August 24, 1912 ----- 531

56. Where a part of a mill site is contiguous to the end line of a lode claim the formal and usual proofs of nonmineral character which accompany the mill-site application will not suffice to permit entry and patent of that part of the mill site contiguous to such end line, but it must be shown that the lode or vein does not extend into any part of the ground covered by the mill site ----- 531

Notice.

See 13, 28, 33, 37, 44, 54, *supra*; 65, 70, *infra*.

57. Under the authority imposed in him by section 2334, Revised Statutes, the Commissioner of the General Land Office may designate any newspaper published in a land district where mines are situated for the publication of mining notices and fix the maximum rates to be charged for such publication, and that officer may compel a publisher charging in excess of those rates to refund the excess under penalty of being barred from future designation for failure to do so ----- 57

Mining Claim—Continued. Page

Notice—Continued.

58. In proceedings against a mining claim based on a charge of the nonmineral character of the land, service of notice by publication under section 2335, Revised Statutes, is authorized against those mineral claimants who can not be found ----- 228

59. A notice of a mining location not filed for record until after an adverse right had intervened is of no validity under the laws of the State of Arizona ----- 245

60. Under the laws of Colorado, where a corporation is dissolved, any action affecting its property must be brought against all the trustees individually, or the survivors of them, and consequently service of notice of proceedings against oil shale locations in that State upon only one trustee of a defunct corporation is not sufficient to bind the other trustees or those whom they represent ----- 562

Notice—Republication.

See 70, *infra*.

61. Where in the adjustment of the boundaries of placer claims to conform to legal subdivisions of the Government survey, the claims as so adjusted collectively include land not described in the posted and published notice of application for patent, republication must be made --- 398

Oil and Gas.

See 66, *infra*.

Oil Shale.

See 35, 37-39, 41, 46-49, 60, *supra*; *Indians and Indian Lands*, 20; *Possession*, 2; *Withdrawal*, 1.

Patent Proceedings.

See 6, 22, 23, 26, 37, 51, 57, *supra*; 73, *infra*.

62. The Land Department will not insist upon a perfect record title as a prerequisite to a patent to a mining claim if, under the circumstances disclosed by the record, it is probably not susceptible of documentary proof, and where, from the evidence, there is no probability that the patent will be attacked by a stranger, or, if attacked, the patentee has at hand the means of showing that the attack can not be sustained --- 26

63. Where the evidence is sufficient to hold that the right, title to, and estate in a mining claim passed by the law of descent and distribution of the State in which the property is lo-

Mining Claim—Continued.	Page	Mining Claim—Continued.	Page
Patent Proceedings—Continued.		Patent Proceedings—Continued.	
cated to the applicant in whose name the patent proceedings were initiated and prosecuted, and there has been a considerable lapse of time since the death of the decedent, final certificate and patent will issue in the name of the applicant, and not to the heirs generally, notwithstanding that a cloud on the title may arise from failure to administer the estate.....	26	segments of different locations embraced in the application do not form one contiguous body of land, the applicant will be required to elect which of such incontiguous tracts he will retain in his application, but outlying segments of one or more claims which form one body of land may be embraced in one application.....	669
64. The fact that a claimant excluded a portion of his mining claim from his application for patent is not conclusive of an abandonment of his possessory right to the excluded portion to another claimant or to the United States.....	336	70. Republication and posting anew for outlying segments of mining claims, not lost in an adverse suit; which the applicant for patent may elect to retain in his application, will not be required where defects in the application are curable by supplemental showings and no adverse rights by a stranger can be acquired to those tracts by relocation.....	669
65. A published notice by an applicant for patent of a mining claim which excluded a claim by name, in legal contemplation, excluded the entire claim as surveyed, not merely the patented portion thereof, and such notice is not sufficient to apprise the owner of the patented claim that the exclusion was restricted to the patented area.....	336	Placer Claim.	
66. A patent to a placer claim traversed by a right of way previously granted under the act of March 3, 1875, carries with it no possibility of a future estate in the land within the right of way in the event of its abandonment, but the land thereupon reverts to the United States.....	340	See 12, <i>supra</i> .	
67. The Land Department is without jurisdiction to consider an amended application for patent to a mining claim until the applicant has furnished proof as to the final disposition of all adverse claims.....	556	71. No rights can be acquired under the placer mining laws to public land, nonmineral in its natural state, that was covered by valuable tailings placed there by another where the owner of the tailings had kept and preserved them from waste and destruction pending such time as they might be profitably worked and sold. <i>Ritter v. Lynch</i> (123 Fed. 930).....	116
68. The element of contiguity of certain mining claims is not destroyed by the fact that an absolute fee title exists in the claimant as to some of them, and an owner of a number of claims who has received patent for certain contiguous claims of a group may apply for a patent for the remainder in one application under section 2325, Revised Statutes.....	614	72. A lode discovery will not sustain a placer mining location.....	410
69. Where in an adverse suit brought under the mining law it is the judgment of the court that neither the adverse claimant nor the applicant for patent is entitled to the possession of the area in controversy, such judgment is conclusive and the patent proceedings are at an end as to such area and, if as a result of such judgment outlying		Possession.	
		See 9, 10, 13, 22, 25, 27, 42, 48, 64, <i>supra</i> .	
		Protest.	
		See 26, <i>supra</i> .	
		73. An unsuccessful adverse mining claimant may still by way of protest call the attention of the Land Department to irregularities in the patent application which were not determined by the court in its judgment.....	116
		74. A controversy between a prior mill site claimant and a placer claimant is not subject to an adverse claim, but of protest, and any finding of a court in adverse proceedings between such claimants as to the mineral or nonmineral character of the land or any fact relevant to that issue is merely advisory and not binding upon the Land Department. <i>Helena, etc. Co. v. Dailey</i> (36 L. D. 144).....	116

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Publication of Notice.

See *Notice*.

Recordation of Location.

See 9, 52, 59, *supra*.

Relocation.

See 47, *supra*; *Custer State Park*, 1; *Withdrawal*, 6.

75. A State law requiring one making a relocation of a mining claim to declare that the new location is located as abandoned property is mandatory and the relocation will be void for failure so to state-----

196

Resumption of Assessment Work.

See 35, 38, 44, 47, 49, *supra*.

Survey.

See 12, 33, 61, *supra*.

76. The Land Department may permit a survey to be made of an amended mining claim in advance of the final disposition of adverse claims where the claimant applies therefor and accepts the risk that the outcome of the pending controversies may nullify such amended survey-----

556

Tailings.

See 3, 18, 71, *supra*.

Tunnels.

See 50, *supra*.

Minors.

See *Indians and Indian Lands*, 15, 17, 40, 46.

Montana.

See *School Land*, 22.

Mortgage.

See *Coal Lands*, 4.

Mount McKinley National Park.

See *Rights of Way*, 7.

Mount Rainier National Park.

See *Elections; National Parks and Monuments*, 1.

Municipal Corporations.

See *Reclamation*, 7-10; 12, 13; *Water Power*, 1, 2.

National Forests.

See *Exchange of Lands*, 2; *Forest Lieu Selection*; *Homestead*, 13; *Rights of Way*, 2; *School Land*, 10; *Trade and Manufacturing Sites*, 6; *Withdrawal*, 2, 3.

Page National Parks and Monuments. Page

See *Elections; Mining Claim*, 14, 15, 21, 45, 53; *Rights of Way*, 2, 7; *Title Insurance; Water Power*, 7, 8.

1. An act of the legislature of the State of Washington ceding exclusive jurisdiction to the United States over the Mount Rainier National Park, reserving, however, to the State certain rights, had the effect of ceding the political jurisdiction of the State only to the limited extent stated in the act-----

315

2. Conveyances by the heirs to the Wakefield National Memorial Association and by the latter to the United States of the family burial ground on the Wakefield property, since designated as the George Washington Birthplace National Monument, constituted a dedication to the public as a national memorial, and alienation by the heirs for such purpose is not prohibited by the laws of the State of Virginia. *Colbert et al. v. Shepherd* (89 Va. 401, 16 S. E. 246)-----

651

Naturalization.

See *Citizenship*.

Naval Service.

See *Homestead*, 9; *Soldiers, Sailors, and Marines*.

Nevada.

See *Accounts*, 2.

New Mexico.

See *Exchange of Lands*, 1.

Northern Pacific Railroad Grant.

See *Railroad Grant*, 2.

Notice.

See *Contest*, 2; *Forest Lieu Selection*, 3; *Homestead*, 16, 17; *Mining Claim*, 13, 28, 33, 37, 44, 54, 57-61, 65, 70; *Possession*, 2; *Railroad Lands*, 2; *Revival of Action*, 2; *School Land*, 6, 13.

Occupancy.

See *Forest Lieu Selection*, 4; *Homestead*, 26; *Indians and Indian Lands*, 5-7, 48; *Railroad Grant*, 4; *Recreation Lands*, 3; *Trade and Manufacturing Sites*, 7.

Offerings at Public Sale.

See *Isolated Tracts, supra*.

Office of Education.

See *Reindeer*, 2; *Withdrawal*, 4.

Officers.

See *Accounts*, 3; *Agents and Attorneys*, 1; *Commissioner of the General Land Office*; *Damages*, 2, 3; *Irrigation Districts*, 1; *Mandamus*; *Mining Claim*, 20; *Register*; *Revival of Action*, 1, 2; *Secretary of the Interior*; *Statutory Construction*, 1; *Supervisory Authority*; *Vested Rights*.

Oil and Gas Lands—Indians and Indian Lands—Lease.

See *Indians and Indian Lands*, 13, 15, 19, 40, 62, 71-73, 78.

Oil and Gas Lands—Act February 25, 1920.

See *Accounts*, 1; *Homestead*, 1, 2, 24; *Patent*; *Potash Lands*, 3; *Rights of Way*, 8; *School Land*, 15, 20.

Generally.

1. The unentered surplus lands within the Flathead Indian Reservation, Montana, which have been opened to entry and sale, are not public lands or lands owned by the United States within the purview of the leasing act of February 25, 1920, and are not, therefore, subject to the operation of that act. *Peter Fredrickson* (48 L. D. 440)----- 154

2. The leasing act confers upon the Secretary of the Interior full power to determine all questions of law and fact essential to the awarding of leases thereunder, and a lease, once granted, is beyond recall by him; thereafter the Department is without jurisdiction to review his action and the lease is subject to cancellation only in the Federal courts----- 205

3. The leasing act conferred upon the Secretary of the Interior full power to administer that act, and clearly in its administration it is his duty to determine what lands are subject to lease and what lands are within the exception of valid claims----- 213

4. An oil and gas lessee of a tract of public land crossed by a railroad or other right of way granted prior to the execution of the lease acquires no rights to the mineral deposits in or under the lands embraced in the right of way----- 270

5. The royalty to which the Government is entitled under an oil and gas lease is to be ascertained as it arises each month or part of month

Oil and Gas Lands—Act February 25, 1920—Continued. Page

Generally—Continued.

within the year, but settlement therefor in money value may be deferred until the fifteenth of the following calendar month except that rental paid for one lease year shall not be credited against royalty which arose in another year----- 512

Section 13—Permits—Generally.

See 13, 19, *infra*; *Accounts*, 1; *Homestead*, 2.

Section 13—Permits—Operating Agreement.

See 26, *infra*.

Section 13—Permits—Unit Operation.

See 25, 26, *infra*.

6. Instructions of April 4, 1932, applications for oil and gas prospecting permits subject to unit operation----- 640

7. Instructions of April 5, 1932, oil and gas prospecting permits subject to unit operation----- 643

Section 14—Lease—Rentals and Royalties.

See 5, *supra*; 9-11, 22, *infra*.

8. The leasing act does not prohibit lessees from agreeing between themselves that one shall develop and produce gas and that the other shall have all rights to the oil, if the provisions of the act and the regulations issued thereunder are not violated, but if interests are thus transferred and held, each lessee will be chargeable for the total acreage involved----- 155

Section 17—Lease—Reduction of Government Royalty.

See 8, *supra*.

9. The phrase "rental paid for any one year to be credited against the royalties as they accrue for that year", contained in sections 14 and 17 of the leasing act, may be construed as meaning "credited against the Government's share as it arises or grows for that year"----- 512

10. Separate royalty computations by the Secretary of the Interior for separate tracts within a leasehold, as a basis for royalty reduction, rather than computation for the leasehold as an entirety, where in the lease there was a definite recognized division of the premises into segregated tracts, is not repugnant to the terms of section 17 of the leasing act which conferred upon

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Section 17—Lease—Reduction of Government Royalty—Continued.

that official the authority to reduce the royalty on future production where the average daily production of any oil well shall not exceed 10 barrels per day----- 474

11. A ruling by the Comptroller General that the Secretary of the Interior is without authority to change the royalty rates prescribed in an oil and gas lease is binding on the Land Department where the production exceeds 10 barrels per well per day----- 477

Section 21—Oil Shale.

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Section 27—Restrictions—Combinations in Restraint of Trade.

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Section 28—Pipe Lines.

12. Instructions of February 21, 1931, rights of way for pipe lines for transportation of oil and gas... 310

Section 29—Easements.

13. The purpose of the provision in section 29 of the leasing act requiring the inscription in permits and leases of a reservation of such easements as may be necessary or appropriate to the working of the permitted or leased lands for the deposits described in that act is to enable the Government to permit exploration, development, and mining of other kinds of minerals than that claimed by the first permittee or lessee----- 508

Section 30—Assignment of Lease.

See *Trusts and Trustees*.

14. Authority does not exist under the general leasing act for recognizing oil interests separate and apart from gas interests in the same land, and the Department can not approve an assignment which recognizes, in the same land, oil interests in one party and gas rights in another... 155

15. The leasing act confers upon the Secretary of the Interior the authority to approve the assignment of leases issued thereunder, and, in the absence of a showing of fraud or imposition upon the Government, that officer may disapprove, as an interference with his award, a decree of assignment by a State court of an oil and gas lease granted by him where the decree resulted from

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a determination of facts that were or should have been presented to the Department before the award was made or arose from a different construction or without regard to the provisions of the act----- 205

16. Where a State court seeks in its decree to impress a constructive trust upon an oil and gas lease issued by the Secretary of the Interior in favor of the petitioner on the ground that the lessee, as agent of the petitioner to present his claim to the Land Department, was in duty bound to acquire the leased area only for the petitioner, but disregarded his duty as fiduciary by not doing so and fraudulently neglected to exhibit the claim of the petitioner to the Department, that officer, in determining whether or not to approve the assignment directed by the court, may decide for himself whether the facts found by the court establish the grounds of fraud and breach of trust upon which the decree is founded----- 206

Section 37—Valid Claim.

See *Mining Claim*, 35, 38.

17. The excepting clause in section 37 of the leasing act differs essentially from the excepting clauses in grants of lands to railroad companies in that the former saves valid claims existing at the date of the act so long as they are maintained in compliance with the laws under which they are initiated while the latter excluded the excepted lands effectually and completely from the grants----- 214

18. Under the saving clause in section 37 of the leasing act maintenance of a mining claim is the test of validity, not merely the status of the claim at the date of the act, and the Land Department may challenge the validity of the claim for default in assessment work at any time prior to a resumption of work and if the default is established the land becomes subject to the operation of that act----- 214

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19. Instructions of March 7, 1930, extension of time on oil and gas prospecting permits under act of January 23, 1930 (Circular No. 1209)----- 55

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Act May 21, 1930—Lease—Railroad and Other Rights of Way.

20. Instructions of July 3, 1930, leases of oil and gas in and under railroad and other rights of way under act of May 21, 1930. (Circular No. 1224)----- 137

21. The act of May 21, 1930, authorizes the Secretary of the Interior to lease deposits of oil and gas in and under lands embraced in railroad or other rights of way whenever he shall deem it to be consistent with the public interest and to adopt rules and regulations governing the exercise of the discretion and authority conferred upon him by the act, which shall constitute a part of any application or lease thereunder----- 270

22. The leasing of oil and gas deposits in and under lands embraced in railroad or other rights of way for the prevention of the drainage of those deposits by the operation of wells on adjoining lands, with the consequent loss of royalty to which the Government is entitled, is an exercise of the discretionary authority conferred upon the Secretary of the Interior by the act of May 21, 1930----- 270

23. The act of May 21, 1930, is an act of the grantor, enlarging the rights of a railroad right of way grantee as to the uses and purposes to which the right of way may be devoted by permitting the exercise of mining rights in deposits in which no others than the parties to the lease have any right, title, or interest----- 340

24. In the administration of the act of May 21, 1930, which empowers the Secretary of the Interior to lease for the extraction of oil and gas lands covered by a right of way, it would not be regarded as consistent with the public interest to grant a lease which would interfere with the Hetch Hetchy water supply and power project grant of December 19, 1913----- 425

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25. Instructions of June 4, 1931, unit operation of oil and gas permits and leases under act of March 4, 1931. (Circular No. 1252)----- 386

26. The approval by the Secretary of the Interior of operating, drilling, or development contracts with-

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Act March 4, 1931—Permits and Leases—Unit Operation—Cont'd.

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Oil Shale Lands.

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Option to Purchase.

See *Mining Claim*, 30.

Oregon.

See *Waters and Water Rights*, 3, 4.

Oregon and California Railroad Lands.

1. Instructions of January 23, 1931, Oregon and California Railroad and Coos Bay Wagon Road grant lands; extension of time for cutting and removing timber under act of May 19, 1930. (Circular No. 1235)- 249

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1. One obtaining patent to public land with oil and gas reservation to the United States, properly impressed in strict accordance with the status and condition of the land at the date his entry is approved for patenting, can not, after acceptance of the patent, be allowed to ex-

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change the patent for one without such reservation on the ground that the land was restored from a petroleum reserve between the dates of the approval for, and issuance of patent.----- 479

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See *Homestead*, 24; *Patent*; *School Land*, 20.

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See *Mining Claim*, 33; *Rights of Way*, 11.

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1. Where the question of prior possessory rights to public lands has been relegated by law to the courts a protest based upon allegations of prior and superior rights to the possession will not lie.----- 58

2. The United States, like any property owner, may assert a claim by the posting of notice and peaceably taking possession of the premises which it believes it owns and has a present right to occupy, preliminary to any adjudication as to its rights to the possession, but if the nonexistence of the facts upon which the act of repossession is founded be established the notice becomes of no effect.----- 214

Potash Lands. Page

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2. Instructions of June 20, 1932, potash permits; extensions of time under act of May 7, 1932. Circular No. 926, modified. (Circular No. 1274)----- 704

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Practice.

See *Agents and Attorneys*, 1; *Contest*; *Homestead*, 1; *Land Department*, 3; *Mining Claim*, 22-24, 46; *Public Lands*, 2; *Railroad Lands*, 1; *School Land*, 9.

1. The rule that an answer which fails to deny a charge is insufficient to warrant a hearing and must be taken as an admission of its truth under the regulations relating to contests on report by representatives of the General Land Office is equally applicable to protests preferred by the Forest Service----- 175

2. Where a claimant elects to stand on his answer to a charge and does not choose to support his contention as to the legal insufficiency of the charge by filing brief and argument before the case is reached in its order for examination in the Land Department, he will not thereafter be heard to assert that he was deprived of his day in court because subsequently denied the privilege of filing brief and argument.----- 175

3. A decision of an officer of a local land office, in a proceeding in which the United States is made a party, is subject to review *sua sponte* by the Commissioner of the

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1. The term "public lands" varies in different statutes passed for different purposes and is sometimes used in larger signification than a mere designation of lands subject to sale and disposal under general laws-----	365	
2. The statutes defining the authority and duties of the officers of the Land Department clearly contemplate that so long as the legal title remains in the Government the lands are public within the meaning of those statutes, the proceedings before the Department are administrative in their nature, and the laws under which such lands are claimed, or being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior-----	453	
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Purchaser.

See *Irrigation Districts*, 6; *School Land*, 19.

Railroad Grant.

See *Oil and Gas Lands*, 17; *Private Claim*, 11.

1. Neither the act of July 27, 1866, nor the act of March 3, 1871, authorizes the Secretary of the Interior to withdraw unselected lands within the indemnity limits of the grant to the Southern Pacific Railroad Company for the sole and exclusive purpose of satisfying the deficiency in the grant to the exclusion of persons desiring to acquire them under the homestead and other public-land laws, notwithstanding that the deficiency has been ascertained and is recognized. *United States v. Northern Pacific Railway Company* (256 U. S. 51), distinguished; *Southern Pacific Railroad Company v. Bell* (183 U. S. 675), applied ----- 211

2. The eastern terminus of the grant of July 2, 1864, to the Northern Pacific Railroad Company was definitely and finally fixed at Ashland, Wisconsin, and consequently the railroad company may select lands in that State in accordance with the terms of the adjustment act of July 1, 1898 ----- 242

3. For purposes of adjustment the grant to the Atlantic and Pacific Railroad Company became by operation of law separated into two distinct grants, one as the eastern division, the other as the western division, and indemnity for losses in the former division can not be satisfied by selections within the limits opposite the constructed portion in the latter division ----- 259

4. The occupancy of the Walapai Indians on lands in Arizona granted to the Atlantic and Pacific Railroad Company by the act of July 27, 1866, having been extinguished by their removal to other lands reserved for them by Congress prior to the date of the grant, the grant attached free from any claim based on Indian occupancy, and the subsequent reservation created for their benefit after the definite location of the road had been fixed embracing lands within the grant did not affect the rights of the railroad company ----- 482

Railroad Lands.

See *Oregon and California Railroad Lands; Repayment*, 1, 2;

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Trade and Manufacturing Sites, 2; *Withdrawal*, 2, 3.

1. Where a railroad selection for lands in place was rejected on default of the selector on an unrefuted charge that the lands were mineral in character at the time that the selection list was filed and a stock-raising homestead entry was allowed to intervene, a readjudication of the question as to the character of the land can not be had while the entry remains intact ----- 264

2. Service of notice by a railroad company upon an entryman of intention to enter an appeal to the rejection of the company's selection list does not constitute a contest against the entry ----- 265

Railroad Rights of Way.

See *Rights of Way*, 8-13.

Reclamation.

See *Desert Land*, 2-5; *Homestead*, 21-23; *Indian Irrigation; Irrigation Districts; Mining Claim*, 1; *School Land*, 3; *Secretary of the Interior*, 5; *Taxation*, 1; *Waters and Water Rights*, 3; *Water Power*, 3.

1. The act of April 23, 1930, which amended section 43 of the act of May 25, 1926, was not a relief act, but rather an act which authorized moneys paid voluntarily by a debtor into the reclamation fund for construction charges on the unproductive portion of a farm unit declared to be in the suspended class to be credited to the unpaid balance of the construction charge on the productive area of the unit ----- 323

2. The Secretary of the Interior has no authority to accept a transfer to the United States of a tract of land and water right within the limits of the Yuma auxiliary reclamation project patented under the act of January 25, 1917, subject to a condition that the purchase price of the reconveyed property shall be applied toward the operation and maintenance charge on another tract of land patented to the grantor under the same act and upon the same project ----- 617

Boulder Canyon Project.

See *Accounts*, 3; *Water Power*, 1, 2; *Workmen's Compensation Insurance*.

3. The term "public interest" as used in subsection (c) of section 5

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of the Boulder Canyon Project Act, in conjunction with section 7 of the Federal Water Power Act, has reference to the Government's responsibility, financial and otherwise, to all the people of the United States for the greatest good to be derived from the project and excludes confinement of the benefits of Boulder Dam power to one locality out of the many that comprise the "region" capable of service-----	1	rights, one under the exception clause of that subsection, and another under section 7 of the Federal Water Power Act, but merely to place a State in a preferred position, as opposed to a competing municipality, in view of the possible parity of these two classes of applicants under the latter act-----	2
4. The primary "public interest" in contracts for the reimbursement of the United States for its investment in the project required by subsection (b) of section 4 of the Boulder Canyon Project Act is in the soundness of the contracts and the solvency of the contractor, and the rights of certain States or municipalities to be preferred in the award of contracts is subordinate to that public interest-----	1	9. The preference conferred by subsection (c) of section 5 of the Boulder Canyon Project Act is limited to the States named therein, but aside from that preference those States are merely on a parity with municipalities under the Federal Water Power Act, except as between a State and one of its own municipalities, in which event the State's right is paramount-----	2
5. The Boulder Canyon Project Act and the "policy of the Federal Water Power Act" make the "public interest" the dominant consideration in the award of contracts and as a consequence thereof a State, as an applicant, does not have an absolute right to all or any part of Boulder Dam power, but it is within the discretion of the Secretary of the Interior to make allocation among various claimants where the public interest requires it-----	1	10. The time limit fixed by subsection (c) of section 5 of the Boulder Canyon Project Act within which a State may contract under the preference accorded to it has reference to the special exception in that subsection which gives preference to a State over a competing municipality, but no time limit is placed upon the power of a State to contract where that preference is not invoked-----	2
6. In the award of a contract under subsection (a) of section 5 of the Boulder Canyon Project Act the Secretary of the Interior is not required to accept the highest bid if that bid is in excess of the price that can be realized for the power under competitive conditions at competitive centers-----	1	11. The discretionary authority of the Secretary of the Interior under the Boulder Canyon Project Act is to be controlled by the public interest, which requires conservation and utilization of the navigation and water resources of the region, the financial security of the United States, and equality of access to Boulder Dam power by areas comprising the region in proportion to the needs of the applicants, provided that their plans for its utilization and conservation are equally well adapted-----	2
7. The preference of a State or municipality for allocation of power in conflict with a privately-owned public utility under subsection (c) of section 5 of the Boulder Canyon Project Act and in conformity with the policy expressed in the Federal Water Power Act is a preference in consumptive right within the borders of the State or municipal corporation, but outside of their respective limits the State or municipality is merely on a parity with any other public utility company furnishing power in that territory-----	2	12. The Secretary of the Interior is not required to grant a preference to a municipality applying for power if the plan for utilization of power which it presents conflicts with a plan presented by another applicant which he regards as better adapted to conserve and utilize the power capable of development, and the determination of this feature is entirely within the discretion of that officer-----	2
8. The purpose of subsection (c) of section 5 of the Boulder Canyon Project Act was not to bestow upon a State two separate preference		13. The Boulder Canyon Project Act does not grant a preference to the city of Los Angeles over other municipalities in the award of power-----	3

Boulder Canyon Project—Cont'd. Page

14. That portion of section 5 of the Boulder Canyon Project Act which provides for general and uniform regulations contemplates that one of the primary responsibilities of the Secretary of the Interior shall be the fixing of financial requirements and rigid examination of the financial status of competing bidders, whether municipalities or privately owned public utilities..... 3

15. The fact that all of the stock of a corporation is owned by a State is not a sufficient reason for bringing the corporation within the preference right provision of subsection (c) of section 5 of the Boulder Canyon Project Act..... 3

16. The preference right accorded a State by subsection (c) of section 5 of the Boulder Canyon Project Act is not assignable either before or after the execution of a contract by a State, but a contract obtained in exercise of the preference is assignable, subject, however, to all restrictions and conditions contained in the original contract, and without diminution of the States' liability to the United States and without waiver of the requirement of financial and legal capacity of the assignee..... 3

17. The preference accorded a State is limited to power which the State proposes to use within its borders, whether the application be presented under section 7 of the Federal Water Power Act or under subsection (c) of section 5 of the Boulder Canyon Project Act and the Secretary of the Interior may incorporate in the allocation to that State a stipulation to that effect.... 3

18. The proviso to subsection (c) of section 5 of the Boulder Canyon Project Act which protects a State or political subdivision thereof from foreclosure of its right to file an application because of nonauthorization of or failure to market a bond issue, until the expiration of a reasonable time therefor, does not preclude the Secretary of the Interior from determining what is a reasonable time or of granting an application to another during the interval, so long as the right of the preference claimant to contract is preserved..... 3

19. The terms "formulating a comprehensive scheme" and "comprehensive plan formulated hereafter," as used in sections 15 and 16, respectively, of the Boulder

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Canyon Project Act, both relate to the same thing..... 4

20. The right conferred by section 16 of the Boulder Canyon Project Act upon commissioners duly authorized under the laws of any ratifying State is that of advising and coordinating in the correlation of the present Boulder Dam undertaking with reference to future development, and to have access to the records with that end in view; but they are not to direct the Secretary of the Interior in the administration of the present work nor is that officer in any wise obligated to act upon their advice contrary to his own judgment..... 4

Construction and Maintenance Charges.

See 1, 2, *supra*; *Irrigation Districts*, 1-4, 6.

San Carlos Project.

See *Secretary of the Interior*, 5.

Yuma Auxiliary Project.

See 2, *supra*.

Reclamation Homestead.

See *Homestead*, 21-23; *Irrigation Districts*, 4, 5; *Taxation*, 1.

Records.

See *Forest Lieu Selection*, 3; *Homestead*, 16; *Mining Claim*, 9, 52, 59, 62; *Reclamation*, 20; *School Land*, 6.

Recreation Lands.

See *Withdrawal*, 6.

1. Instructions of April 18, 1931, recreational and grazing use of lands withdrawn for protection of watersheds in California under act of March 4, 1931. (Circulars Nos. 1247 and 1254)..... 369

2. Instructions of July 16, 1931, acquisition and use of public lands by States, counties, or municipalities for recreational purposes. Prior instructions superseded. (Circular No. 1085)..... 405

3. The proviso to the act of June 7, 1924, reserving to the United States the minerals in the lands granted to the city of Phoenix, Arizona, for park purposes, did not have the effect of restoring the lands to the operation of the mining laws either absolutely or with limitations, and occupancy and use of the lands for mining purposes not in accord with rules and regulations of the Secretary of the Interior are without authority of law..... 245

Register.

See *Commissioner of the General Land Office; Forest Lieu Selection*, 1.

Reimbursement.

See *Reclamation*, 4.

Reindeer—Alaska.

1. The general provision contained in prior appropriation acts authorizing the sale of surplus male reindeer belonging to the United States in the Territory of Alaska was not repealed by the mere failure to continue it in the latest appropriation acts, but the proceeds derived from such sales can not be used to augment the specific appropriation contained in the later legislation for the support of reindeer stations and for the care and management of the reindeer industry—

71

2. Authority of the Governor of Alaska, as ex officio commissioner of that Territory, to sell surplus male reindeer belonging to the United States is one of the powers and duties pertaining to the reindeer of Alaska that was vested in that official by transfer from the Commissioner of Education by the act of February 10, 1927, but that authority does not extend to the sale of female reindeer—

71

3. The proceeds derived from the sale of male reindeer belonging to the United States in the Territory of Alaska are to be deposited in the Treasury of the United States—

71

4. The Governor of Alaska, as *ex officio* commissioner of that Territory, has the power to regulate relative to the sale of reindeer belonging to the natives with a view to proper protection and conservation of their property and the promotion of their general welfare—

71

5. Except as specified in contracts with apprentices, the sale of male reindeer owned by the natives of Alaska is without restriction, but female reindeer may be disposed of only upon the written approval of the general supervisor of the Alaska Reindeer Service—

71

Reinstatement.

See *Homestead*, 7.

Relation, Doctrine of.

See *Indians and Indian Lands*, 39.

Relinquishment.

See *Desert Land*, 2; *Forest Lieu Selection*, 4; *Mining Claim*, 17; *Repayment*, 1, 3, 5; *Rights of Way*, 12, 13; *Trade and Manufacturing Sites*, 5; *Withdrawal*, 2, 3.

Rentals.

See *Coal Lands*, 5; *Fur Farming; Indians and Indian Lands*, 58; *Oil and Gas Lands*, 8, 9; *Rights of Way*, 2, 6; *Water Power*, 5.

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Repayment.

1. The term "erroneously allowed" as used in the act of June 16, 1880, has reference solely to erroneous action on the part of the Government, and furnishes no authority for repayment where a railroad selection list was canceled on relinquishment filed by the company after it was ascertained that the lands were not of the character represented at the date the lists were tendered to the district land office—

46

2. The final location fee referred to in paragraph 7 of section 2238, Revised Statutes, does not come within the purview of the act of March 26, 1908, as limited by the act of December 11, 1919—

46

3. A homestead entry allowed for land within a pending swamp-land selection is an entry erroneously allowed within the contemplation of the repayment act of June 16, 1880, and a relinquishment of the entry filed because of the conflict constitutes merely a waiver of the claim for the purpose of securing a return of the fees improperly applied—

254

4. Repayment of the purchase money paid in connection with a desert-land entry regularly allowed for land subject thereto and canceled for default is not authorized by the act of June 16, 1880, where the entry could have been completed by complying with the reclamation law and no legal obstacle prevented its confirmation, nor can it be allowed under the act of March 26, 1908, where the claim is barred by the limitation contained in the amendatory act of December 11, 1919. *Heirs of James Byrne* (50 L. D. 161); *J. M. Hudson* (50 L. D. 297); and *Oliver M. Harrison* (50 L. D. 418)—

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5. An application for repayment of fees tendered with an application for a water exploration permit filed after the permit application was rejected but before adverse decision had been declared final, does not amount to a voluntary withdrawal or relinquishment of the application for permit so as to bar repayment of the fees. *John J. Kotkin* (49 L. D. 344), and *J. G. Hofmann* (53 I. D. 254)—

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Repossession.

See *Mining Claim*, 42; *Possession*, 2.

Res Judicata.

See *Forest Lieu Selection*, 1; *Land Department*, 3; *Mining Claim*, 24, 25, 74; *School Land*, 11; *Swamp Land*, 2, 3, 4.

Reservations.

See *Homestead*, 1, 2; *Indians and Indian Lands*, 13, 19, 20; *Patent*; *Water Power*, 10.

Reservoir Sites.

See *Indians and Indian Lands*, 21; *Rights of Way*, 5, 7; *Water Power*; 9; *Withdrawal*, 8, 9.

Residence.

See *Homestead*, 7-9, 14-17, 31, 32; *School Land*, 1.

Restorations.

See *Recreation Lands*, 3; *School Land*, 4, 20.

Reverter.

See *Mining Claim*, 40, 66.

Revival of Action.

1. Section 11 of the act of February 13, 1925, affords a remedy in a suit brought in a Federal court against a public officer which would otherwise abate upon his death or separation from office by permitting substitution of his successor upon satisfactory showing to the court within six months that there is a substantial need for continuing and maintaining the cause----- 232

2. The provision in subsection (c) of section 11 of the act of February 13, 1925, requiring that before substitution is permitted the officer affected must be given reasonable notice of the application therefor and be accorded an opportunity to present any objection he may have, contemplates that the duty of substitution rests upon the original plaintiff no matter what his position may be in an appellate court... 232

Rights of Way.

See *Exchange of Lands*, 2; *Mining Claim*, 66; *Oil and Gas Lands*, 4, 12, 20-24; *Possession*, 1; *Trade and Manufacturing Sites*, 2, 3, 5, 7; *Waters and Water Rights*, 3, 4, 6, 7; *Water Power*, 4, 5, 7, 8; *Withdrawal*, 2.

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Generally.

1. Instructions of February 21, 1931, rights of way over public lands and reservations. (Circular No. 1237.)----- 277

2. Where an existing contract requires the payment of annual rentals in advance for the use of privileges granted by the Government in the exercise of certain specific authority conferred by an act of Congress, a release from the contract or reduction in the rate of payment can not be allowed if the obligation had accrued before petition is filed----- 37

3. The act of March 8, 1922, provides that upon extinguishment by forfeiture or abandonment of rights of way the title holder of the lands traversed or occupied by the right of way shall be vested with the right of way strip, unless it be embraced in a public highway or municipality, subject, however, to a reservation of the minerals in favor of the United States----- 340

4. The Government may allow compensation for damage to crops and improvements on lands within a right of way reserved under the act of August 30, 1890, resulting from the construction of irrigation works, but no allowance will be made for damage to the land----- 399

Hetch Hetchy Project.

5. The grant of December 19, 1913, to the city and county of San Francisco of public lands for development and use of the Hetch Hetchy water supply and power project is similar to the grant of March 3, 1875, of rights of way and station grounds for railroad purposes, and of March 3, 1891, for reservoir sites, that is, a base or qualified fee not subject to interference by subsequent disposals----- 425

Power Purposes.

See *Water Power*, 4, 5, 7, 8.

6. Instructions of October 16, 1931, rights of way for power purposes; payment of rentals. Prior instructions modified. (Circular No. 1260)----- 511

7. Rights of way for power projects and for the storage and carriage of water authorized by the act of February 15, 1901, can not be granted within the boundaries of the Mount McKinley National Park, Alaska, as originally established by the act of February 26, 1917, except

Rights of Way—Continued.	Page	Rights of Way—Continued.	Page
Power Purposes—Continued.		Railroads—Continued.	
upon specific authorization by Congress, but permits for purposes other than the storage or carriage of water or development or transmission of power authorized by the act of 1901 may be granted without such specific authority-----	674	to tender an unqualified relinquishment, including the portion of the former grant to the extent of the overlap covered by the right of way subsequently applied for and upon which its line has actually been constructed, on the ground that its rights would be prejudiced thereby--	527
Railroads.		Riparian Rights.	
See 3, 5, <i>supra</i> ; <i>Mining Claim</i> , 66; <i>Oil and Gas Lands</i> , 4, 20-24.		See <i>Waters and Water Rights</i> , 1, 8, 9.	
8. A mining claim embracing a tract of land including a right of way previously granted under the act of March 3, 1875, carries neither title to the land included in the right of way nor any interest in or to any mineral deposits beneath the surface thereof-----	339	Royalties.	
9. Upon the grant of a right of way under the act of March 3, 1875, the land ceases to be public land and any attempted appropriation thereof under the mineral or other public-land laws is void and patent issued pursuant to such appropriation is inoperative to the same extent as if the land in the right of way had been expressly eliminated by description-----	340	See <i>Indians and Indian Lands</i> , 15, 40; <i>Oil and Gas Lands</i> , 5, 9-11, 22.	
10. The fact that the grantee of a railroad right of way is restricted to the use of the lands for railroad purposes only and is not invested with any right to mine and remove the minerals for any other purpose does not render the land subject to location under the mining laws----	340	1. The term "royalty" means a share of the product or profit reserved by an owner for permitting another to use his property. <i>Hill v. Roberts</i> (284 S. W. 246).	
11. Section 1 of the act of March 3, 1875, protects the rights of a railroad company in the right of way over which its line has been actually constructed, while section 4 thereof gives the company, upon approval of its map of definite location, the benefit of the act as of the date of the filing of the map in advance of actual construction-----	527	Rules and Regulations	
12. Where a prior railroad right of way grant, which is in part overlapped by the constructed line of road of the grantee's successor in interest, is relinquished, the relinquishment does not impair any rights of the successor company acquired through actual construction of its road as to the lands in conflict-----	527	See <i>Homesteads</i> , 30; <i>Mining Claim</i> , 12, 32, 41; <i>Oil and Gas Lands</i> , 21; <i>Reclamation</i> , 14; <i>Reindeer</i> , 4; <i>School Land</i> , 9.	
13. The Land Department may accept a qualified relinquishment of a railroad right of way grant and leave for future judicial determination questions as to its rights thereunder as against a patentee or other claimant under the public-land laws, where the railroad company declines		San Carlos Reclamation Project.	
		See <i>Secretary of the Interior</i> , 5.	
		School Land.	
		See <i>Final Proof</i> ; <i>Mining Claim</i> ; <i>Secretary of the Interior</i> , 3; <i>Survey</i> ; <i>Waters and Water Rights</i> , 1.	
		Generally.	
		1. Settlement and residence on an original farm by an applicant for an adjoining farm entry, who at the time of filing application was not qualified to make such entry, does not constitute such an adverse claim as will defeat the right of the State to a school section in place under its school-land grant. <i>Carl A. Williams</i> (52 L. D. 472), distinguished. 238	
		2. The act of April 23, 1912, expressly confirmed title in the State of Louisiana to unsurveyed lands shown by official protraction of the Government surveys to be embraced within sections numbered sixteen in those townships in which unsurveyed swamp lands had been certified or patented to the State, and further surveys by the Government are unnecessary-----	363
		3. A temporary reclamation withdrawal made pursuant to the act of June 17, 1902, comes within the meaning of "other reservations of any character" excepted from the grant of school lands to the State of	

School Land—Continued. Page

Generally—Continued.

Utah by the proviso to section 6 of the enabling act of July 16, 1894..... 365

4. The title to a designated school section in place does not vest *eo instanti* in the State of Utah under section 6 of the enabling act of July 16, 1894, upon the extinguishment of a reservation created prior to survey, but the State must await restoration of the land to the public domain, and the intervening of another withdrawal will postpone further the attachment of the grant..... 365

5. The phrase "otherwise disposed of under the authority of any act of Congress," as used in the school-land grant to the State of Utah in section 6 of the enabling act of July 16, 1894, covers other disposition, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed..... 365

6. Until the record is cleared of the *prima facie* title of the State by a determination, after due notice to the State and the submission of satisfactory proof that the land was known to be mineral in character prior to the date the State's right to a school section would otherwise have attached, mineral applications for the land confer no rights and can not be recorded..... 584

7. Withdrawals for stock-drive-way purposes and reservations for potash made subsequent to the date that the rights of a State attached under its school-land grant do not affect the title of the State under the grant..... 585

Indemnity.

See 20, *infra*; *Final Proof*; *Mineral Claim*, 13; *Secretary of the Interior*, 3; *Survey*; *Waters and Water Rights*, 1.

8. Lands that passed to a State under its school-land grant upon approval of the survey thereof, do not afford valid base for an indemnity selection because the State's title has been lost through litigation in which the Government took no part and by which it was not bound..... 113

9. The departmental practice and regulations requiring all entries, selections, and other disposals of public lands to conform to the smallest regular legal subdivision or lot, and to treat minor subdivisions as indivisible, for all administrative purposes may be waived by the Secre-

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Indemnity—Continued.

tary whenever he deems it advisable..... 149

10. Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final, and the State will be estopped from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction..... 222

11. The doctrine of *res judicata*, or estoppel by judgment, is clearly applicable where a State was erroneously permitted to assign as base for an indemnity selection a school section in place and thereafter remained silent for fifteen years and permitted adverse rights to intervene before questioning the validity of the transaction..... 268

12. To establish a charge that a State fraudulently procured title to mineral lands under its indemnity school-land grant it must be shown by clear, unequivocal, and convincing evidence, and not by a mere preponderance of evidence that leaves the question in doubt, that the land was known to be mineral in character at the date of the completion of the selection by the State..... 436

13. The Government does not owe any duty to seek to have a trust imposed on the title of a State to an approved indemnity school-land selection, in the absence of evidence of fraud in making and perfecting it, in favor of a mining claimant who had not made claim to the land in the Land Department or filed protest after legally constructive notice before its approval, even though he might have shown a better right to the land under the mining laws..... 439

14. The approval of a State indemnity school-land selection list deprives the Land Department of further jurisdiction over the land contained in the list..... 584

Act January 25, 1927—Grant of Mineral Lands.

15. The act of January 25, 1927, passed but a conditional fee title to the mineral lands granted thereby with a possibility of reverter to the United States in the event the States fail to observe the condi-

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Act January 25, 1927—Grant of Mineral Lands—Continued.

tions of the grant, and in effect created a trust by implication whereunder the States are required to lease the minerals and use the rents and royalties derived therefrom for the benefit of the public schools.-----

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16. The act of January 25, 1927, extending the common-school land grants to the various States to include sections containing coal and other minerals, does not affect lands title to which passed to the States under the original grants by reason of its not being shown at the time such grants became effective that they were mineral in character, although they were discovered at a later date to contain such minerals.-----

30

17. The act of January 25, 1927, which extended the grants of common-school sections to the various States to include mineral sections, did not except from the operation of its provisions lands theretofore sold, conveyed, or patented by the States, which were expressly excepted from the original grants by reason of their known mineral character.-----

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18. Lands within designated sections that did not pass to the States under the original school-land grants by reason of their known mineral character at the time those grants would otherwise have become effective, can be disposed of by the States only in accordance with the terms of the additional grant of January 25, 1927, and the States have no power by legislation or otherwise to alienate the mineral deposits in such lands or to have their prior conveyances of those minerals considered as alienations.-----

31

19. As the act of January 25, 1927, did not invest the States with an absolute, unrestricted title to the minerals in the lands granted, prior purchasers from the States of absolute fee simple title to such lands can acquire no greater rights therein under the doctrine of estoppel than those acquired by the States under the act.-----

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20. Lands in designated school sections in the State of Utah which did not pass to the State under its grant of July 16, 1894, because they were by Executive order included within a petroleum reserve prior to survey, are forever excepted from

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Act January 25, 1927—Grant of Mineral Lands—Continued.

the operation of the grant of January 25, 1927, and the State must either select other lands in lieu thereof or await the extinguishment of the reservation and thereupon take under the original grant.-----

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21. Lands within a phosphate reserve at the date of the additional grant of school sections mineral in character by the act of January 25, 1927, are by reason of such reservation excluded from the provisions of that act by subsection (c) thereof.-----

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Act May 7, 1932—North Dakota, South Dakota, Montana, and Washington.

22. Instructions of June 27, 1932, school lands; North Dakota, South Dakota, Montana, and Washington; act of May 7, 1932. (Circular No. 1276)-----

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Act May 20, 1932—Grant of Mineral Lands.

23. Instructions of May 20, 1932, confirmation in States and Territories of school lands containing minerals under act of May 2, 1932. (Circular No. 1270)-----

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Secretary of the Interior.

See *Alaskan Natives*, 1, 4; *Coal Lands*, 2-5, 9; *Damages*, 3; *Indians and Indian Lands*, 21, 24, 39, 42, 78, 79; *Indian Irrigation*, 2; *Land Department*, 1, 2; *Mundamus; Oil and Gas Lands*, 2, 3, 11, 15, 16, 21, 22; *Public Lands*, 2; *Railroad Grant*, 1; *Reclamation*, 14, 17, 18, 20; *Revival of Action*, 1, 2; *Supervisory Authority; Swamp Land*, 2; *Vested Rights; Water Power*, 2; *Withdrawal*, 9.

1. Where by the terms of an act of Congress the Secretary of the Interior is required to perform certain duties he has the power to make all determinations of law or fact essential to the performance of those duties, and, after the issuance of patent or other like instrument, his findings of fact are conclusive, in the absence of fraud or mistake, both upon the Department and the courts, although there be demonstrable error in the estimation or appreciation of evidence; and his rulings on matters of law, though reviewable in the courts, are not subject to reexamination in the Department.-----

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Secretary of the Interior—Cont'd. Page

2. The Secretary of the Interior is not bound to adopt the opinion of a lower court in a proceeding to which he was not a party, where the decree was rendered after the question at issue had become moot. 232

3. Ordinarily where an act granting public lands excludes those known to be mineral, the determination as to whether a particular tract is of that character rests with the Secretary of the Interior, and where such act provides for other action than the issuance of a patent to pass title or afford evidence that it has passed, such as the approval of a list, the approval imports a final determination of the nonmineral character of the land, is accepted by the courts upon collateral attack as conclusive evidence of such character, and terminates the jurisdiction of the Land Department. 435

4. In carrying out the laws of Congress relating to his Department the Secretary of the Interior is the administrative agent, and the ordinary rules of agency apply forcefully to him. 514

5. The duty imposed upon the Secretary of the Interior by section 4 of the act of June 7, 1924, to approve the appraisal and purchase price of any tract of land on the San Carlos reclamation project sold prior to the time when more than one-half of the construction charge remains unpaid, can not be delegated to another, but that officer may delegate to a subordinate a mere ministerial or clerical act involved in the approval of the sale. 515

Secretary of War.

See *Soldiers, Sailors, and Marines.*

Segregation.

See *Homestead, 11; Rights of Way, 9; Survey.*

Selection.

See *Final Proof; Forest Lieu Selection; Indemnity; Railroad Grant, 2; Railroad Lands; Repayment, 1; Swamp Land.*

Settlement.

See *Homestead, 6, 14, 16, 17; School Land, 1.*

Settlers.

See *Homestead, 8, 16, 17; Timber Cutting; Waters and Water Rights, 5.*

Shoshone Dam.

See *Water Power, 3.*

Shoshone Power Plant.

See *Water Power, 3.*

Small Holding Claims.

See *Private Claim, 1.*

Sodium Lands.

See *Accounts, 1.*

Soldiers, Sailors, and Marines.

1. The transfer of insane persons of the Army, Navy, or Marine Corps, committed to St. Elizabeths Hospital by the Secretary of War or the Secretary of the Navy pursuant to section 4843, Revised Statutes, to the rolls of the Veterans' Administration, does not affect the authority of the hospital to continue to hold such patients until released or discharged by the committing officer. 545

2. Transfer of insane persons of the Army, Navy, or Marine Corps, confined in St. Elizabeths Hospital to the rolls of the Veterans' Administration is one of the functions, powers and duties which the Administrator of Veterans' Affairs is authorized to delegate to the Medical Director of that organization by section 5 of the World War Veterans' Act of June 7, 1924, as amended by the act of July 3, 1930. 545

South Dakota.

See *Custer State Park; Mining Claim, 40; School Land, 22.*

Southern Pacific Railroad Grant.

See *Railroad Grant, 1.*

St. Elizabeths Hospital.

See *Soldiers, Sailors, and Marines.*

State Election Laws.

See *Elections; Irrigation Districts, 3; National Parks and Monuments, 1.*

State Game and Fish Laws.

See *Hunting and Fishing Privileges.*

State Grants.

See *Custer State Park; School Land; Swamp Land.*

State Irrigation Districts.

See *Irrigation Districts.*

Statutes.

See *Acts of Congress and Revised Statutes, tables of, pages XXXII-XL; Statutory Construction, infra.*

Statutory Construction.**Generally.**

See *Indians and Indian Lands, 8, 9; Secretary of the Interior, 1, 3; Supervisory Authority.*

1. It is solely the province of the courts to determine the constitutionality of an act of Congress, and until an act is judicially held to be unconstitutional it is the duty of the executive officers of the Government to administer the law as written----- 427

2. Where the general language of a statute is broad enough to include the subject matter, any intent to exclude a person or class of persons must be definitely expressed therein. 606

Specific Statutes.

Act March 3, 1851.—Board of Land Commissioners.

See *Private Claim, 2.*

Act June 9, 1863.—Nez Perce Treaty; Exemption from Taxation.

See *Indians and Indian Lands, 59.*

Act July 2, 1864.—Northern Pacific Grant; Eastern Terminus.

See *Railroad Grant, 2.*

Act July 27, 1866.—Atlantic and Pacific Grant.

See *Railroad Grant, 4.*

Southern Pacific Grant.

See *Railroad Grant, 1.*

Act April 10, 1869.—Board of Indian Commissioners.

See *Indians and Indian Lands, 22.*

Act March 3, 1871, Section 23.—Southern Pacific Grant.

See *Railroad Grant, 1.*

Act March 3, 1875.—Railroad Rights of Way.

See *Rights of Way, 5, 8, 9.*

Section 1, Rights Granted.

See *Rights of Way, 11.*

Section 4, Profile of Road; Forfeiture of Rights.

See *Rights of Way, 11.*

Act June 15, 1880.—Uncompahgre Utes; Allotments.

See *Indians and Indian Lands, 11.*

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Statutory Construction—Cont'd.

Act June 16, 1880.—Repayment.

See *Repayment, 1, 3, 4.*

Act March 3, 1881.—Mining Claims; Proceedings Where Title Not Established by Court Action.

See *Mining Claim, 22, 23.*

Act February 8, 1887.—Indian Allotment Act.

See *Indians and Indian Lands, 12, 44, 59.*

Section 5, Trust Patents; Descent and Distribution.

See *Indians and Indian Lands, 43.*

Section 6, Citizenship.

See *Indians and Indian Lands, 31.*

Act March 2, 1889, Section 3.—Leave of Absence on Account of Crop Failure.

See *Homestead, 16.*

Act March 3, 1891, Section 7, Confirmation.

See *Confirmation.*

Sections 18–21, Rights of Way for Canals and Ditches.

See *Rights of Way, 5.*

Act July 16, 1894, Section 6.—Utah School Grant.

See *School Land, 3, 4, 5, 20.*

Act August 15, 1894.—Nez Perce Agreement; Cession.

See *Indians and Indian Lands, 59.*

Act June 4, 1897.—Forest Lieu Selection.

See *Forest Lieu Selection, 2.*

Act June 7, 1897.—Uncompahgre Utes; Allotments.

See *Indians and Indian Lands, 11.*

Act May 14, 1898.—Alaska Homesteads.

Section 7, Reservations.

See *Trade and Manufacturing Sites, 6.*

Section 10, Trade and Manufacturing Sites.

See *Trade and Manufacturing Sites, 1, 3, 5, 6, 7.*

Act February 15, 1901.—Rights of Way for Telegraph and Telephone Lines, Electrical Plants, Canals, and Reservoirs.

See *Rights of Way, 7.*

Statutory Construction—Cont'd.

- Act April 23, 1904.—Flathead Indian Reservation.
See *Homestead*, 22.
- Act April 28, 1904.—Small Holding Claims.
See *Private Claim*, 1.
- Act April 26, 1906.—Five Civilized Tribes.
Section 19, Alienation Restrictions Extended.
See *Indians and Indian Lands*, 18.
- Act May 8, 1906.—Indian Trust Patents; Citizenship.
See *Indians and Indian Lands*, 31.
- Act May 17, 1906.—Alaska Allotments.
See *Alaskan Natives*, 1.
- Act June 27, 1906, Section 5.—Relief of Desert-Land Entrymen on Reclamation Projects.
See *Desert Land*, 3.
- Act June 28, 1906.—Osage Lands. Section 2, Restrictions; Taxation.
See *Indians and Indian Lands*, 65, 69.
- Act March 26, 1908.—Repayment.
See *Repayment*, 2, 4.
- Act May 27, 1908.—Five Civilized Tribes. Section 9, Deceased Allottees; Descendant and Distribution.
See *Indians and Indian Lands*, 15, 17.
- Act May 30, 1908.—Fort Peck Lands; Allotments.
See *Indians and Indian Lands*, 12.
- Act June 22, 1910.—Agricultural Entries on Withdrawn Coal Lands. Section 3, Right to Prospect.
See *Coal Lands*, 9.
- Act June 23, 1910.—Assignment of Completed Reclamation Homestead Entries.
See *Irrigation Districts*, 4.
- Act June 25, 1910.—Indian Heirship act.
See *Indians and Indian Lands*, 42, 44.
- Section 13, Power Site Withdrawals on Indian Reservations.
See *Indians and Indian Lands*, 21; *Water Power*, 9; *Withdrawal*, 8, 9.
- Section 14, Cancellation of Trust Patents.
See *Indians and Indian Lands*, 21.

Statutory Construction—Cont'd.

- Act June 25, 1910.—Withdrawals.
See *Mining Claim*, 55; *Water Power*, 6; *Withdrawal*, 8.
- Act March 4, 1911.—Forest Reserves; Rights of Way.
See *Water Power*, 4, 5.
- Act April 23, 1912.—Louisiana School Grant.
See *School Land*, 2.
- Act June 6, 1912.—Three Year Homestead Act.
See *Homestead*, 7.
- Act August 9, 1912, Section 3.—Reclamation Entries; Limitation as to Holdings.
See *Irrigation Districts*, 5.
- Act August 24, 1912.—Withdrawals; Mining Rights Continued.
See *Withdrawal*, 7.
- Act February 14, 1913, Section 2.—Approval of Indian Will; Revocation of Approval.
See *Indians and Indian Lands*, 79, 80.
- Act December 19, 1913.—Yosemite National Park; Rights of Way for Reservoirs; Hetch Hetchy Valley, California.
See *Rights of Way*, 5.
- Act July 17, 1914.—Phosphate, etc., Lands; Surface Entries.
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- Act May 18, 1916.—Yakima Indian Reservation; Irrigation of Allotted Lands.
See *Indian Irrigation*, 10.
- Act August 11, 1916.—Reclamation Act Extended to State Irrigation Districts.
See *Irrigation Districts*, 4, 5.
- Section 6, Sale of Nonirrigable Land.
See *Irrigation Districts*, 5.
- Act December 29, 1916.—Stock-Raising Homesteads.
Section 3, Additional.
See *Homestead*, 30.
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See *Homestead*, 31, 32.
- Section 5, Additional.
See *Homestead*, 31.
- Act February 25, 1919.—Credit for Military Service.
See *Homestead*, 9.

Statutory Construction—Cont'd.

- Act February 25, 1919.—Homestead Residence Reduced for Climatic Reasons.
See *Homestead*, 17.
- Act October 22, 1919.—Underground Water Reclamation, Nevada.
See *Accounts*, 2.
- Act December 11, 1919.—Repayment.
See *Repayment*, 2.
- Act February 25, 1920.—Leasing Act.
See *Oil and Gas Lands*, 1-3, 8, 14, 15; *Potash Lands*, 3.
- Section 7, Coal Permits and Leases; Annual Rental.
See *Coal Lands*, 5.
- Section 14, Oil and Gas Leases; Royalty and Rental.
See *Oil and Gas Lands*, 9.
- Section 17, Oil and Gas Leases; Reduction of Royalty.
See *Oil and Gas Lands*, 9, 10.
- Section 27, Acreage Limitation.
See *Oil and Gas Lands*, 26.
- Section 29, Joint Use of Easements.
See *Oil and Gas Lands*, 13.
- Section 37, Valid Claims Excepted.
See *Mining Claim*, 35, 38; *Oil and Gas Lands*, 17, 18.
- Act June 4, 1920, Section 1.—Crow Lands; Allotments.
See *Indians and Indian Lands*, 14.
- Section 3, Enrollment.
See *Indians and Indian Lands*, 75-77.
- Section 11, Distribution of Tribal Funds.
See *Indians and Indian Lands*, 75, 76.
- Act June 10, 1920.—Federal Water Power Act.
See *Mining Claim*, 16; *Reclamation*, 5, 7; *Water Power*, 6, 10.
- Section 7, Preferences to States and Municipalities.
See *Reclamation*, 3, 8, 17; *Water Power*, 1, 2.
- Section 23, Valid Existing Claim.
See *Water Power*, 4, 5.
- Section 24, Lands within Projects Reserved from Entry.
See *Water Power*, 9.

Statutory Construction—Cont'd.

- Section 29, Repeal of Inconsistent Laws.
See *Water Power*, 6.
- Act March 3, 1921.—National Parks and Monuments Excepted from Federal Water Power Act.
See *Water Power*, 7, 8.
- Act March 3, 1921.—Osage Lands.
Section 3, Removal of Restrictions.
See *Indians and Indian Lands*, 69, 70.
- Act June 10, 1921, Section 305.—General Accounting Office.
See *Accounts*, 3.
- Act March 8, 1922.—Disposal of Abandoned Railroad Rights of Way.
See *Rights of Way*, 3.
- Act May 15, 1922.—State Irrigation Districts.
See *Irrigation Districts*, 4, 5.
- Act June 2, 1924.—Certificates of Citizenship to Indians.
See *Alaskan Natives*, 5; *Indians and Indian Lands*, 25.
- Act June 7, 1924.—Grant to City of Phoenix, Arizona, for Park Purposes.
See *Recreation Lands*, 3.
- Act June 7, 1924.—San Carlos Irrigation Project.
Section 4, Approval of Appraisal and Purchase Price.
See *Secretary of the Interior*, 5.
- Act June 7, 1924.—World War Veterans' Act.
Section 5, Director of Veterans' Bureau; Administrative Powers.
See *Soldiers, Sailors, and Marines*, 2.
- Act December 5, 1924.—Fact Finders' Act.
Section 4 (I), Distribution of Net Profits from Power Plants.
See *Irrigation Districts*, 1.
- Act February 13, 1925, Section 11.—Survival of Action on Death of Government Official.
See *Revival of Action*, 1.
- Section 11 (c), Substitution of Official.
See *Revival of Action*, 2.

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- Act February 25, 1925.—Extension of Time to Make Desert-Land Final Proof.
See *Desert Land*, 4.
- Act February 25, 1925.—Industrial Schools for Alaskan Natives.
See *Withdrawal*, 4.
- Act February 27, 1925.—Preference Right Claims, Wisconsin.
Section 3, Division of Lands Among Riparian Owners.
See *Preference Right Claims*.
- Act March 3, 1925.—Custer State Park, South Dakota; Patent.
See *Custer State Park*, 1-3; *Mining Claim*, 40.
- Act May 19, 1926, Crow Lands; Allotments.
See *Indians and Indian Lands*, 76.
- Act May 25, 1926.—Adjustment of Water Right Charges.
Section 43, Suspension of Construction Charges.
See *Reclamation*, 1.
- Act May 26, 1926.—Crow Lands; Leasing of Allotments.
See *Indians and Indian Lands*, 14.
- Act January 25, 1927.—School Grant to Include Mineral Lands.
See *School Land*, 15-21.
- Act February 7, 1927.—Potassium and Sodium Leases.
See *Potash Lands*, 3.
- Act February 10, 1927.—Ex-Officio Commission for Alaska; Reindeer.
See *Reindeer*, 2.
- Act March 3, 1927.—Fort Peck Lands; Allotments; Reservation of Oil and Gas.
See *Indians and Indian Lands*, 13, 19.
- Act April 21, 1928.—Taxation of Homestead and Desert-Land Entries on Reclamation Projects.
See *Homestead*, 22, 23.
- Act May 2, 1928.—Crow Lands; allotments to After-born Children.
See *Indians and Indian Lands*, 76.
- Act May 10, 1928.—Five Civilized Tribes; Taxation of Allotments.
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Section 1, Restrictions Extended.
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- Section 2, Termination of Restrictions.
See *Indians and Indian Lands*, 17.
- Section 3, Taxation of Mineral Production.
See *Indians and Indian Lands*, 62, 71-73.
- Section 4, Taxation of Restricted Lands in Excess of 160 Acres.
See *Indians and Indian Lands*, 51, 61, 71.
- Act May 12, 1928.—Custer State Park, South Dakota; Grant to the State.
See *Custer State Park*, 2-4.
- Act December 21, 1928.—Boulder Canyon Project Act.
See *Reclamation*, 5.
Section 4 (b), Contracts for Reimbursement of the United States.
See *Reclamation*, 4.
Section 5, Rules and Regulations.
See *Reclamation*, 14.
Section 5 (a), Contracts for Electrical Energy; Bids.
See *Reclamation*, 6.
Section 5 (c), Public Interest.
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——— Contracts for Use of Water; Preference to States.
See *Reclamation*, 7-10, 15-17.
——— State Applications where no Bond Issue Authorized.
See *Reclamation*, 18.
- Section 15, Comprehensive Scheme for Utilization of Water.
See *Reclamation*, 19.
- Section 16, Comprehensive Plan.
See *Reclamation*, 19.
——— Commission to Act in Advisory Capacity.
See *Reclamation*, 20.
- Act February 20, 1929.—Indian Irrigation Projects; Damage to Private Property.
See *Damages*, 3; *Indian Irrigation*, 4.
- Act March 2, 1929.—Osage Lands; Exemption from Taxation.
See *Indians and Indian Lands*, 67, 68.
- Act March 4, 1929.—Relief to Desert-Land Entrymen; Patents.
See *Desert Land*, 5.

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- Act January 23, 1930.—Extension of Time on Oil and Gas Permits.
See *Oil and Gas Lands*, 19.
- Act April 17, 1930.—Relief of Desert-Land Entry-men, Chucawalla Valley, California.
See *Desert Land*, 1.
- Act April 23, 1930.—Suspension of Construction Charges on Reclamation Projects.
See *Reclamation*, 1.
- Act May 19, 1930.—Extension of Time for Cutting Timber on Oregon and California Railroad and Coos Bay Wagon Road Lands.
See *Oregon and California Railroad Lands*.
- Act May 21, 1930.—Oil and Gas Leases on Railroad and Other Rights of Way.
See *Oil and Gas Lands*, 20-24.
- Act May 23, 1930.—Sale of Isolated Tracts of Coal Lands, Alabama.
See *Isolated Tracts*, 2.
- Act June 6, 1930.—Desert-Land Entries on Abandoned Reclamation Projects.
See *Desert Land*, 2.
- Act July 3, 1930.—Citizenship of Married Women.
See *Citizenship*, 2.
- Act February 4, 1931.—Fort Hall Indian Reservation Irrigation Project; Michaud Division; Damages.
See *Indian Irrigation*, 3, 4.
- Act February 28, 1931.—Stock-Raising Homestead Within Petroleum Reserves.
See *Homestead*, 24.
- Act March 2, 1931.—Five Civilized Tribes; Taxation of Lands Purchased with Funds from Sale of Restricted Lands.
See *Indians and Indian Lands*, 54.
- Act March 3, 1931.—Citizenship of Married Women.
See *Citizenship*, 3.
- Act March 4, 1931.—Oil and Gas Permits and Leases; Unit Operation.
See *Oil and Gas Lands*, 25, 26.
- Act March 4, 1931.—Withdrawal for Protection of Watersheds in California; Recreational and Grazing Use.
See *Recreation Lands*, 1.

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- Act March 2, 1932.—Leave of Absence in Drought-Stricken Areas.
See *Homestead*, 15.
- Act April 23, 1932.—Reclamation Withdrawals; Mineral Lands.
See *Mining Claim*, 1.
- Act May 2, 1932.—Confirmation of Mineral School Sections.
See *School Land*, 23.
- Act May 7, 1932.—North Dakota, South Dakota, Montana, and Washington School Lands.
See *School Land*, 22.
- Act May 7, 1932.—Potash Permits; Extension of Time.
See *Potash Lands*, 2.
- Act May 13, 1932.—Extension of Time for Homestead Final Proof.
See *Homestead*, 12.
- Act June 6, 1932.—Suspension of Assessment Work on Mining Claims.
See *Mining Claim*, 34.
- Revised Statutes—
- Section 236.—Public Accounts.
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- Section 441.—Secretary of the Interior.
See *Alaskan Natives*, 4.
- Section 2289.—Homesteads; Qualifications.
See *Homestead*, 18, 19, 20.
- Section 2291.—Homestead Final Proof.
See *Homestead*, 7.
- Section 2304.—Soldiers' and Sailors' Homesteads.
See *Homestead*, 9.
- Section 2324.—Miners' Regulations.
See *Mining Claim*, 35.
- Section 2325.—Patents for Mineral Lands; Adverse Proceedings.
See *Mining Claim*, 22, 23, 68.
- Section 2334.—Appointment of Surveyors of Mining Claims.
See *Mining Claim*, 57.
- Section 2337.—Mill Sites.
See *Mining Claim*, 55.
- Section 2238.—Fees and Commissions of Registers and Receivers.
See *Repayment*, 2.
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See *Community Property; Homestead*, 7, 20, 24-32; *Mineral Lands; Mining Claim*, 10, 54; *Railroad Lands*.

Substitution of Parties.

See *Mandamus; Revival of Action*, 1, 2.

Suits Against the Government.

See *Damages*, 1.

Supervisory Authority.

See *Alaskan Natives*, 4; *Commissioner of the General Land Office; Water Power*, 2.

1. Where a statute places responsibility for its administration upon a head of an Executive department that responsibility will not be curtailed by an attempted shifting thereof to the President, although the latter, if he sees fit, may, by virtue of his supervisory control in respect to any administrative matter, advise or control the heads of the various Executive departments in the performance of duties primarily committed to them----- 37

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1. The segregation of mineral and nonmineral lands by aliquot parts of a subdivision rather than by a metes and bounds survey simplifies the record, avoids unnecessary trouble and expense, and insures that the nonmineral land will be disposed of to a nonmineral claimant to whom it should rightfully go----- 149

Surveyors.

See *Agents and Attorneys*, 1.

Swamp Land.

See *Land Department*, 2; *Repayment*, 3; *School Land*, 2.

1. Instructions of April 20, 1931, entries and filings on swamp lands, prior instructions superseded. (Circular No. 1246)----- 377

2. The final act of the Secretary of the Interior in a proceeding, after hearing had, to determine whether or not land is swampy in character

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within the purview of the swamp-land grant fixes the rights of the parties and creates a right of property in the land in question which neither the Secretary himself, nor his successor in office, can revoke or take away----- 453

3. The lack of power of the Secretary of the Interior to proceed further after having determined the character of lands pursuant to the provisions of the swamp-land grant is not based on the doctrine of *res judicata*, but on loss of jurisdiction over the *res* by the passing of title. 454

4. The rule of *res judicata* is not applicable to a decision by the Commissioner of the General Land Office holding that land was not swampy in character when he had no facts before him other than the preliminary showing by the State that the land was swamp and inured to the State under the swamp-land act--- 454

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See *Mining Claim*, 3, 18, 71.

Tax Title.

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See *Forest Lieu Selection*, 3; *Homesteads*, 22; *Indians and Indian Lands*, 50-73.

1. Instructions of July 22, 1931, taxation of entries within reclamation projects and of homesteads within Indian irrigation projects prior to issuance of final certificate. Circular No. 1176, amended (Circular No. 1257)----- 418

2. Double taxation or unequal taxation, so long as the inequality is not based upon arbitrary distinctions, is not repugnant to the Federal Constitution----- 606

Timber Cutting.

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1. Instructions of April 5, 1930, timber cutting by settlers and entrymen on unperfected claims (Circular No. 1211)----- 73

Title Insurance.

1. Title insurance may be accepted by the Government in lieu of an abstract of title upon proof that the company is solvent and properly qualified if the policy is free from conditions and stipulations adverse to ownership by the United States... 105

Torts.

See *Damages*, 1.

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See *Withdrawal*, 3.

1. The distinction that may be made in law between assignees and transferees and those who succeed to the title or interest in property upon and in consequence of the demise of the owner, is not a sufficient reason for modification of the existing rule of the Department that in the purchase of a town lot all necessary papers and patent will be issued in the name of the purchaser----- 146

Trade and Manufacturing Sites—Alaska.

See *Possession*, 1.

1. The question as to whether one claiming a trade and manufacturing site in the Territory of Alaska under section 10 of the act of May 14, 1898, or an adverse claimant, has a better and prior right of possession is by the provisions of that section made determinable by the courts in an action to quiet title, and any patent issued for the land by the Land Department must be in accordance with the final decree of the court... 58

2. Allegations that a railway company had not complied with the terms of its right of way grant over the lands involved are not material in considering its application for a trade and manufacturing site for the same lands----- 58

3. Under the restriction in section 10 of the act of May 14, 1898, limiting a person, association, or corporation, as the case may be, in the purchase of a trade and manufacturing site to one claim only for any such person, association, or corporation, an application by a corporation must be denied if a majority interest in it be owned by another corporation which had acquired a site under the act, or if the persons holding the majority interest in the stock of the corporation applying for a site are also the holders of the majority stock interest in another corporation which had exhausted its rights; and the applicant's status in this respect is to be adjudged as of the time of the filing of the application----- 58

4. When the question arises as to whether a public-land statute is sought to be circumvented by the legal fiction of separate entity between a corporation and the parties

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holding the substantial beneficial interest therein, the Land Department has the power to look through the web of the artificial corporate entity for the purpose of discovering the real parties in interest----- 65

5. Land within a right of way grant for terminal purposes that has not been relinquished or forfeited is not public land, and can not, therefore, be selected as a trade and manufacturing site under section 10 of the act of May 14, 1898----- 65

6. Section 7 of the act of May 14, 1898, which makes the act inapplicable to lands within a military park, Indian or other reservation in Alaska precludes the selection of lands within a national forest or other reservation for trade and manufacturing purposes under section 10 of that act----- 65

7. Actual possession and use for trade and manufacture of lands within an existing grant of right of way for terminal and station grounds by the grantee can not upon relinquishment of the grant be considered as possession and use for a trade and manufacturing site under section 10 of the act of May 14, 1898----- 65

Transfer and Transferee.

See *Coal Lands*, 2, 3; *Forest Lieu Selection*, 3; *Mining Claim*, 4; *National Parks and Monuments*, 2; *Oil and Gas Lands*, 8; *Reclamation*; 1, 2; *Soldiers, Sailors, and Marines*; *Town Site*.

Transfer of Payment.

See *Reclamation*, 1, 2.

Trusts and Trustees.

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1. An exception to the rule that one placed in such relation to another that he becomes interested with him in any subject, property, or business is prohibited from acquiring antagonistic rights, arises where those interests accrue at different times and under different instruments and neither party has superior means of information respecting the state of the title----- 205

Undue Influence.

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Vested Rights.

See *Indians and Indian Lands*, 46, 55, 63, 64; *Indian Irrigation*, 2; *Mining Claim*, 10; *Rights of Way*, 12, 13; *School Land*, 4; *Swamp Land*, 2.

1. Equities can not prevail to defeat a plain legal right, and the officers of the Land Department are without discretionary authority to deprive one of a right conferred upon him by Congress after he has done everything essential exacted by law and the lawful regulations...

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Veterans' Administration.

See *Soldiers, Sailors, and Marines*.

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Voting Privilege.

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See *Coal Lands*, 5; *Homestead*, 2; *Indians and Indian Lands*, 56; *Mining Claim*, 29-31; *Repayment*, 3; *School Land*, 9; *Waters and Water Rights*, 5.

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See *National Parks and Monuments*, 2.

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See *Elections; National Parks and Monuments*, 1; *School Land*, 22.

Water Exploration Permit.

See *Repayment*, 5.

Water Holes.

See *Homesteads*, 28, 29.

Water Power.

See *Indians and Indian Lands*, 21; *Mining Claim*, 16, 55; *Reclamation*, 3-20; *Rights of Way*, 5-7; *Withdrawals*, 8, 9.

1. A State and a municipality of another State stand on a basis of equality under section 7 of the Fed-

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eral Water Power Act, but the right of a State thereunder is superior to a municipality of the same State... 3

2. Where conflicting applications are presented under section 7 of the Federal Water Power Act by a State and a municipality of another State, the Secretary of the Interior may make an equitable allocation between them in accordance with the public interest and with what, in his discretion, appears the best method of conserving and utilizing the water resources of the region... 3

3. In view of the special act of March 4, 1929, which specifically prescribes for the distribution of the net proceeds derived from the operation of the Shoshone power plant constructed by the United States at the Shoshone Dam, Wyoming, the general provision contained in subsection 1, section 4, of the act of December 5, 1924, relative to the distribution of the accumulated net profits derived from the operation of project power plants has no application to that project... 427

4. Where a license is issued under section 23 of the Federal Water Power Act of June 10, 1920, in place of a prior right of way grant under the act of March 4, 1911, the legal effect is that the prior grant is merged with and superseded by the license in so far as the license covers the project embraced in the prior grant... 442

5. Where a project for which a right of way was granted under the act of March 4, 1911, is partially covered by a license issued under section 23 of the Federal Water Power Act, the grantee will be required to make annual payments under the old grant only to the extent of that portion of it not covered by the license... 443

6. The Federal Water Power Act of June 10, 1920, is inconsistent with the act of June 25, 1910, as amended, which left open without restriction in withdrawals thereunder the appropriation of the land under the mining laws so far as they apply to metalliferous minerals, and to the extent of such inconsistency by section 29 of the former act the latter act was repealed... 532

7. The authority of the Land Department to issue permits and licenses without first obtaining con-

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sent from Congress within those portions of the Mount McKinley National Park, Alaska, added to the park by the acts of January 30, 1922, and March 19, 1932, are restricted to such projects as are not inhibited by the act of March 3, 1921.-----

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8. The act of March 3, 1921, which amended the Federal Water Power Act so as to prohibit the granting of permits, licenses, leases, or authorizations for any of the purposes specified therein within any national park as then constituted without first obtaining specific authority from Congress, is applicable to those portions of the Mount McKinley National Park, Alaska, added by the acts of January 30, 1922, and March 19, 1932.-----

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9. Section 24 of the Federal Water Power Act of June 10, 1920, providing for the issuance of patents on locations, entries, selections, or filings theretofore made on lands reserved as water-power sites, subject to the limitations and conditions therein contained, has no application to tribal Indian allotments embracing lands on the Colville Indian Reservation withdrawn for power or reservoir sites under section 13 of the act of June 25, 1910.-----

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10. The term "reservations of the United States," as defined in the Federal Water Power Act of June 10, 1920, embraces tribal lands in Indian reservations, but it does not include Indian allotments.-----

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Water Reserve.

See *Withdrawal*, 5.

Waters and Water Rights.

See *Desert Land*, 5; *Indian Irrigation*, 1-3, 6-10; *Reclamation*, 2.

Avulsion.

1. The law of title by accretion has no application to lands uncovered by an avulsion resulting in a change in the course of a river, and the Land Department retains sole jurisdiction to survey unsurveyed public lands thus formed and to dispose of them under appropriate laws.-----

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Diversion.

See *Indian Irrigation*, 6.

Flowage.

See 2, 3, 5, *infra*; *Indian Irrigation*, 3.

Page Waters and Water Rights—Con. Page**Lakes.**

2. The United States has the authority to use the bed of Lower Klamath Lake and the public lands surrounding it for flowage purposes or to drain the lake and to use the lands thus uncovered for agricultural purposes.-----

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3. The right conferred upon the United States by the State of Oregon to appropriate unappropriated waters in that State for agricultural purposes was plenary as to its use unaffected by lack of diligence on the part of the Government in completing its project or by the fact that all the waters are not required to irrigate the lands served by its ditches, but no appropriation for flooding lands in Lower Klamath Lake was authorized.-----

693

4. The contracts between the United States and the Oregon-California Power Company contemplated that the waters stored in Klamath Lake and the natural flow of Klamath River would be used for agricultural purposes and for the development of power, and if a different use, detrimental to the rights of the power company or definitely changing the use contemplated under the Oregon law, be desired, such changed uses must be first agreed to by the power company and by the State.-----

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5. The waiver of damage clause in the contract made with the settlers owning lands in Klamath Drainage District does not permit the Federal Government to flood their lands for bird refuge purposes without just compensation as contemplated by the Constitution.-----

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Medicinal Springs.

6. Instructions of August 16, 1930, withdrawal of lands containing hot or medicinal springs. (Circular No. 1231).-----

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7. Instructions of February 11, 1931, withdrawal of lands containing hot or medicinal springs. Circular No. 1231, amended. (Circular No. 1236).-----

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Riparian Rights.

8. The United States does not retain the ownership of the beds of streams or other bodies of water, whether navigable or nonnavigable, after the marginal uplands have been disposed of without reservations or restrictions, and the extent of riparian rights is governed by

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 local law. *Hardin v. Jordan* (140 U.S. 371)----- 429

9. In the State of Iowa a riparian owner takes title only to the water's edge of streams or other bodies of water, whether navigable or non-navigable, and Government patents for marginal lands follow the State rule and convey no land under a nonnavigable lake----- 429

Seepage.

See *Indian Irrigation*, 6.

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See *Indian Irrigation*, 1.

Wills.

See *Indians and Indian Lands*, 79-81.

1. As a general rule undue influence and fraud, as applied to wills, are practically synonymous terms, and the evidence designed to show the former differs but slightly, if at all, from the proof required to support the latter----- 520

2. Proof of undue influence necessary to destroy the validity of a will must establish a fraudulent influence controlling the mind of the testator so as to induce him to make a will which he would not have otherwise made, but the mere influence of affection, attachment, or gratitude will not suffice----- 520

3. Where the question of mental competency of a testator is not raised, the fact that the will, on its face, is one that could very reasonably be expected to have been made by a person mentally competent and under such circumstances as surrounded the testator at the time the instrument was executed, is a strong factor to be considered in connection with any charge of fraud or undue influence----- 520

Wisconsin.

See *Preference Rights*.

Withdrawals.

See *Custer State Park*, 1; *Desert Land*, 3, 5; *Indians and Indian Lands*, 7, 20, 21; *Mining Claim*, 1, 16, 20, 43, 53, 55; *Railroad Grant*, 1, 4; *Recreation Lands*, 1; *School Land*, 3, 4, 7, 20, 21; *Trade and Manufacturing Sites*, 6; *Waters and Water Rights*, 6, 7; *Water Power*, 6, 9.

1. Instructions of June 9, 1930, withdrawal of oil shale lands by Executive order of April 15, 1930. (Circular No. 1220)----- 127

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2. A blanket withdrawal of public lands containing a saving clause that it is made subject to valid existing rights so long as legally maintained does not attach to lands embraced within a prior right of way grant that has not been relinquished or forfeited, but such withdrawal will become effective *eo instanti* as to those lands upon relinquishment or forfeiture of the grant----- 65

3. Where lands are excluded from a national forest withdrawal and simultaneously included within a town-site withdrawal, the later withdrawal will attach immediately upon relinquishment or upon reversion to the United States by forfeiture of lands which had been excepted from the operation of the first withdrawal because of prior valid appropriation----- 65

4. Withdrawal of public lands in Alaska to be administered by the Office of Education under the supervision of the Secretary of the Interior primarily for experimental vocational education of the natives as authorized by the act of February 25, 1925, and in aid of their support and advancement is in the public interest and for a public purpose----- 111

5. A withdrawal for a public water reserve does not contemplate the inclusion of a tract of land containing mere dry depressions or draws which do not in their natural condition, furnish or retain a supply of water available for public use, and an order withholding such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon should be revoked.... 210

6. A temporary withdrawal in aid of the grant of June 7, 1924, of lands to the city of Phoenix, Arizona, for park purposes, becomes effective as to mining locations within its area upon their abandonment and cuts off the right of their relocation under the mining laws.... 245

7. The act of August 24, 1912, which amended section 2 of the act of June 25, 1910, is remedial and should be liberally construed to effect its purpose, and nothing therein indicates any intention to curtail the metalliferous miner's rights that could be exercised by him on the public domain----- 531

8. The act of June 25, 1910, authorizing the President to temporarily withdraw public lands for power

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sites, irrigation, classification, or other public purposes, and section 13 of another act of the same date authorizing the Secretary of the Interior to reserve lands within any Indian reservation valuable for power or reservoir sites or needed for use in connection with any irrigation project were intended to be separate and distinct as to the sphere of operation, the former relating exclusively to public lands, the latter to Indian lands----- 680

9. The Secretary of the Interior has full power to revoke withdrawals made by him under section 13 of the act of June 25, 1910, for power and reservoir sites embracing allotted lands on the Colville Indian Reservation----- 681

Witnesses.

See *Indians and Indian Lands*, 81; *Practice*, 5.

Words and Phrases.

1. "Abandonment" is the giving up or relinquishment of property to which a person is entitled, with no purpose of again claiming it and without any concern as to who may subsequently take possession, and does not depend upon any rules or regulations or customs of mining, but is largely, if not entirely, a matter of the locator's intention, to be determined from his acts and statements together with the circumstances of the particular case----- 195

2. The term, "erroneously allowed" as used in the act of June 16, 1880, has reference solely to erroneous action on the part of the Government----- 46

3. The terms "formulating a comprehensive scheme" and "comprehensive plan formulated hereafter," as used in sections 15 and 16, respectively, of the Boulder Canyon Project Act, both relate to the same thing----- 4

4. The term "homesteader" as used in the proviso to the act of February 25, 1919, includes homestead settlers on unsurveyed lands who file in the local office notice of the approximate location of the lands settled upon and claimed----- 96

5. The phrase "Indian Country," as used in the Federal statutes, includes only that portion of the public domain which has been set apart as a reservation in the usual sense

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for the use and occupancy of an Indian tribe by treaty, act of Congress, or Executive order----- 349

6. A temporary reclamation withdrawal made pursuant to the act of June 17, 1902, comes within the meaning of "other reservations of any character" excepted from the grant of school lands to the State of Utah by the proviso to section 6 of the enabling act of July 16, 1894----- 365

7. The phrase "otherwise disposed of under the authority of any Act of Congress," as used in the school-land grant to the State of Utah in section 6 of the enabling act of July 16, 1894, covers other disposition, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed----- 365

8. The "policy of the Federal Water Power Act" makes the "public interest" the dominant consideration in the award of contracts and as a consequence thereof a State, as an applicant, does not have an absolute right to all or any part of Boulder Dam power----- 1

9. The word "proprietor" as that term is used in section 2289, Revised Statutes, simply means an owner of land, that is, one who has a fee simple title or who may acquire such title by carrying out his own obligations or by enforcing a vested right----- 183

10. The term "public interest" as used in subsection (c) of section 5 of the Boulder Canyon Project Act, in conjunction with section 7 of the Federal Water Power Act, has reference to the Government's responsibility, financial and otherwise, to all the people of the United States for the greatest good to be derived from the project----- 1

11. The primary "public interest" in contracts for the reimbursement of the United States for its investment in the project required by subsection (b) of section 4 of the Boulder Canyon Project Act is in the soundness of the contracts and the solvency of the contractor... 1

12. The term "public lands," varies in different statutes passed for different purposes and is sometimes used in larger signification than a mere designation of lands subject to sale and disposal under general laws----- 365

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13. The phrase " <i>rental paid for any one year to be credited against the royalties as they accrue for that year,</i> " contained in sections 14 and 17 of the leasing act, may be construed as meaning "credited against the Government's share as it arises or grows for that year"-----	512	1. The cost of workmen's compensation insurance comes within the class "or other general expenses," and must be excluded from payment under a contract for extra work which limits the charges to "actual necessary cost," defined therein as "labor, materials, and supplies," but not "office or other general expenses"-----	586
14. The term " <i>reservations of the United States,</i> " as defined in the Federal Water Power Act of June 10, 1920, embraces tribal lands in Indian reservations, but it does not include Indian allotments-----	681	Wyoming. See <i>Irrigation Districts</i> , 3.	
15. The term " <i>royalty</i> " means a share of the product or profit reserved by an owner for permitting another to use his property-----	512	Yuma Auxiliary Reclamation Project. See <i>Reclamation</i> , 2.	

